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In examining this Act the only reference that I find which in my opinion would cover the types of books mentioned in your request and which would authorize free distribution is to the Indiana University School of Law.

I find that the Statutes relating to distribution of reports and the duties of the reporter concerning the same have been interpreted by this office on several occasions. 1943 O.A.G. 472; 1945 O.A.G. 104, 318, 561. These opinions I have rather thoroughly digested those statutes and consequently I do not feel the necessity to restate the authority and reasoning used therein.

It is established from these opinions that the reporter, as a state officer, has only such powers and authority as are given by statute and those necessarily implied and that in order to authorize free distribution, the recipient must be specifically named in the distribution statute for the particular type of reports under consideration.

Therefore, it is my opinion that the books which you purchased or had printed from sheet stock under the authority of the 1945 Act must be sold unless the prospective recipient comes within a specifically named class as outlined in the above mentioned statutes.

HVW:vb:man

OFFICIAL OPINION NO. 118

December 1, 1949.

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

Dear Sir:

Your request of October 26, 1949, for an official opinion reads as follows:

“Since rendition of your Official Opinion No. 77 to Mr. Noble W. Hollar, Chairman, State Board of Tax Commissioners, innumerable questions have been pre-

sented to this office relative to existing laws governing construction and maintenance of ditches.

“Your official opinion is respectfully requested on questions following.

“1. Is Section 381½, Chapter 221, Acts of 1945 (Burns’ 27-242) invalid due to the fact that this section is not mentioned in the title of the Act?

“2. If your answer to the foregoing question is in the affirmative, is the entire Act, Chapter 221, Acts of 1945, invalid?

“3. If you answer to the last preceding question is in the affirmative, are subsequent enactments which amend the sections of the ditch law previously amended by Chapter 221, Acts of 1945 also invalid?

“4. When, pursuant to Sec. 381½, Chapter 221, Acts of 1945 (27-242), private ditches and drains are made subject to *all* of the drainage laws of the state affecting the construction and maintenance of ditches or drains established by an order of court, is the county surveyor required to fix proportionate allotments to each interested landowner for the maintenance of *tile* drains or does Sec. 48, Chapter 264, Acts of 1933, as last amended by Chapter 190, Acts of 1947 (27-210) which states that all public tile drains which are within the jurisdiction of the county surveyor shall not be classified for biennial repairs, control in the matter of allotment?

“5. If allotments for the maintenance of *tile* drains made subject to all of the drainage laws pursuant to Sec. 381½, Chapter 221, Acts of 1945 (27-242) are not to be made by the surveyor, can such tile drains be repaired under Sec. 48, Chapter 264, Acts of 1933 as last amended by Chapter 190, Acts of 1947 (27-210)?

“6. If your answer to question 5 is to the effect that tile drains made subject to all of the drainage laws pursuant to Sec. 381½, Chapter 221, Acts of 1945 may be repaired under the terms of Sec. 48, Chapter 264, Acts of 1933 as last amended by Chapter 190, Acts

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of 1947 (27-210), and *there is no public record of the original cost of such ditches*, by what method would a county surveyor determine the original costs so he would know how to proceed 'to have such tile drain repaired without advertising, letting a contract or contracts for the performance of the work, *if the total cost of such repairs does not exceed one-twentieth of the original cost of the ditch or four hundred dollars*'? (First emphasis ours.)

"7. Sec. 48, Chapter 264, Acts of 1933 as last amended by Sec. 1, Chapter 190, Acts of 1947 (Burns' Statutes 27-210) appears to make provision for repairs to tile drains, without advertising, letting a contract or assessing the benefits, payable from the ditch improvement fund, if the total cost of such repairs does not exceed one-twentieth of the original cost of the ditch or four hundred dollars.

"Does the term 'one-twentieth of the original cost of the ditch or four hundred dollars' mean one-twentieth of the original cost or four hundred dollars, *whichever is smaller* or does it mean one-twentieth of the original cost of the ditch or four hundred dollars, *whichever is greater*?

"Chapter 314, Acts of 1943 as last amended by Chapter 191, Acts of 1947 (Burns' Statutes 27-238 to 27-241) also uses the term 'one-twentieth of the original cost of the ditch or four hundred dollars'.

"8. In this section, does the term 'one-twentieth of the original cost of the ditch or four hundred dollars,' mean one-twentieth of the original cost of the ditch or four hundred dollars, *whichever is smaller*, or does it mean one-twentieth of the original cost of the ditch or four hundred dollars, *whichever is greater*?

