In the case of Douglass v. State *ex rel.* Wright, 31 Ind. 429, it was held that, under the constitutional provision, an officer takes his office immediately after the election and qualification. This decision was cited with approval by the Supreme Court in the case of Lake County Election Board v. State *ex rel.* Eyears, *supra*, and holds that an auditor takes his office immediately after his election and his qualification.

Hence, in answer to your second question, you are informed that a newly elected officer will assume his duties immediately after his election and qualification.

OFFICIAL OPINION NO. 29

March 27, 1952.

Honorable Otto K. Jensen,
State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis, Indiana.

Dear Sir:

Your request for an official opinion reads as follows:

> "On May 9, 1951, the judge of the Criminal Court in Marion County forfeited a cash bond in the amount of $1,500.00. The amount of the forfeiture was paid into the county treasury by the clerk of the circuit court on June 6, 1951. Acting upon a petition filed with the Governor to have the forfeiture remitted, the Governor did on June 14, 1951, grant a remission of the forfeited bond in the amount of $1,500.00.
>
> "It is my understanding that the county auditor has not yet remitted the amount of the forfeiture to the Auditor of State under the provisions of Section 28-156, Burns' 1948 Replacement. The county auditor is required to issue his warrant to the treasurer of state semiannually on May 1 and November 1. The auditor of Marion County has raised the question as to his right to make refund from the fines and forfeitures account.

"It seems to me that the question involved is to when a fine or forfeiture after payment becomes a part of the common school fund. I would like to have your official opinion on that question stated as follows:

"When does a fine or forfeiture after payment become a part of the common school fund?"

Article 8, Section 2, Constitution of Indiana, provides:

"The Common School fund shall consist of * * *.

"From the fines assessed for breaches of the penal laws of the state; and from all forfeitures which may accrue; * * *."

By Chapter 251, Acts of 1947, the Legislature amended Chapter 181, Section 7, Acts of 1943 (Burns' Statutes, Section 28-156) to read as follows:

"In all counties of the State of Indiana, all fines and forfeitures and any and all other revenue which, by law, accrues to the common school fund or to the permanent endowment fund shall be collected as provided by law, and all money so collected, shall be paid into the state treasury and shall be a part of the common school fund or of the permanent endowment fund in the custody of the treasurer of state. The county auditor shall keep a record of all fines and forfeitures and all other revenue which, by law accrues to the common school fund or to the permanent endowment fund in the records of the county. Semi-annually on May 1 and November 1, the county auditor shall issue his warrant payable to the treasurer of state in an amount equal to the total collections in the six (6) months preceding of fines and forfeitures and all other revenue which by law accrues to the common school fund or to the permanent endowment fund.

"At the time of payment of principal, interest or accretions to the treasurer of state, the county auditor shall file a report with the auditor of state, which report shall set forth the amount of (a) common school fund (b) permanent endowment fund (c) interest on common school fund (d) interest in permanent endowment

fund (e) fines and forfeitures (f) all other accretions included in such payment and the balance of such funds held in trust by the county. Forms for making such report shall be furnished by the auditor of state.

"All money collected as interest on the common school fund or on the permanent endowment fund shall be paid into the state treasury and shall be distributed for the uses and purposes as now or hereafter otherwise provided by law."

The answer to your question may depend somewhat upon the meaning of the word "accrue" which appears both in the constitutional provision and in the statute above quoted.

Webster's New International Dictionary defines "accrue" when used as a verb as follows:

"To come into existence as an enforceable claim; to vest as a right; as, a cause of action has accrued when the right to sue has become vested."

From an examination of a number of cases on the subject, it would appear that as soon as fines and forfeitures have passed from the jurisdiction of the court, or passed from the custody of an administrative officer over which the Governor has control, that such funds when paid into the county treasury then vest in the Common School Fund. That the right of remission of fines and forfeitures exists at all times until such funds are paid and thereafter until such payments have passed beyond the court's jurisdiction or beyond the control or custody of an administrative officer who is under the control of the Governor.

It has been held that pardons and remissions are in derogation of the law. Therefore, we should not give a liberal construction to provisions granting such powers. The Supreme Court of Indiana in State v. Leak (1854), 5 Ind. 356, 363, the following:

"Pardons and remissions are in derogation of the law, and should never be extended except in cases which, could the law have foreseen, it would have excepted from its operation; yet the heedlessness with which they had been granted had become a serious evil.

