only such other powers as might be necessary to carry those into effect.

State *ex rel.* Bingham v. Home Breweries Co. of Indianapolis (1914), 182 Ind. 75;

Department of Insurance v. Church Members Relief Association (1939), 217 Ind. 58.

The statutes above mentioned show that you, as Director, are charged with the duty of administering the mining laws, but neither you, as Director, nor the Bureau itself have been given any authority to make and promulgate any rules and regulations concerning the operation of mines.

Therefore, upon the above statutes and authority, it is my opinion that the Director of the Bureau of Mines and Mining has no authority to fix the size of the block of coal to be left around the oil drill hole.

Although the above answers your precise question, I further point out that, in accordance with Section 11 of Chapter 334 (Burns, 40-2141), the Commissioner of Labor is authorized and directed to adopt rules prescribing various safeguards in every employment for the purpose of the prevention of industrial accidents. Thus, if any reasonable rule or regulation concerning this subject matter was properly made and promulgated by the Commissioner of Labor, then it would be the duty of the Director of the Bureau of Mines and Mining to see that the same was carried out and properly enforced.

OFFICIAL OPINION NO. 59

September 20, 1948.

Hon A. V. Burch,
Auditor, State of Indiana,
State House,
Indianapolis, Indiana.

Dear Sir:

We have your letter of June 22, 1948, in which you enclose a letter from Judge Owen of Terre Haute and make the following inquiries:

"Does the Supreme Court decision, referred to in Judge Owen's letter, increase all judges' salaries regardless of when they were elected and took their office?

"If we are to increase all judges' salaries referred to above, is the increase retroactive to the time the increased salary law (Chapter 242, Acts 1945) became effective, December 12, 1945?"

Since your inquiry brings into question two laws concerning the compensation of judges, both of which were passed in the 1945 General Assembly, our consideration is first as to those two laws and their effect. It is axiomatic in a question of statutory construction, that the primary purpose is discovery of the legislative intent as expressed in the statutes. There are a great number of rules of thumb which are often quoted as rules of statutory construction, but in every case the application of any rule of thumb should promote rather than discourage the discovery of true legislative intent.

At the time of the meeting of the General Assembly in 1945 it was generally assumed by administrative officers and members of the General Assembly that a purported amendment to the Indiana Constitution in 1926 (Art. 15, Sec. 2) was properly adopted and a part of our organic law. That amendment prevented a raise in salary of an officer during his term of office. The existence of the amendment has been indirectly recognized by the courts.

Board of Commissioners v. Crowe (1938), 214 Ind. 437, 446;

Benton Co. Council v. State *ex rel.* Sparks (1946), 224 Ind. 114, 120 to 125.

At the time of the 1945 General Assembly, on the same day (March 7, 1945), the Governor approved House Bill 329 and Senate Bill 169, Chapters 295 and 242, respectively, in the Acts of 1945.

Chapter 295 contains a long preamble reciting that there had been no change in the salaries of officers and employees of political subdivisions of the state since 1933, and there had been additional duties, increases of population and defense establishments which, by inference, made salaries in-

adequate. The difficulty with the preamble is that it mentions only the 1933 fee and salary bill which did not affect judges. As a practical matter judges' salaries have not been changed since 1921. However, judges were included in the provisions of the act itself. The act applies only to counties having less than 75,000 in which are located defense plants, army camps, naval air bases, proving grounds, shipyards, or a county contiguous to one having such an installation. It provides for $1.75 a day for each official enumerated, including judges. The additional per diem was to be paid by the counties. The act became effective April 1, 1945, and was to expire by limitation March 31, 1947.