"9. In instances where authority is given to repair open drains referred to in Sec. 1, Chapter 314, Acts of 1943 (Burns' 27-238) and such ditches have been constructed cooperatively or under private contract and there is no public record of the original costs of such drains, by what method would a county surveyor deter-

mine the original costs so he would know how to proceed under Sec. 2 (27-239), i.e. to 'proceed immediately to have such drain repaired without advertising, letting a contract or contracts for the performance of the work, *if the total cost of such repairs does not exceed one-twentieth of the original cost of the ditch or four hundred dollars*'?

"10. Section 12, Chapter 264, Acts of 1933 as amended by Chapter 221, Acts of 1945 (Burns' 27-112), in proceedings to establish a drain, requires the attorney representing the petitioners to mail notices to landowners and in some instances by registered mail, and in some instances to publish a notice to landowners. Section 33, Chapter 264, Acts of 1933 as amended by Chapter 221, Acts of 1945 (Burns' 27-133) requires certain costs to be paid from the general ditch improvement fund and provides for a method of fixing the attorney's fee. Should all of the following items be considered legitimate in a claim filed by the attorney for the petitioners and be paid from the general ditch improvement fund, or should certain of the items be absorbed in the attorney's fee fixed pursuant to this section?:

Stamped post cards

Printing of the post cards

Postal registration of notices

Postage on returned notices

Stenographic help employed by the attorney to address the cards

Automobile travel of the attorney

Expense of publishing notices required of the attorney

"Section 6, Chapter 264, Acts of 1933 as amended by Chapter 221, Acts of 1945 (Burns' 27-106) provides for notices of the filing, pendency and time fixed for docketing of the petition, which notice may be served by the petitioner or petitioners or by any person for them.

"11. Is the cost of serving these notices to be borne by the petitioners, or may such petitioners be reimbursed for such expense in case the drain is ordered constructed, and if so, is such cost to be included in the total cost of the drain, to be apportioned to the several tracts of land benefited?

"12. Can Sec. 48, Chapter 264, Acts of 1933 as last amended by Chapter 190, Acts of 1947 (Burns 27-210) be construed to mean that a county surveyor could authorize an expenditure of not exceeding one-twentieth of the original cost of the ditch or four hundred dollars without advertising, letting a contract for performance of the work, or assessing the benefits, if landowners affected agreed to donate their own labor to do the remainder of the work necessary to complete the needed repair of a public tile drain?

"13. Section 2, Chapter 314, Acts of 1943 provided for certain expense in the maintenance of open ditches to be paid from the general fund of the county or counties. This section was amended by Chapter 191, Acts of 1947 (Burns' 27-239) and among other things changed the words 'from the general fund or funds of the county or counties' to 'from the ditch fund or funds of the county or counties'.

"In view of Chapter 36, Acts of 1949, would an appropriation from the general fund of a county for the purpose of repairing open drains under the terms of Chapter 314, Acts of 1943 as amended by Chapter 191, Acts of 1947 be lawful?

"14. In counties where appropriations were made from the general fund of the counties prior to the effective date of Chapter 36, Acts of 1949, for the construction and maintenance of ditches, would expenditures for construction and maintenance of ditches from such appropriations be lawful after the effective date of said Act, to the end of the calendar year 1949?

"15. In referring to the general ditch improvement fund, Section 31, Chapter 264, Acts of 1933 as amended, prior to its last amendment by Chapter 36, Acts

of 1949 contained the following: 'If the board of county commissioners shall deem it inadvisable to establish said fund, all payments from and reversions to such fund shall be paid from and shall revert to the county general fund.'

"Can assessments on ditches, the cost of which ditches was paid from the county general fund prior to the effective date of Chapter 36, Acts of 1949 be receipted into a general ditch improvement fund created after the effective date of Chapter 36, Acts of 1949, or must such assessments be paid into the general fund of the county to reimburse the general fund for all payments having been made from it?"

In the beginning, I believe it may be helpful to bear in mind a well established and fundamental rule of law to the effect that all of the people of the State or of a lesser unit of government cannot lawfully be taxed for the private benefit of less than all of the people of the taxing unit. This principle of government is stated in 51 American Jurisprudence under the subject of "Taxation", Section 322, page 375 in part as follows:

"While it is universally agreed that an attempt to raise money by taxation for private purposes is unconstitutional, the authorities are not in agreement in respect to what constitutional provision is thereby violated. * * * In its last analysis, however, it would seem that the levy of what purports to be a tax for a purpose not public is most obviously objectionable as the taking of the property of the persons assessed without due process of law; to impose it is a mere spoliation of the individual without the sanction of any of the precedents which constitute due process of law. The right of private property, guaranteed by the state and Federal Constitutions, is subject to the governmental power of taxation; but the power to tax can be exercised only to raise money for a purpose public in nature. Even a liberal view as to the purposes for which a tax may be levied leaves open to be conceded the principle that the liberty of the citizen to acquire, own,

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and use private property cannot be destroyed or interfered with arbitrarily under the guise of taxation.”