> Our new constitution, article 5, section 17, attempted to provide for some check upon this abuse; but the most effective corrective will be found in the strict application to those acts of executive grace of the rules of law by the Courts."

In State *ex rel.* Michener, Attorney General v. Board of Commissioners of Shelby County (1892), 5 Ind. App. 220, 223, 224, 32 N. E. 92, the Appellate Court held that funds paid to the County Treasurer should have been credited to the school fund, and that the Attorney General could recover the funds for the school fund. That counties are trustees of the school fund and could not divert such funds. The court commented as follows:

> "The demurrer to the complaint admits that the money was paid into the county treasury and not added to the school fund as by law required. We must, therefore, infer that some other disposition was made of it, that it was applied to some other purpose. If the money, instead of being added to the permanent school fund, was applied to other purposes for the benefit of the county, it was a virtual conversion of the money to the use of the county. If the money was so appropriated, we are not convinced that a writ of mandate was a proper remedy in the premises.
>
> "The State of Indiana is interested in the preservation of the common school fund. The Constitution provides that 'the principal of the common school fund shall remain a perpetual fund, which may be increased but shall not be diminished.' It is the property of the State. 'Fines and other additions to the school fund' become a part of the permanent principal of the fund. No part of this principal can be diverted and applied to uses other than for which the fund was created. Board, etc. v. State *ex rel.*, 116 Ind. 329. Counties in receiving school funds receive the same as trustees, and in administering their trust they are held to a strict accountability. They have no power to divert the fund, 'directly or indirectly, to any other purpose than that to which it is devoted by express law.' Board, etc. v. State, *ex rel.*, 103 Ind. 497."

In Board of Commissioners of Fountain County v. LaTourette (1876), 60 Ind. 460, 462, the Supreme Court indicated that fines in the hands of the County Treasurer are a part of the Common School Fund. The court said:

> "By section 5 of the act of 1873, the county treasurer was not entitled to any per cent., for receiving and disbursing the school funds, specifically. The appellee, therefore, is not entitled to the fees claimed for collecting and disbursing the fund arising from fines for criminal offenses, because such fines are a part of the permanent school fund. Hanlon v. The Board of Commissioners, etc., 53 Ind. 123."

Comments of courts of other jurisdictions are as follows:

Cook v. Board (1857), 26 N. J. L. 326, 339, is as follows:

> "Certain pardoning powers, very similar to or identical with our own, have been vested, by their respective constitutions, in the federal and in all the state executives. In the constitution of the United States, the language is, 'the president shall have power to grant pardons.' In some of the states, the language is, 'the governor shall have power to grant pardons,' in others, 'to grant pardons and remit fines,' in others, 'to grant pardons after conviction,' in others, 'to remit fines and to grant pardons after conviction.' In no less than fourteen of them, it is 'to remit fines and to grant pardons.' These constitutions have been in force, more or less of them, from the Revolution to the present time. Immense numbers and amounts of fines have during that period been paid into the state treasuries, which have been used by the states, or paid out by them to the counties or others their grantees. If such a power had been considered to exist, it is impossible to conceive that through such a long period of time, in so many states, numerous occasions should not have arisen to call it into exercise, and many questions in relation to it have been agitated in our courts.
>
> "Yet I have never seen the report of a case, nor have I ever heard of an instance, where a fine has been repaid under the exercise of this power of the executive,

after it has once passed beyond the power of the court by which it was imposed. So far as I am aware, this power has only been used to *prevent*, and not to *restore* the payment of a fine."

Fischel v. Mills (1892), 55 Ark. 344, 18 S. W. 237, is as follows:

"The fact that the statute directs that the fine shall go to the county or into the county treasury for the use of the school fund does not interfere with the power of the executive to remit it. Baldwin v. Scoggin, 15 Ark. 427. The only question in this case not previously determined by this court is whether the fund has passed beyond recall while it is in the hands of the sheriff by virtue of payment made in pursuance of the judgment of conviction before pardon.