Chapter 242 of the Acts of 1945, which was approved the same day, increased the salaries of judges from $4,200.00 to $4,900.00, payable out of the state treasury, with provisions for increases by the counties. Section 2 of the act provided that the salary should be in lieu of all other salaries or compensation now or heretofore paid by the state. There was no emergency clause in Chapter 242, so that it did not become effective until December 12, 1945, while the per diem statute was in effect during a large part of the year. As a question of contemporaneous construction, the question immediately arises whether a judge of a county of less than 75,000 could, under some circumstances, receive the additional salary and the per diem. This question was presented to the Attorney General in 1946 and he, at that time, said that the $1.75 per diem statute was only applicable in those cases where the salary of the official had become inadequate since the passage of time and would not be applicable to a circuit court judge who had received the increase in salary established by Chapter 242. That construction was apparently confirmed by the legislature in 1947 when, in renewing the per diem statute by Chapter 272 of the Acts of 1947, it was expressly provided in Section 1 that the judges who had received the salary increase under the provisions of Chapter 242 of the Acts of 1945 should not receive the per diem.

In view of the passage and approval of the two acts at the same time, and the then current opinion that Article 15 of Section 2 of the Constitution was in effect, it seems obvious that the legislative intent was to provide additional compensation by per diem for those judges in counties of 75,000 or under who were then in their terms and to provide the raise

in salaries for new judges by election or appointment. I do not believe the legislature ever contemplated the receipt of both per diem and increased salary by a judge.

Now it appears that Article 15 of Section 2 of the Indiana Constitution was not properly adopted. In Swank v. Tyndall (1948), — Ind. —, 78 N. E. (2d) 535, the court said at page 543:

> "* * * It follows, of course, that the Todd decision had no effect whatever on the proposed amendment to Art. 15, Sec. 2, of the Indiana Constitution, voted upon by the electors of the state at the general election on the first Tuesday after the first Monday of November, 1926. The provisions of the law with respect to this election having been faithfully followed, the proclamation of the governor on December 21, 1926, that the proposed amendment was rejected, remains undisturbed."

We are confronted then with the problem of determining the effect of Swank v. Tyndall upon the two 1945 statutes. It is apparent that the contemporaneous legislative intent was based upon a mistake of law—the assumption that judges then in their terms could not receive the benefits of Chapter 242. Without the 1926 amendment to Article 15, Section 2, it seems to me there is still ample evidence of legislative intent that the judges should not receive the benefits of both acts. That intent is affirmed by the 1947 legislature. However, without the 1926 amendment to Article 15, Section 2, judges in counties of 75,000 or over were entitled to the increased salary immediately upon the effective date of Chapter 242 (December 12, 1945). That would be true of Judge Owen. As to those counties under 75,000, it seems to me that the judges became immediately entitled to the per diem but that upon the effective date of Chapter 242, which increased their salaries, they were entitled to the increased salary. That leaves the 1947 Act (Chapter 272) ineffective as to judges since by that time all judges, in the absence of constitutional prohibition, were entitled to the increased salary.

Final determination of the question also depends upon the applicability of another statute. Section 49-1103, Burns 1933, same being Section 1, Chapter 161, Acts 1925, provides as follows:

> "The salary of any officer elected to any elective township, city, county or state office in the state of Indiana, shall not be increased during the term for which such officer was elected, and this act shall be construed to be a part of any law enacted for the change or increase of any such salaries."

Although cognizant of the rules of statutory construction that an earlier salary statute may by implication be repealed by a later statute on the same subject, due to the above provision that "this act shall be construed to be a part of any law enacted for the change or increase of any such salaries", I deem it advisable to fully consider the question as to whether such judges are county or state officers, within the meaning of said statute, without determining the question of implied repeal or the controlling effect, if any, the quoted part of said section of the statute would have upon later salary statutes.

As far as judges of the circuit court are concerned, the law is well settled in this State that circuit court judges, while they exercise state functions, "are not state, county or township officers; they are constitutional officers."

> State *ex rel.* Pitman v. Tucker (1874), 46 Ind. 355, 359;
>
> State *ex rel.* Gibson v. Friedley (1893), 135 Ind. 119, 131.

The case of State *ex rel.* Gibson v. Friedley, *supra,* was approved without comment in the case of Spencer v. Criminal Court of Marion County (1938), 214 Ind. 551, 557. On this question also see 1948 Ind. O.A.G., Official Opinion No. 1.