Most of our drainage laws are of that character. Usually less than all the people of a unit of government receive the benefits of a particular drainage system or project. Therefore, should the general funds of the unit of government raised by taxation be used to construct or to maintain such a drainage system or project? This appears to be involved in some of the questions that follow.

1. If the title of the *original* Act is sufficient to cover an amendment, the title of the amendatory Act is immaterial.

Shoemaker v. Smith (1871), 37 Ind. 122;

Brandon v. State (1861), 16 Ind. 197;

State *ex rel.* Meyer-Kiser Bank v. Superior Court Marion County (1931), 202 Ind. 589.

The title of the original Act of which Section 38½, Chapter 221, Acts of 1945, is amendatory, concerned the subject of “drainage”. This title is broad enough to include the subject matter of Section 38½ and said Act of 1945, Chapter 221 is not invalid.

The answer to question number one is in the negative.

2. The foregoing answer disposes of your question number 2.

3. The foregoing answer disposes of your question number 3.

4. Your question number 4 deals with the proper method of maintaining tile drains. Section 38½, Chapter 221, Acts of 1945, Burns’ Statutes, Section 27-242, in part reads as follows:

“Whenever ten (10) per cent of the owners of any land affected by any private ditch or drain, constructed by two (2) or more persons, desire that such private ditch or drain be made subject to all of the drainage laws of the state affecting the construction and maintenance of ditches or drains established by an order of court, they may petition the county surveyor to have such ditch or drain made subject to such drain-

age laws. The county surveyor shall review such petition and if he determines that the same should be granted, he shall fix the proportionate allotments to each interested landowner for the maintenance of said ditch or drain. * * *

Section 1, Chapter 190, Acts of 1947, Burns' Statutes, Section 27-210, in part reads as follows:

"All public tile drains which may be within the jurisdiction of and under the supervision of the several surveyors of this state, shall be repaired under the direction of such surveyor, whenever the necessity for such repairs may arise or exist, and shall not be classified for biennial repairs as herein provided for open drains. Any surveyor of any county in this state shall be, and is hereby authorized to repair any tile drain within his jurisdiction, at any time, upon notice of the necessity of such repairs, by any person or corporation interested. * * *

It is my opinion that the General Assembly intended that tile drains be maintained by the respective County Surveyors out of the General Ditch Improvement Fund of the county as provided by Chapter 190 of the 1947 Acts. Section 33, Chapter 221, Acts of 1945, Burns' Statutes, Section 27-208 provides in part as follows:

"Where any person or persons shall have converted, that portion of any open ditch or drain allotted to him, or them, for the biennial clean-out into a blind ditch by putting in drain tile of sufficient dimensions to serve the purpose of drainage, such drain tile so put in being continuous from the head or beginning of such ditch or drain, thus obviating the necessity of cleaning that part of such ditch so tiled, such owner or owners shall be exempt from allotment in that particular drain. * * *

Therefore, it appears that the "allotments" referred to in Section 38 $\frac{1}{2}$ of said Act, refers to "open" ditches and drains only and not to the tile drains.

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5. By reason of the foregoing answer to question number 4, the answer to question number 5 should be in the affirmative.

6. If the public records of original ditch costs have become lost or destroyed, the records may be re-established as provided by Chapter 8, Acts of 1852; Burns' Statutes, 57-101 *et seq.* If there never were any such records it would seem that the limitation would have to be taken as four hundred (\$400.00) dollars rather than one-twentieth of the original cost.

7. Section 1, Chapter 190, Acts of 1947, Burns' Statutes, Section 27-210, in part reads as follows:

“* * * Upon receipt of such notice, such surveyor shall proceed immediately to have such tile drain repaired without advertising, letting a contract or contracts for the performance of the work, if the total cost of such repairs does not exceed one-twentieth of the original cost of the ditch or four hundred dollars (\$400). In the event that the cost of such repairs shall be less than one-twentieth of the original cost of the ditch or four hundred dollars (\$400). * * *”

In my opinion the language used means, whichever amount is smaller; that the amount cannot exceed four hundred (\$400.00) dollars but may be less.

8. Question number 8 should be answered the same as question number 7.

9. The answer to question number 9 should be the same as the answer to question number 6.

10. Question number 10 deals with certain items of services and expense chargeable to the General Ditch Improvement Fund. Under the terms of the Acts referred to in your question, in my opinion the following items are proper charges payable from the ditch fund, to-wit: Stamped post cards, printing of post cards, postal registration of notices, postage on returned notices, expense of publishing notices required of the attorney.

