to be legally admitted to do business in this state. In accepting papers for filing in connection with such admittance, it is my opinion the Secretary of State is not required to file any paper for which there is no statutory authorization.

OFFICIAL OPINION NO. 10

March 27, 1947.

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

Dear Mr. Ruston:

I have your request for an opinion on the following questions:

> "(1) Is the State of Indiana liable for costs in a state highway condemnation proceeding?
>
> "(2) Are clerk's service fees in a venued cause, or appraiser's fees and witness fees considered as taxable items of cost, or are they considered as personal fees for services rendered?
>
> "(3) If judgment is rendered against the State, and such fees are considered as personal fees for services rendered, is the State liable for the payment of such fees?
>
> "(4) Is the State liable for interest on the full amount of the judgment from the date of judgment to the date of payment, or
>
> "(5) Is the State only liable for the difference between the tender and the total judgment?"

The first question has been passed upon by two Attorneys General of the State. The first opinion was rendered by Hon. Arthur L. Gilliom on July 2, 1925, and the second by Hon. Philip Lutz on January 19, 1933. In each of these opinions it was held that the State, in condemnation proceedings, is not liable for ordinary court costs, but that it is

liable for the fees of the appraisers and the costs of publication of notice in cases involving non-resident defendants, since such services are rendered by parties "who are not obligated to render services as officers of the court."

The opinion of January 19, 1933, which appears in the Opinions of the Attorney General of 1933, page 34, quotes and follows the opinion of July 2, 1925. These opinions are based on the holding of the Supreme Court in *Ex Parte* Fitzpatrick (1908), 171 Ind. 557, in which this language appears:

> "The policy of the law and the express provision of the statute are against the taxation of costs to the State."

The statute referred to is Section 1, Acts 1885, page 239 (Sec. 2-3005 Burns' R. S. 1933), which reads as follows:

> "Relators and persons and corporations for whose use an action is brought, whether such use is shown by the pleadings of the plaintiff or defendant shall be liable for costs jointly with the actual parties to the action, but when the State is plaintiff, the relator only shall be liable, and judgment for costs shall be rendered accordingly, except when a State officer or prosecuting attorney, by virtue of his office, may be a relator for the State of Indiana, such relator shall not be liable for costs."

It should be noted that this statute in effect excludes the State itself and also State officials acting as relators in their official capacities from the operation of the provision relative to the payment of costs.

The State Highway Commission is not an entity separate from the State government; and the express provisions of the statutes governing the Commission require proceedings in eminent domain to be brought by the Attorney General in the name of the State. Sec. 18, Acts 1933, p. 67; Sec. 36-118 Burns' R. S. 1933.

It is my opinion that the previous opinions of the Attorneys General hereinbefore cited state the law correctly; and your first question is answered in the negative.

In your second question you ask, in substance, whether the services of the clerk of the court in venued cases and

the services of appraisers and witnesses are considered taxable and payable as personal fees for services rendered.

The opinions of the Attorneys General hereinbefore cited hold in effect that the allowances for the services of appraisers in condemnation proceedings and also the services of publishers in the publication of notices to non-resident defendants do not fall in the category of ordinary court costs, since such services are rendered by parties "not obligated to render services as officers of the court." Section 9 of the Eminent Domain Act (Acts 1905, p. 59; Sec. 3-1709 Burns' R. S. 1933) requires the plaintiff to pay the costs of the preliminary proceedings. Witness fees and costs would not be a part of the preliminary costs. The act, however, is general in the sense that it governs the procedure in all cases for the appropriation of property.

Alberson Cemetery Association v. Fuhrer (1922), 192 Ind. 606.

The act, therefore, applies to the proceedings brought by quasi-public corporations for the acquirement of property; and the provision relative to the payment of costs applies to such corporations; but, for reasons hereinafter stated, I think the provision is limited in its application to the State.

The services of publishers and appraisers are not of the same nature as the services of the clerk of the court or of witnesses. I think the services of appraisers or publishers in such cases are in the nature of particular services within the meaning of the "just compensation" clause of the Constitution (Sec. 21, Art. I) and, since the plaintiff is chargeable with costs of the preliminary proceedings, I think such charges are within the intent of Section 9, *supra,* and the State is therefore liable for such charges. But the opinion in *Ex Parte* Fitzpatrick, *supra,* was rendered after the enactment of the Eminent Domain Act of 1905, and I think the reasoning in that opinion applies to ordinary court costs taxable for services of officers of the court in condemnation proceedings brought directly by the State; and, hence, the State is not liable for such ordinary court costs.