In determining whether judges of the superior, criminal, probate and juvenile courts of this state are "state officers" or "county officers" it is deemed necessary to set out certain provisions of the Constitution of Indiana which are considered and referred to in the foregoing cases, and in the cases hereinafter cited.

Article 7, Section 1 of the Constitution of Indiana provides as follows:

> "The judicial power of the State shall be vested in a Supreme Court, in Circuit Courts and such other courts as the General Assembly may establish."

Article 7, Section 8 of the Constitution of Indiana reads as follows:

> "The Circuit Courts shall each consist of one Judge, and shall have such civil and criminal jurisdiction as may be prescribed by law."

Article 7, Section 12 of the Constitution of Indiana provides:

> "Any Judge or Prosecuting Attorney, who shall have been convicted of corruption or other high crime, may, on information in the name of the State, be removed from office by the Supreme Court, or in such other manner as may be prescribed by law."

Article 7, Section 13 of the Constitution of Indiana further provides:

> "The Judges of the Supreme Court and Circuit Courts shall, at stated times, receive a compensation, which shall not be diminished during their continuance in office."

It must be taken for granted that judges of the superior courts of this state are not "county officers" for the Supreme Court of Indiana in determining the validity of a statute establishing joint superior court districts of Marion County and Shelby County in the case of State *ex rel.* v. Bartholomew (1911), 176 Ind. 182, at page 195, held:

> "Judges of the circuit and the superior courts are not county officers, but belong to the judicial department and perform state functions in the discharge of their official duties; and they may be required to perform these duties in counties attached to their judicial districts after their election. * * *"

Since the decision in the case of State *ex rel.* v. Bartholomew, *supra,* is necessarily predicated upon the authority of the legislature to create such "other courts" pursuant to the provisions of Article 7, Section 1, of the Constitution of Indiana, *supra,* and since there is nothing in said decision tending to show the law establishing the Marion Superior Court would

warrant such court being considered as an exception for classification for other superior, criminal, probate and juvenile courts of this State, for as the judges thereof not being "county officers", it must be considered that the effect of such decision is that none of the judges of the superior, criminal, probate and juvenile courts of this state are "county officers".

It, therefore, remains to be determined if the judges of such courts, other than the circuit courts, are "state officers" within the meaning of Section 49-1103, Burns 1933, *supra.*

Attention is called to the fact that prior to 1881, Article 7, Section 1 of the Constitution of Indiana vested the judicial power of the state "in a Supreme Court, in Circuit Courts and such *inferior* courts as the General Assembly may establish." By the amendment of said Article of March 14, 1881, the word "inferior" was deleted and the word "other" inserted so as to make that part of such provision read "and such *other* courts as the General Assembly may establish."

In the case of Woods v. McCay, Treasurer (1895), 144 Ind. 316, the Supreme Court of Indiana, in considering the foregoing amendment to the Constitution, on page 322 of the opinion said:

> "* * * such courts need not now be made inferior to the circuit court, and the amendment was doubtless made to meet the growing wants of the state."

In the case of Board, etc., v. Albright (1907), 168 Ind. 564, the court was required to determine the legality of the establishment by the legislature of a superior court district for the counties of Elkhart and St. Joseph as well as the character of such court as so created. On this question, on pages 571 and 572 of the opinion, the court said:

> "* * * Under the *ejusdem generis* rule, which finds its ordinary application where the word 'other' is used in introducing unenumerated particulars following specific terms, there is commonly an intendment that the unenumerated particulars are of the same class as the terms specifically mentioned. So, at the least, no violence is done to the word in assuming that the provision of the Constitution is broad enough to authorize

the creation of courts like the circuit courts. The court which sits at Elkhart, although it has the same jurisdiction as the circuit court at Goshen, is, nevertheless, another court. Indeed, it would seem, unless there is something evincing a design to give to the circuit court a particular and unique jurisdiction, which it is inadmissible to parallel from its beginning to its end, that it would be enough to distinguish the two courts that one is a court presided over by a judge who holds for six years, while the other court has a judge whose term cannot, under the Constitution, exceed four years.

