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OFFICIAL OPINION NO. 95

October 6, 1949.

Mr. Willis K. Batchelet,  
State Senator,  
Angola, Indiana.

Dear Sir:

This will acknowledge receipt of your request for an official opinion, dated September 10, 1949, which reads as follows:

"As State Senator, I respectfully request an official opinion on the following questions that have arisen as a result of the recent appointment of a city judge in Angola, under the provisions of Section 4-2614 Burns' Indiana Statutes Annotated, 1946 Replacement Volume.

"1. After an arrest, but before an affidavit is filed in such cause, may the city judge set and hold the accused to bail, under the procedure outlined in Section 9-704 Burns' Indiana Statutes Annotated, 1942 Replacement Volume?

"2. In view of Section 4-2402 Burns' Indiana Statutes Annotated (1933), does the Justice of Peace Court have jurisdiction for enforcement of the violation of Ordinances of a 5th Class City?

"3. Does a duly elected and acting Justice of Peace, who is also an attorney at law duly admitted to practice in Indiana, and who holds his court in a city of the 5th Class, have the right to practice law in the City Court of that city?"

Your question number one (1) is whether or not a city Judge has the power to set the amount of bail and hold the accused person to bail after an arrest but before an affidavit or charge has been filed against the accused. Burns' Indiana Statutes, Section 9-704, to which you refer, reads in part as follows:

"When an officer arrests an accused, \* \* \* he shall take the accused \* \* \* before the nearest magistrate if no warrant has been issued, and it shall be the duty of such magistrate to immediately docket the cause

\* \* \*. Such magistrate shall forthwith enter and copy, or cause to be entered and copied, upon such docket the affidavit made in such cause, \* \* \*. The term 'magistrate' as herein used shall be construed to include and mean any justice of the peace, city judge or mayor acting as city judge."

This section would indicate that if the Magistrate's Court is in session when the accused is brought in, that it is the duty of the Court, first to cause a charge to be placed against the accused *immediately* and the judge shall *forthwith* copy the charge in a docket.

But let us assume that the Magistrate's Court is not in session when the arrest is made. May the accused then be released on bail before an affidavit is filed? Attention is called to Burns' Indiana Statutes, Section 48-6112 which provides as follows:

"Whenever any arrest has been made by any member of such police force, it shall be the duty of the officer making the arrest forthwith to bring the person arrested before the city court, or court having jurisdiction of the offense, to be dealt with according to law. If the arrest is made during the hours when such court is not in session, or if the judge is not holding court, such offender shall be detained in the city prison until there shall be an opportunity for such hearing at the earliest practicable time, or until he shall have given bond for his appearance. But no person shall be so detained longer than twenty-four (24) hours without such examination, except where Sunday intervenes, in which case no person shall be detained longer than forty-eight (48) hours. Any person or corporation who shall interfere with such commissioners of public safety, or their appointees, in the legal discharge of their duties, shall, on conviction, be fined not more than one thousand dollars (\$1,000), to which may be added, in case of any person so offending, imprisonment for not more than ninety (90) days."

It has been held by our Supreme Court that the amount of bail for certain classes of offenses may be fixed by an order

of court pending the further order of the court. The case of Carmody *et al.* v. State (1885), 105 Ind. 546 at 552, reads in part as follows:

“The doctrine of this extract, and the consequent right of a party charged to have a discriminating judgment exercised in determining the amount of bail which ought to be exacted in his particular case, were argumentatively and generally recognized in the case of Gregory v. State, *ex rel.*, 94 Ind. 384 (48 Am. R. 162), but the right thus recognized does not restrain the courts from making a general order fixing the amount of bail which shall be thereafter required during a given term, in certain classes ofailable offenses, and from enforcing such an order in all cases, except where the exercise of a discriminating judgment is, by some means, specially invoked, or some question is made upon the alleged injustice of its operation in a particular case. Votaw v. State, 12 Ind. 497; Myers v. State, 19 Ind. 127; Hawkins v. State, *ex rel.*, 24 Ind. 288; Gachenheimer v. State, 28 Ind. 91.”

Thus, an accused may be released on bail, the amount of which has been fixed by an order of Court previously made, and before an affidavit or written charge has been filed.

But it would appear that as soon as Court convenes and at the first opportunity, the Judge should cause a charge to be filed against the accused and then consider any further questions concerning a proper bail.

Your question number two (2) deals with the jurisdiction of Justices of the Peace in the enforcement of city ordinances of cities of the fifth class. Burns' Indiana Statutes, Section 4-2401 provides in part as follows:

“The judicial power of every city of the first, second, third and fourth classes shall be vested in a city court. \* \* \* Provided, That, in cities of the fifth class, the mayor shall exercise all the powers and be required to perform all the duties herein provided for city judges, in so far as the same are applicable. \* \* \*”

Section 4-2402 provides in part as follows:

“\* \* \* He shall hold daily sessions of the city court,  
\* \* \*. He shall have and exercise within the county  
in which such city is located the powers and jurisdic-  
tion now or hereafter conferred upon justices of the  
peace in all cases of crimes and misdemeanors, except  
as otherwise herein provided. He shall have exclusive  
jurisdiction of all violations of the ordinances of such  
city. \* \* \*”

Chapter 26, Acts 1949 provides in part as follows:

“\* \* \*

“In such cities the mayor shall act as city judge and  
the duties now provided by law for city judge shall  
devolve wholly upon the mayor. \* \* \*”

From a consideration of the foregoing expressions of the  
General Assembly, it appears that mayors, in cities of the  
fifth class, acting as city judges, have the jurisdiction of city  
judges of cities of the other classes as defined by Burns'  
Indiana Statutes, Sections 4-2401 and 4-2402. In such cities  
of the fifth class, the City Judge has “exclusive jurisdiction  
of all violations of the ordinances of such city.” Therefore,  
justices of the peace would not have such jurisdiction.

Your question number three (3) concerns the right of a  
Justice of the Peace to practice law in a city court in a city  
of the fifth class.

Burns' Indiana Statutes, Section 10-3105—6 makes it a  
penal offense for a Justice of the Peace to practice law in a  
justice court in the county of his residence. The statute reads  
as follows:

“It shall be unlawful for any justice of the peace to  
practice law in any justice court of the county in which  
he lives, or to give counsel or advice in relation to any  
business in said courts, or in any case appealed from  
said courts.”

It appears that judges of other courts generally are re-  
stricted from the practice of law, but I do not find any other  
statute which answers your question specifically. However

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much such Justice of the Peace might be subjected to criticism, I do not find that he is prohibited from practicing law in city courts.

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OFFICIAL OPINION NO. 96

October 4, 1949.

Mr. George H. Herrmann,  
Secretary-Treasurer,  
State Board of Embalmers and Funeral Directors,  
1505 South East Street  
Indianapolis, Indiana.

Dear Sir:

Your letter of September 9, 1949 has been received requesting an official opinion construing Chapter 38 of the Acts of 1949, same being the new statute regarding Embalmers and Funeral Directors. You specifically desire an answer to the following questions:

- "1. What will be the status of the Funeral Directors licenses issued under Section 6 (e) of the old law. Will they continue in force or be automatically cancelled?
- "2. Does an embalming room have to be maintained in a branch establishment?
- "3. Can a funeral director's license be issued to an unemployed embalmer? Also, if he is employed and leaves his place of employment is his license cancelled?
- "4. Will there be two type of funeral directors licenses
  - (a) An Operator's License covering the Owner and Operator of a funeral home.
  - (b) A Professional License covering a man employed in a funeral home.