"The judgment establishes the county's right to the fine if it remains in force until the county can enjoy its fruits, but it may be deprived of the fruits by executive clemency. That is a condition upon which the judgment is rendered. In collecting the amount due on the judgment, the sheriff acts as the arm of the court in which the conviction was had, and not as the fiscal agent of the county. Until he has paid the amount into the county treasury, or at least until the county court has charged him with it in auditing his accounts, and has thereby appropriated it to the use of the county by its judgment, the county's right to the fund is no more vested than it was upon the rendition of the judgment. But the rule established by the authorities is that until a vested right intervenes, the power of the Governor to remit the fine remains. Baldwin v. Scoggin, 15 Ark., *supra*; Ill. Central R. Co. v. Bosworth, 133 U. S. 92. Say the Supreme Court of the U. S., in Knote v. U. S., 95 U. S., 149: 'The property'—that is, property condemned by the court in a confiscation proceeding—'and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds

have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the treasury, in the other.' That is a succinct statement of the law governing this class of cases. It is applicable to the case in hand and is decisive of it in appellant's favor.

"A case in point is Commonwealth v. Denniston, 9 Watts (Pa.), 142, as is also the opinion of Attorney General Cushing, which is stated and cited with approval by the court in Knote v. U. S., 95 U. S., *sup.* See too Commonwealth v. Shick, 61 Pa. St. 495; Cope v. Com., 28 id., 297; Brown v. U. S., McCahon (Kas.), 229; In re Flournoy, 1 Kelly (Ga.), 606; Ill. Central R. Co. v. Bosworth, 133 U. S., *sup.*"

Hendricks v. Reed (1919), 137 Ark. 454, 208 S. W. 800, is as follows:

"The controlling principle was announced by this court in Fischel v. Mills, 55 Ark. 344, where it was held that the power of the Governor to remit a fine continues after the fine has been paid to the sheriff or other officer who has custody of the prisoner, if the amount has not been paid into the county treasury or otherwise appropriated to the county's use. In that case the court said: 'In collecting the amount due on the judgment, the sheriff acts as the arm of the court in which the conviction was had, and not as the fiscal agent of the county. Until he has paid the amount in the county treasury, or at least until the county has charged him with it in auditing his accounts, and has thereby appropriated it to the use of the county by its judgment, the county's right to the fund is no more vested than it was upon the rendition of the judgment. But the rule established by the authorities is that until a vested right intervenes the power of the Governor to remit the fine remains.' "

Knote v. U. S. (1877), 95 U. S. 149, 154, is as follows:

"* * * The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid

into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers,— it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.

"Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the treasury, in the other."

Commonwealth v. Denniston (1839), 9 Watts (Pa.) 142, 143, is as follows:

"* * * In one case it was made a matter of complaint against the executive of the United States that he remitted a fine and ordered it to be returned to the party after the money had been paid; but it never occurred to any person to question his right to remit the fine before it had been paid, or had reached the treasury of the United States. And such has been the uniform practice since the foundation of the government. Nor does the act of the 24th of March 1818 put the country in a different position. The right of the governor rests upon the constitution, for by that instrument he has power to remit fines and forfeitures, and grant reprieves and pardons, except in cases of impeachment:

> and that right the legislature can neither abridge nor impair. The act puts the counties as the recipients of the money arising from fines and forfeitures, in the place of the commonwealth. The fines are escheated into the offices of the commissioners of the respective counties, and the commissioners are bound to superintend their collection, and when collected to apply them to county purposes. But until the money is collected and paid into the treasury, the constitutional right of the governor to pardon the offender and remit the fine or forfeiture remains in full force. They can have no more vested interest in the money than the commonwealth under the same circumstances would have had, and it cannot be doubted that until the money reaches the treasury, the governor has the power to remit. * * *"

Commonwealth v. Shick (1869), 61 Pa. St. 495, 496, is as follows:

> "* * * The recognizance was that of bail forfeited for a default of his principal to appear to answer a criminal charge. It is a debt to the Commonwealth to which none but she or her representative, the county, has any title or claim until a distribution has taken place, under the Act of 22d April 1846: Bright. Purd. 1861, p. 480. The fact that judgment has been recovered on the recognizance makes no difference, the power of the governor to remit being as great after judgment as before it, until the money has been paid into the treasury: Commonwealth v. Denniston, 9 Watts 142. * * *"

The Governor's power to remit fines and forfeitures is restricted by the legislature by statute. Burns' Statutes, Section 9-2501 reads as follows:

> "All applicants to the governor for the remission of fines and forfeitures shall forward to him, with their application, the opinion of the propriety of so doing of a majority of the following officers in the county where the fine was assessed or forfeiture incurred, viz.: The clerk of the circuit court, auditor, sheriff, county

> treasurer and such officers as shall, from time to time, have the care and custody of the common school fund within the county."

