Honorable Frank T. Millis,
Auditor of State,
238 State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of January 5, 1951, addressed to the Attorney General has been referred to me for reply. Your request for an opinion is in substance as follows:

"Does the State of Indiana have the power to withhold payment to a state employe for his services for the General Assembly, due to the fact that a certified judgment appears against him. If so, does the Auditor of State have the power to withhold the entire amount of wages, same to apply on this judgment?"

There seems to be no specific statute on the question as to whether or not the Auditor of State has the power to withhold from the wages of an employe, the payment of the judgment which the employe owes the State. The substance of the matter about which you inquire involves what is referred to in law as a set-off and is authority in cases where suit is brought against the defendant and the plaintiff is indebted to the defendant, the defendant may off-set the claim of the defendant to the extent of the amount to which the plaintiff is indebted to the defendant. Burns Revised Statutes 2-1016.

Under the principle involved in this Section of the statute the Supreme Court of Indiana has held that:

"In enforcing an equitable set-off the court proceeds upon the principle that one demand is, pro tanto, a satisfaction of the other, and that the real indebtedness is merely the balance. Keightley v. Wells (1866), 27 Ind. 384, 387."

In the case of Porter v. Roseman (1905), 165 Ind. 255, the Court said:

"It is certainly unconscientious for an insolvent party to coerce the payment of his claim when he is
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owing the other party an equal or larger sum, and thus leave the latter remediless; * * *.'"

It appears, therefore, from the decision cited; as between individuals, the principle of set-off exists and we see no reason why the State of Indiana could not invoke this principle where a claim is filed against it.

We find no specific statute that provides for set-off claims filed against the State except in the case of delinquent taxes, Burns Section 64-1500, provides that if the duty of the Auditor of State, the State Highway Commission, the Board of Trustees of State Institutions or state schools, to deduct from any money due the State Treasury, State Highway Commission, State Institutions or state schools an amount of such delinquent taxes as shown by lists on file and shall pay the same to the County Treasurer of the county entitled thereto in satisfaction of such delinquent taxes.

Section 64-1507 is a penal clause making it a fine of not less than $10.00 nor more than $100.00 for failure to perform this duty.

I am of the opinion that the right of set-off exists between any party claiming compensation from the state the same as this right would exist between two private individuals. An anomalous situation would exist where the state would be paying money to a person who owed the state a large amount on a money judgment such as involved here.

I am of the opinion that the Auditor of State would be justified in deducting from the employe the amount which he owes the State of Indiana on a money judgment to the extent of the amount of such judgment. Because if the employe should sue on such claim the State would clearly have a right at law to plead set-off and to take from his salary in advance would effect the same purposes, if you desire to do so.