"In Commonwealth, *ex rel.* v. Hipple (1871), 69 Pa. St. 9, it was held that, under a provision of the Pennsylvania constitution authorizing the creation of 'other courts,' it was competent to establish criminal courts having concurrent jurisdiction with criminal courts existing under the constitution, the court saying: 'The constitution having neither defined nor limited the jurisdiction of the courts named in the constitution, or of those to be afterwards established, the power to create new courts and new law judges carried with it the power to invest them with such jurisdictions as appear to be necessary and proper, and to part and divide the judicial powers of the state so as to adapt them to its growth and change of circumstances.'

"When the Constitution of this State required that such courts as might be created should be 'inferior' to the circuit courts, their relative rank was properly tested by the extent of their jurisdictions, but, with the word 'other' substituted, it appears to us that no possible constitutional objection could exist to the creation of a court which shared with the circuit court its jurisdiction and its power. As applied to the case in hand, we may appropriately borrow the observation of this court, in Combs v. State (1866), 26 Ind. 98, 99: 'Large communities require more time for the transaction of judicial business than small ones, and if one court cannot do the business, there must be more created.' "

Again on pages 577 and 578 of the opinion the court continued:

> "Although created by legislative fiat, the courts in question nevertheless deraign their title from the Constitution, and since they enjoy, with the courts enumerated in the Constitution, that measure of inherent power which is essential to enable them to protect themselves, we have no doubt that in the absence of other authority such courts could require what is absolutely essential to be provided. Board, etc. v. Stout (1893), 136 Ind. 53, 22 L. R. A. 398. And see State *ex rel.* v. Noble (1889), 118 Ind. 350, 4 L. R. A. 101, 10 Am. St. 103. As said in Board, etc. v. Stout, *supra:* 'Courts are an integral part of the government, and entirely independent; deriving their powers directly from the Constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the Constitution or established in pursuance of the provisions of the Constitution, cannot be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts.' "

The cases heretofore referred to in holding that circuit court judges were not state or county officers decide that while they perform state functions, they are created by the constitution, and are constitutional officers. No distinction in that respect would seem to exist "as far as other courts" created by the legislature pursuant to Article 7, Section 1, of the Constitution of Indiana are concerned, in view of the recent decision by the Indiana Supreme Court in the case of State *ex rel.* Kostas v. Johnson (1946), 224 Ind. 540, which held the "Lazy Judge Act" unconstitutional. On pages 550 and 551 of that opinion the court said:

> "The relator in arguing the constitutionality of the statute, urges that the Superior Court of Marion County is a statutory court created by the legislature and therefore subject to regulation by its creator. It

> is true that the Superior Court of Marion County is a statutory court but that does not mean that it acquires its judicial power from the legislature. The legislature, under the Constitution, may create other courts than those named in the Constitution. But the Constitution alone bestows judicial power and all judicial power comes from the Constitution and is vested by it in courts and judges who can no more be interfered with by the legislature than a court or a judge created by the Constitution itself. State *ex rel.* Youngblood v. Warrick Circuit Court, *supra;* Board, etc. v. Albright, *supra;* Board v. Stout, *supra;* State, *ex rel.* v. Noble, *supra.*"

The theory may be advanced by some that since such "other courts" are established by legislative acts, pursuant to constitutional authority, that they, therefore, have a different status than circuit courts. No such distinction would seem to exist when it is considered that the legislature has, pursuant to constitutional authority (Article 7, Section 9 of the Constitution), divided the territorial jurisdiction of circuit courts and in doing so established additional circuit courts.

> Board v. Albright (1907), 168 Ind. 564, 572;
> State *ex rel.* v. Bartholomew (1911), 176 Ind. 182, 196.