With reference to the services of the clerk in the preparation of transcripts in venued cases, the Legislature enacted

a general statute in 1933 (Acts 1933, ch. 21, p. 88; Sec. 4-1007 Burns' 1933), which contains this provision:

> "All fees for preparing the transcript upon change of venue from the county shall accrue to and be retained by the clerk of the circuit court of the county from which the change of venue is taken, and all other clerk's fees taxed on such change of venue shall accrue to the clerk of the circuit court of the county to which such change of venue is taken and shall there be taxed and retained by the clerk of such circuit court."

Previously to the enactment of this provision this service in all cases was considered official in character and the costs were charged and taxed as the property of the county.

Acts 1881, sec. 256, p. 240; Sec. 2-1406 Burns' 1933;
Acts 1927, secs. 1, 2, 3, p. 140; Secs. 2-1421, 2-1422 Burns' (Repl.) 1946;
State, *ex rel.* v. Carey (1909), 44 Ind. App. 659, 661, 662.

It is settled that the transcript fees on change of venue are "costs". The provision in the Act of 1933, *supra,* and also Sections 2-1406, 2-1421, 2-1422, 2-1423, *supra,* designate the service charge of the clerk as "costs". Furthermore, in State *ex rel.* v. Pyle (1932), 204 Ind. 509, it was said:

> "The 'costs of the change' has always been interpreted to mean the clerk's costs in preparing the transcript and certifying the same, and has not been interpreted as including any other costs."

By the enactment of the general act of 1933, *supra,* the Legislature has modified the rule that previously existed. Under that act such fees as to parties generally become the property of the clerks, but, in my opinion, the act did not change the law with reference to the State or officials acting as relators in their official capacities. My reason for excepting the State and such relators acting in their official capacities is that the Act of 1885, *supra,* (Sec. 2-3005 Burns'

R. S. 1933) expressly applies to the State and such relators and, in my opinion, the Act of 1933, *supra,* does not have the effect of modifying the Act of 1885, *supra,* nor the effect of the opinion in *Ex Parte* Fitzpatrick, *supra.*

Since the express provision of the Act of 1885 and the opinion of the Supreme Court thereon were in existence, I think the Legislature is presumed to have known the law on the subject as thus expressed; and, had the Legislature intended to make the Act of 1933 apply to costs occasioned by the State or by such officials acting as relators it would have so provided. This conclusion finds support in the case of Carr, Aud. v. State, *ex rel.* (1890), 127 Ind. 204. Furthermore, it is a rule of statutory construction that, in the event a particular intention expressed in an act conflicts with a general intention expressed in a later act, the particular intention shall be given effect, leaving the later act to operate only outside the scope of the former.

Cleveland, etc., R. Co. v. Blind (1914), 182 Ind. 398, 424, and cases cited;
Straus Bros. v. Fisher (1928), 200 Ind. 307, 316;
Monical v. Heise (1911), 49 Ind. App. 302, 305.

The Legislature had the power to modify the law by granting to the clerks all or part of the costs occasioned by applications for changes of venue as compensation; and, by the enactment of the provision of the Act of 1933, *supra,* the Legislature did make such change and thereby authorized the clerks to retain as compensation such costs as are occasioned by parties not within the Act of 1885, *supra.* The Legislature had the same power to retain this right in favor of the State as it did to grant it in the first place; and I think an intention to relinquish on the part of the State in such instances may not be inferred from a provision in a general act in the absence of language bringing the State within its terms. The Act of 1933, *supra,* is silent as to the State.

In an opinion of the Attorney General of January 27, 1934 (Ind. OAG 1934, p. 128), involving the taxing and apportionment of fees occasioned by changes of venue, it was held that such fees were retainable by the clerks and the opinion

sets forth the method of apportionment as to the clerks involved; but in that instance the Act of 1885, relative to the taxation of costs as against the State, was not involved; and, hence, the opinion is limited to the questions therein presented.

With reference to the fees of witnesses, I think fees properly taxable as such fall in the category of court costs. The statutes of the State and the opinions of the Supreme Court so treat them. For example, Section 2-1705 Burns' (Repl.) 1946, reads as follows:

> "If any party summon (subpoena) more than three (3) witnesses to prove the same fact, he shall pay the costs occasioned by the additional number of witnesses, unless the court shall otherwise order."

