provision in the existing law by Statute or Case Law in Indiana which might supersede the limitation set out to authorize the Central Government to enter into long term lease agreements of privately owned property for State use."

We have examined Chapter 279 of the Acts of 1947 to which you refer and we are of the opinion that there is no provision in existing law or statutes that would permit the State of Indiana to lease real estate for a longer period than four (4) years.

There are but two (2) ways in which this could be accomplished:

1. Execute a lease for a period of four (4) years with an irrevocable provision that the same could be renewed successively at the option of the State. This plan will undoubtedly be rejected by the owner because he would not feel inclined to make the substantial expenditure referred to on a lease with such uncertain tenure. This method was employed in the lease of the Governor's residence on Fall Creek in 1919; but that was before the enactment of the statute referred to and was a case which we understand did not require the owner to make any substantial expenditure to equip the building.

2. The other method is by an amendment to Section 5 of the Act referred to. Such amendment if adopted by the General Assembly would be clearly constitutional and could be accomplished by the addition of appropriate words to Subsection 4 of Section 5.

CHJ:mfl

OFFICIAL OPINION NO. 8

February 28, 1949.

Hon. C. E. Ruston,
State Examiner,
State Board of Accounts,
State House, Room 304,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of February 9, 1949. Your request is as follows:

"A jury is impaneled to serve in a city court:

"1. Are the members of a jury in the city court entitled to be paid at the rate of $5.00 each, under chapter 322, acts of 1947, page 1287; and also mileage of 5c per mile each way per day between their homes and the court room?

"2. If the reply to question number one is in the affirmative, should the per diem of all jurors, and their mileage, be taxed as costs against the defendants, and collected from them as part of the costs?

"3. If the reply to question number two is 'Yes', then should the jury fee and other costs be pro rated as between the defendants if more than one case was heard by the jury, or should there be a duplication of jury fees and mileage because they tried all three of these cases at one time, although the affidavits were entirely separate and tried together by agreement?

"4. If the defendants should fail to pay the costs including jury fees, then do the jurors go unpaid, or is it the obligation of the city to pay the jury the fees and mileage provided by law?

"5. If the city is obligated to pay the jurors, should they be paid in the same manner as other city obligations are paid irrespective of the taxing and collection of the costs?

"6. If your answer to question number five is in the affirmative and your answer to question number two is in the affirmative would not the costs when collected be paid into the general fund of the city?

"7. If the jury is out, deliberating on a case, and no verdict is reached before a meal time, is the city obligated to pay for the meals or should each juror pay for his own meals? If your answer to the foregoing question obligates the city, should the cost of meals be taxed as court costs against the defendant if convicted?"

It is observed that your questions are limited to criminal procedure in city courts, in cases where a verdict of guilty has

been returned by a jury. If there had been a verdict or finding of "not guilty," then usually no costs are taxable against the defendant. See Burns Statutes, Section 9-1826. But as Section 9-1825 provides: "when the defendant is found guilty, the court shall render judgment accordingly; and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly finds otherwise."

We come then to the question of what are "costs" that may be taxed against the defendant. In State *ex rel.* Board of Commissioners of Hamilton County v. Carey, 44 Ind. App. 659, the court quotes with approval the following: "* * * ' "The word 'costs' is a word of known legal signification. It signifies, when used in relation to the expenses of legal proceeding, the sums prescribed by law as charges for the services enumerated in the fee bill." ' " In State *ex rel.* Friedman v. Freidberg, 70 Ind. App. 1, it is held that costs are never allowed a party in the absence of a statute, and a party claiming costs must show that the costs or charges which he claims are within the statute.

In Bennett v. Korth, 37 Kan. 235 it was held that costs are the statutory allowances to a party to an action for his expenses in conducting such action. They have reference only to the parties, and the amounts paid or presumed to have been paid by the parties seeking to recover such expenses. Costs are unknown at common law, and are only given by statutory direction.

In City of Carterville v. Cardwell, 152 Mo. App. 32, it was stated that costs in criminal proceedings are those charges fixed by law which have been necessarily incurred in the prosecution of one charged with public offense as compensation to the officers for their services.