The case of State of Indiana v. Patterson (1914), 181 Ind. 660, concerned an action to remove a prosecuting attorney from office, which was filed pursuant to an act of the legislature, being Section 1, Chapter 182, Acts 1897, same being Section 49-801, Burns 1933, which authorized the impeachment of "all state officers and all judges and prosecuting attorneys * * * for any misdemeanor in office." In holding that the grounds of impeachment of judges and prosecutors was limited to those grounds enumerated in Section 12, Article 7, of the Constitution of Indiana, the court made the following pertinent statements concerning the questions with which we are herewith confronted. On pages 662 to 664 of the opinion the court said:

> "Section 12, Art. 7 of our Constitution, relating to the judiciary, reads as follows: 'Any judge or prose-

cuting attorney who shall have been convicted of *corruption or other high crime,* may, on information in the name of the state, be removed from office by the supreme court, *or in such other manner as may be prescribed by law.*' It is claimed by appellee that a prosecuting attorney cannot be removed from office for any cause other than 'corruption or other high crime'. Sections 7 and 8, Art. 6 of our Constitution reads as follows: '7. All state officers shall, for *crime, incapacity,* or *negligence* be liable to be removed from office, either by impeachment by the house of representatives, to be tried by the senate, or by a joint resolution of the general assembly; two-thirds of the members elected to each branch voting, in either case, therefor. 8. All *state, county, township* and *town officers* may be impeached, or removed from office, *in such manner as may be prescribed by law.*' In McComas v. Krug (1882), 81 Ind. 327, 42 Am. Rep. 135, this court held that these two sections should be construed together as providing that state officers may be removed from office either by legislative impeachment, or in such manner as may be prescribed by law, for crime, incapacity or negligence, and that, for the same causes, county, township and town officers may be removed as prescribed by law. Appellant contends that prosecuting attorneys are included in the class of officers named in Sec. 8, Art. 6, above quoted. This court has held the contrary. In State, *ex rel.* v. Tucker (1874), 46 Ind. 355, 359, it was said: 'Judges of the circuit court and prosecuting attorneys are not state, county, or township officers. Art. 5, Sec. 18, Const.' In State, *ex rel.* v. Friedley (1893), 135 Ind. 119, 126, 34 N. E. 872, 21 L. R. A. 634, it was held: 'The judge and prosecuting attorney are constitutional officers; they are so designated in the organic law, and are neither state nor county officers.' In Board, etc. v. Albright (1907), 168 Ind. 564, 575, 81 N. E. 578, it was held that prosecuting attorneys are not county officers. *Indeed, if judges and prosecuting attorneys are State or county officers, within the meaning of Sections 7 and 8, Art. 6, of our Constitution, it was wholly unnecessary to provide in Sec. 12 Art. 7, for*

> *their removal, for corruption or other high crimes. We are not warranted in treating as meaningless any clause, or even word, found in the organic law.* Greencastle Tp. v. Black (1854), 5 Ind. 557; Denny v. State, *ex rel.* (1896), 144 Ind. 503, 529, 42 N. E. 929, 31 L. R. A. 726. *Section 1 of the act in controversy (Section 9628, Burns 1914, Acts 1897, p. 278) indicates that the legislature did not consider judges or prosecuting attorneys as State officers, for it provides that 'all state officers, and all judges and prosecuting attorneys are liable to impeachment.'"* (Latter emphasis ours.)

Under the last referred to case, it is clear that to hold any of the judges of those classes of courts here involved to be "state officers" would be to hold that the framers of our Constitution did a useless act in making provision for the impeachment of judges under Section 12, Article 7, of the Constitution for if they were state officers provision was made for impeachment under Sections 7 and 8 of Article 6 of the Constitution. Also, as so forcefully pointed out in that opinion, the legislature has seen fit by its own prior statutes to make provision for impeachment of "state officers, and all judges and prosecuting attorneys." (Section 49-801, Burns 1933, *supra.*) As so clearly pointed out in that case the legislature has seen fit to classify judges as something other than state officers. In this connection it is submitted there is a well recognized rule of statutory construction that in ascertaining the legislative intent as to a statute, the courts may take into consideration other acts in *pari materia,* whether passed before or after the act in question.