It is noted by Section 9, Chapter 221, Acts of 1945, Burns' Indiana Statutes, Section 27-112, that, “Upon such date (of

hearing) being fixed, the attorney representing the petitioner shall within five (5) days notify, by United States mail, on a stamped five-day return postal card, all of the owners whose names appear in the surveyor's report of assessments or damages." Thus it appears that to comply with this provision, the attorney representing the petitioners may be compelled by time limitation to procure stenographic help to address the notice cards. In my opinion such a charge for stenographic services is properly payable from the General Ditch Improvement Fund.

As to whether or not automobile travel of the attorney is properly chargeable to said ditch fund, would be a question of fact to be determined in each instance.

11. Section 6, Chapter 221, Acts of 1945, Burns' Indiana Statutes, Section 27-106, in part provides as follows:

"* * * a written or printed notice, setting forth the route of such drain as described in the petition, the fact of the filing and pendency of such petition, and when the same will be docketed, which notice may be served by the petitioner or petitioners, or either of them, or by any person for them, by delivering a copy to the owner and/or occupant, person or corporation, to be notified, or by leaving such copy at his or its last and usual place of residence or place of business, and proof thereof made by the affidavit of the persons making such service. * * *"

In my opinion the cost of serving such notices, whether by the *petitioners* or by *others*, is a part of the improvement and would be a legitimate charge against the Ditch Improvement Fund.

12. A search of the drainage statutes reveals no mention of repairs by use of donated labor. It is my opinion that whenever the entire cost of the repair is in excess of one-twentieth of the original cost of the ditch or four hundred dollars (\$400.00), whichever is smaller, it would be the duty of the surveyor to award a contract for the work and to assess the entire cost as benefits to the lands affected.

13. Section 1, Chapter 191, Acts of 1947, Burns' Indiana Statutes, Section 27-239, in part reads as follows:

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“It shall be the duty of the surveyor of each and every county of this state in which any such open ditch or drain, other than open dredge ditches of court record, or any part or parts thereof are located, to clean out and repair and remove all obstructions therefrom, except that title ditches shall be repaired as otherwise provided by law. * * * When such ditch or drain is located in more than one county, the county surveyor of the county having the major portion of such drain shall perform the duties herein required and each county shall bear its proportionate share of the expense. The total cost of such work shall be paid from the ditch fund or funds of the county or counties in which such ditch or drains are located: * * *”

In my opinion, by the language of the General Assembly as above expressed, your question number 13 should be answered in the negative.

14. In our Official Opinion No. 77, 1949, it was held that under the provisions of Chapter 36, Acts of 1949, the County General Fund could not be used for ditch purposes. This Act became effective on February 28, 1949. Prior to the effective date of said Act, counties were authorized to appropriate money from the General Fund for ditch purposes, with the understanding that it would be returned by assessments upon land owners who were benefited. Therefore, in my opinion, counties would be authorized to make expenditures to the amount of the appropriation even though some or all of the expenditures are made after the effective date of Chapter 36, Acts of 1949. An appropriation sets apart certain funds for a particular purpose without regard to the time they are expended but provided the appropriation is exhausted before the balance reverts to the General Fund.

In answer to your question number 15, it is important to note the provisions of Section 1, Chapter 36, of the Acts of 1949, particularly as to what must be paid into the General Ditch Improvement Fund, the pertinent provisions of that section are as follows:

“* * * The board of county commissioners of each county in this state may, at any time, provide and

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establish a fund to be known as the General Ditch Improvement Fund, of not to exceed one hundred thousand dollars, which shall be used as a fund to pay for the construction of ditches and their maintenance. Such fund shall consist of all funds in any ditch fund not otherwise appropriated at the time this act takes effect, or any taxes then or thereafter levied or collected for ditch purposes, the proceeds of all bonds issued and sold for the construction of specifically named ditches and from the collection of all special payments and benefits to property as provided in this act for the construction, repair or enlargement of ditches and such other funds as by law are or may hereafter be provided to be paid therein."

It is, therefore, my opinion that all moneys hereafter collected for ditch improvements, which improvements were made prior to the effective date of the above Act, should be paid into the General Ditch Improvement Fund. However, a sufficient amount of said moneys should be earmarked for payment to the general fund of the county from which moneys had for said improvements were originally appropriated. Expressly, the general ditch improvement fund would then serve as a medium for a proper reimbursement to the general fund of the county and same could not then be used for any contemplated new ditch improvements.

WOL:vb

OFFICIAL OPINION NO. 119

December 7, 1949.

Mr. Arthur M. Thurston
Superintendent, Indiana State Police
Stout Field
Indianapolis, Indiana

Dear Sir:

I have your letter with enclosures requesting my opinion concerning the number of years service which should be credited to Mr. Risher for pension purposes. Your letter