Thus it appears that court costs must be declared by statute, and since costs are not of common law origin, such statutes are in derogation of the common law and should be strictly construed.

Attention is called to the provisions of Burns Statutes, Section 4-2403, Acts of 1921, Chapter 161, page 404, regarding the duties of Judge of the City Court, which in part reads as follows:

"* * * It shall be the duty of such judge, whether regular or special, to tax, for the use and benefit of such city, a docket fee of five dollars ($5.00) in each case where a defendant is adjudged guilty of a violation of any law of this state or ordinance of such city, which docket fee shall be collected in the same manner as other costs are collected; and no other fees whatever, except witness fees, shall be taxed against a defendant, unless as otherwise expressly stated in this act: Provided, however, That nothing herein shall prevent the taxing and collection of the penalties and fees now fixed by law in case of the collection of judgments on execution, levy and sale of personal property. Such penalties and fees including such docket fee, when collected, shall be for the use and benefit of such city: And provided, further, That any money collected by any city judge where the judgment includes fine and costs, shall be applied, pro rata, on such fine and costs. Any person having been adjudged guilty of a violation of an ordinance of such city, and committed therefor, may be discharged by such court or judge after such defendant has been imprisoned, in addition to the term of imprisonment, if any, adjudged against him as a part of the sentence, one day for every dollar of such fine and costs, if it appear to such court or judge that such defendant is unable to pay or replevy such fine and costs, but an execution may issue against the property of the defendant as in the case of other judgments. In no case, however, shall the city be liable to any person for costs or fees. The several city courts shall have power to suspend or to withhold judgment in any case where any person shall have been convicted in such court or shall have entered a plea of guilty, as now provided by law for the circuit and criminal courts of this state. In case a jury is called, the number of such jurors shall be six (6)."

It is seen that this Act states specifically what costs are chargeable and exclude all others.

It would seem that no jury fees or expenses were taxable as costs after 1921 and prior to the Acts of 1947, Chapter 322, page 1287 which reads as follows:

> "In causes tried by jury, a jury fee of three dollars shall be taxed as costs in favor of the county: Provided, however, That the jury fee in causes tried by a jury in a city court shall be taxed as costs in favor of the city. Petit jurors of circuit, superior, criminal, juvenile and probate courts and grand jurors shall be paid five dollars per day while in actual attendance and shall receive five cents for each mile necessarily traveled in going to and returning from the place where the court is being held. Petit jurors of municipal and city courts shall be paid five dollars per day while in actual attendance and jurors of municipal courts shall receive five cents for each mile necessarily traveled in going to and returning from the place where the court is being held."

A strict construction of this Act seems to limit the taxation of a jury fee as costs to causes tried by a jury. Nothing else is allowed or granted by the Act as taxable costs. If that is the proper construction of the Act, then a jury fee of three dollars is taxable as costs to each *cause* tried, regardless of the number of causes tried in any one day, or the number of defendants tried in any one cause.

Attention is called to the following cases:

State v. Cripe *et al* (1838), 5 Blackford 6. Defendants were indicted and found guilty of riot, and separately fined. The Prosecuting Attorney moved the court to tax a separate docket fee against each defendant. The court overruled the motion and directed but one docket fee to be taxed against all of the defendants.

On appeal the Supreme Court reversed the trial court judgment and said:

> "* * * The statute respecting crimes and punishments, * * *, directs that each defendant found guilty of a riot shall be separately fined, &c. The judgment of course must be several, though the sentence against several defendants, tried together, may constitute but one entry on the record. Each defendant is liable for his own fine; were the judgment joint, each would be responsible for the fines of all the defendants.

> "The statute regulating fees, * * * gives to the prosecuting attorney a fee of five dollars 'for every conviction upon an indictment or presentment on plea of not guilty.' Enough has been said, we think, to show that on an indictment for a riot, there must be as many convictions as there are defendants found guilty, fined, and sentenced, and that the prosecuting attorney is entitled to a fee against each."