> Sherfey v. City of Brazil (1937), 213 Ind. 493, 497, 498.

Since the statute here involved was enacted by the legislature in 1925, which was subsequent to the enactment of the legislature in Section 49-801, *supra,* as well as subsequent to the decision in 1914 of the case of State of Indiana v. Patterson, *supra,* the statute here in question is subject to the further well established rule of statutory construction that the legislature is presumed to be acquainted with existing law and in legislating on any subject to have in view its provi-

sions, together with the construction placed thereon by the courts.

> Stith Petroleum Co. v. Dept. of Audit and Control (1936), 211 Ind. 400, 405;
>
> Town of Brownstown v. Trucksess (1933), 98 Ind. App. 322, 329.

The case of State of Indiana v. Patterson, *supra*, has been cited and approved by the Supreme Court of Indiana in the cases of State v. Redman (1915), 183 Ind. 322, 342, and State v. Dearth (1929), 201 Ind. 1, 11.

Under the foregoing authorities, I am of the opinion that judges of the superior, criminal, probate and juvenile courts of this State, established by the legislature under the authority of the "other courts" clause of Section 1, of Article 7, of the Constitution of Indiana, while they may be commonly referred to as statutory courts (due to their being established by statute and their jurisdiction and tenure regulated by statute) are in fact tribunals authorized by the constitution and their inherent judicial powers come from the constitution and that they can no more be classed as State officers than the judge of the circuit court.

It is to be conceded the law in Indiana is not entirely in harmony on the foregoing proposition. Expressions may be found in several cases, including Fenstermacher v. Indianapolis Times P. Co. (1936), 102 Ind. App. 189, 191, and Harrison *et al.* v. Alexander, Secretary of State (1946), 224 Ind. 450, 68 N. E. (2d) 784, 786, to the effect that such courts are mere creatures of the General Assembly and have only such powers as given to them by statute. However, it is doubtful if the courts in those cases meant their language there used to be extended to cases such as the instant case. In the first referred to case, the question solely concerned the limitation of power of the superior court of Marion County to jurisdiction in all civil causes *except slander*. While in the latter case, the question involved was the tenure of office of the judge of such court. Such limitations of jurisdiction and tenure by the legislature were fully authorized by Article 7 of the Constitution of Indiana.

From the foregoing, I am of the opinion judges of the circuit, superior, criminal, probate and juvenile courts of this

State are not elective officers of the township, city, county or state, within the meaning of Section 49-1103, Burns 1933, *supra*, and that said act does not prohibit an increase in the salary of such judges during their term of office.

It is unfortunate that the mistake of law was not discovered earlier since by now considerable in increased salaries has accrued. The salary of an officer is an incident to the office and I do not believe that the failure to draw it or make demand for it is a waiver or estoppel against the officer. It is not a matter of contract. Under those circumstances I am of the opinion that all judges are entitled to the increased salaries as of December 12, 1945. However, I am still of the opinion, which is supported by the 1947 Act, that the legislature never intended the receipt of both a salary and a per diem, so while the judges are entitled to the increased salary from the state for the period subsequent to December 12, 1945, every county where the judge has received a per diem since that time has a claim against the judge for the amount of per diem he has received since December 12, 1945.

OFFICIAL OPINION NO. 60

September 27, 1948.

Colonel Ben Herr,
Adjutant General's Office,
212 State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of September 22 as follows:

> "The National Defense Act under which the Indiana National Guard is organized, provides one of the requisites that the State assumes responsibility of federal property issued to the troops and shall be pecuniary liable for same in case of loss through neglect or, in certain cases, insecurity of stationed storage facilities.
>
> "I now have before me a claim for $23.77, supported by a report of survey, for property lost under what