In Ryan v. State (1911), 176 Ind. 281, 95 N. E. 561, the Supreme Court said:

> "It has been held in this State that the Governor can only remit fines and forfeitures in pursuance to the provisions of law. State v. Dunning (1857), 9 Ind. 20, 23, 24."

If there is any intimation by the foregoing statutes that fines and forfeitures in the hand of the county treasurer may be remitted upon the grounds that they are not vested in the common school fund, I believe such intimation has been dispelled by the legislature by Chapter 55, Acts 1909 (Burns' Statutes Section 60-214), which provides as follows:

> "It shall also be the duty of any officer who collects or receives fines or forfeitures belonging to the state of Indiana to keep in a separate book a record of all sums received from such fines and forfeitures, the amount of each and from whom and when received. It shall be the duty of the clerk of every court possessing criminal jurisdiction, and of every justice of the peace, mayor or city judge who assesses fines, to make report *forthwith* to the auditor of state of any and all fines assessed in such courts or by such justices of the peace, mayors or city judges for violation of the criminal statutes of the state of Indiana, and, upon payment of any such fines, *forthwith* to report such payment to the auditor of state, and it shall be the duty of such officers immediately upon the occurrence thereof, to report to the auditor of state the forfeiture of all bonds and recognizances in which the principals have defaulted, and, for the purpose of making such report, a forfeiture shall be deemed to have occurred whenever and as soon as the principal in said bond or recognizance shall have defaulted therein, and, upon payment of any such forfeiture, the same shall be by such officer reported forthwith to the auditor of state, and it shall be the duty of the auditor of state to keep an account

> of all such fines and forfeitures and payments thereof and to charge such officers therewith as debtors to the common school fund *immediately* upon the report of payment thereof. The examination in this act provided for shall extend to the offices of justice of the peace and all mayors and city judges who collect and receive such fines and forfeitures. The expense of such examinations shall be paid for by the township in and for which such person is justice of the peace, or by the city or town for which such person is mayor or judge, as the case may be, and as provided in section fourteen of this act. Any public officer who shall violate any of the provisions of sections eleven and twelve (§§ 60-213, 60-214) of this act, or fails to comply therewith, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars ($100) nor more than five hundred dollars ($500), and shall forfeit and be removed from his office as now or hereafter provided by law." (Our emphasis.)

Thus it is seen that it is the duty of the clerks of the courts, as well as justices of the peace, mayors, and city judges to report *forthwith* to the Auditor of State all fines *assessed.* Then after such fines have been paid to report again *forthwith* such payments, as well as forfeitures, to the Auditor of State. And that the Auditor of State shall charge such officers therewith as *debtors* to the common school fund *immediately* upon report of such payment. Thus it appears that the legislature intended that such funds be considered vested in the common school fund, at the latest, when they have been paid into the hands of the county treasurer who acts as a custodian of the school funds for the State of Indiana, and report of such payments made to the Auditor of State.

The Constitution has provided that funds may not be withdrawn from the common school fund. Article 8, Section 3, provides as follows:

> "The principal of the Common School fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever."

Funds once lawfully vested in the Common School Fund are beyond recall. In view of the foregoing, I am of the opinion that fines and forfeitures vest in the Common School Fund at the time they are paid into the county treasury and a report thereof made to the Auditor of State.

Since it appears that, in the instance to which you refer, no report had been made to the Auditor of State, the Governor had authority to remit and the county auditor should make a refund from the fines and forfeitures account.

OFFICIAL OPINION NO. 30

April 2, 1952.

Honorable Lytle J. Freehafer, Director,
State Budget Committee,
302 State House,
Indianapolis 4, Indiana.

Dear Sir:

I have your request for an official opinion which reads as follows:

> "Section 2½ of Chapter 217, Acts of 1951, provides for a $15 per month cost of living increase for certain 'full time' State employees.
>
> "I should like to have your official opinion as to whether Secretaries of the various licensing boards, who receive a nominal amount for their services as Secretary to the Board, and who also practice their profession, are entitled to the $15 cost of living increase. It is my understanding that the Secretaries of the Licensing Boards generally are paid amounts for certain clerical work, or the supervision of certain clerical work that must be performed by the Boards between the official meetings of the Boards. In addition many of the Secretaries receive a *per diem* as members of the Boards when the Boards are in session.
>
> "Generally, these Secretaries have operated on the theory that they are not full time employees, and I have