In Krutz v. State (1853), 4 Ind. 647, the defendant was charged and convicted on nine separate indictments all tried in one trial. The defendant moved the court to tax costs against him in the nine causes, but one jury fee, one docket fee and one witness fee, which motion was overruled. On appeal the Supreme Court affirmed the trial court and stated the following:

> "* * * There is a statutory provision which enacts that, 'In all cases of a conviction, the costs of prosecution shall be included in the judgment rendered against the convicted person, unless the Court or jury trying the cause expressly find otherwise.' * * * Against the defendant there was a conviction in each of the nine cases, and several judgments were accordingly rendered. It follows that costs were properly included in each judgment."

Under the statute then in force, it would appear that the number of judgments rendered against the defendant was the determining factor in the assessment of costs against him.

State v. Kinneman (1872), 39 Ind. 36. Defendants were charged with riot. They pleaded guilty and were severally fined. The trial court allowed but one docket fee to be taxed in the cause on appeal the Supreme Court reversed the trial court saying:

> "The question must depend upon the construction of the statute of 1871, which governs the case. That statute provides as follows:
>
> " 'The prosecuting and district attorneys' fees shall be as follows, to wit:

" 'Docket fee on plea of guilty in felony_____$7.00
" 'Docket fee on plea of guilty in misdemeanor_ 5.00'
"* * *

"The statute above quoted does not provide (like the statute of 1852, quoted in the case cited from 8 Ind.) for a docket fee in a 'case' but it provides for a docket fee on a plea.' * * * There must be as many pleas as there are defendants arraigned upon a criminal prosecution. * * *

"We think, under the present statute, that on an indictment or information against two or more, a separate docket fee is chargeable against each defendant who pleads guilty, * * *."

The present statute uses the word "cause" instead of "case", in authorizing the taxing of a jury fee as a part of the costs. It would appear that a jury fee may now be charged "in causes tried by jury."

Bunday *et al.* v. State (1855), 6 Ind. 398. Ten defendants were convicted of riot. On appeal "The only exception taken is to the part of the judgment giving several docket-fees. It is contended that, as the trial of all the defendants was joint, there was but one case and should have been but one docket-fee." In the code of that year (1852) it was provided, that, " 'in all cases, civil and criminal, a docket-fee of three dollars,' * * * shall be taxed, * * * and paid to the county treasurer. * * *"

"* * * In the case before us there was but one trial, one judgment, one 'case', and the statute provides for but 'a docket-fee', that is, one docket-fee, in a case. We think the court below erred in taxing a docket-fee against each defendant."

From the reasoning of the foregoing cases, it would appear that a jury fee is taxable as costs in each *cause* tried by a jury, and not for each conviction or judgment in a cause.

Therefore if two or more separate causes are tried together the jury fee would be taxable in each cause tried.

Therefore, in my opinion question number one should be

answered in the affirmative, except that mileage should be allowed at five cents per mile each way per day actually traveled between their homes and the court room.

Question number two should be answered in the negative. Only the jury fee of $3.00 is taxable as costs.

Question number three should be answered as follows: The jury fee should be taxed as costs in each cause tried, regardless of the number of convictions.

Question number four should be answered as follows: The per diem and mileage should be paid by the city. The jury fee is not payable by the city but is taxed as costs in favor of the city, much the same as witness fees are charged in favor of the witness. If the defendant or defendants are found guilty and sentenced and pay the costs including the jury fee, then the jury fee is credited to the city.

Question number five should be answered in the affirmative.

Question number six should be answered in the affirmative. That is, the collectible costs due the city should be paid into the general fund.

Question number seven should be answered as follows: The city should pay the cost of meals so long as the jury is kept together, but the cost of meals is not taxable as costs against the defendant if convicted. See Burns Statutes, Section 9-1810.

WOL:vb

OFFICIAL OPINION NO. 9

March 17, 1949.

Mr. Everett L. Gardner, Director,
Indiana Employment Security Division,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have your letter under date of March 15, 1949 asking for an opinion as to whether Section 2401, page 727, Acts of 1947, constitutes an unqualified acceptance of the provisions of the United States Employment Service Act, June 6, 1933, 48 Stat.