In Wilson v. Jenkins (1896), 147 Ind. 533, 535, the Supreme Court uses this language:

> "While it is true, in general, that one who recovers judgment for costs is entitled to collect on execution from the other party all costs and charges laid out by him, or for which he is liable, (Keifer v. Summers, 137 Ind. 106; Mott v. State, 145 Ind. 353), yet the statute may modify such rule, and in the case at bar has modified it. Section 496, Burns' R. S. 1894 (488, R. S. 1881), provides that 'if any party summon more than three witnesses to prove the same fact, he shall pay the costs occasioned by the additional number of witnesses, unless the court shall otherwise order.' * * *"

It is generally true that witness fees are primarily payable by the party who incurs the fees. That such fees may later be taxable as costs, however, does not relieve that primary liability to the witness on the part of the person securing his services, but creates a new indebtedness from one party in a law suit to the other party. The party against whom costs are taxed has no direct responsibility to the witness entitled to fees. As stated in Keifer v. Summers (1893), 137 Ind. 106 at 108:

> "Fees are moneys due to witnesses and officers for services rendered in court. They are a part of the

costs of the action, and are due from the party who procured the services. If the party who has made such costs, and who owes such fees, is successful in the litigation, the court will award him a judgment against the defeated party, and this judgment will include whatever costs the successful party has been compelled to make. This judgment for costs is the sole property of the person in whose favor it is rendered, as much so as any other judgment. * * *.

"* * * appellants owed certain fees referred to in the complaint. These fees could be collected by fee bill from appellants, who had procured the services for which the fees were due; they could be collected from no one else. Appellees did not owe the fees; they did, however, owe a judgment for the costs."

See also:

Mott v. State *ex rel.* (1896), 145 Ind. 353;
Alexander v. Harrison (1891), 2 Ind. App. 47, 48;
Kepler v. Jessup (1894), 11 Ind. App. 241 at 256.

It is, therefore, my opinion that fees of witnesses so far as the liability of the State is concerned are court costs and that whatever the position of the State may be as to the fees of witnesses procured by the State, it is not liable for witness fees taxed as costs against it in the absence of express statutory authority.

In your fourth and fifth questions you ask whether the State is liable for interest on the full amount of the judgment from date to the date of payment or for interest on only the difference between the amount of the tender and the total judgment, and specific reference is made to the case of State v. Pickering, No. 33,462, in the Wayne Circuit Court, which was a condemnation proceeding instituted to procure right of way for a state highway improvement.

In the case of State v. Pickering, the State was represented by a Deputy of the Attorney General, and this office is informed as to the action of the court with reference to interest.

The allowance of interest, under instructions of the trial court, was included *in* the verdict, the jury having been instructed to allow interest from the date of the taking of possession of the property appropriated to the date of the verdict. Neither the opinion of the Attorney General nor any action of the State Examiner or of the clerk of the court could change that result, since the only recourse of the State or of the defendants, in the event of disagreement as to the court's action, would have been by appeal from the judgment. The trial court's reasoning, however, on the subject of interest followed the holding of the Supreme Court in the case of State v. Orcutt (1937), 211 Ind. 523. In that case the Supreme Court held that the question of interest is not only one of fact but that interest should be included in the verdict in the same manner as any other element of damage.

Since it was the attitude of the court, consistently with the decisions of the State Supreme Court that interest should be allowed upon the full amount from the time of taking possession to the time of judgment, it would seem that the question of the amount of tender is immaterial and that what, if any, interest is allowed after judgment would be upon the full amount.

The question then remains as to interest which the State must pay upon the judgment itself. The right to collect interest in any case is purely a statutory, and not a constitutional, right. In the early case of Frazer v. Boss (1879), 66 Ind. 1, 17, the opinion goes into the history of interest and shows that at common law the right to collect interest did not exist. The opinion quotes with approval from Ord on Usury as follows:

> "* * * Among us, the statute of Henry VIII was the first that gave any connivance to the practice of lending at interest. Till that time, all degrees of it were looked upon as equally illegal; and all persons, who took it, were indiscriminately subjected to the same punishment!"

Since this was the rule at common law even as between individuals in matters of contract, it follows that the recovery of interest is not a constitutional right under the

"just compensation" clause of the Constitution (Art. I, Sec. 21), which clause recognizes the inherent right of government to acquire private property for a public use but places a restriction to the effect that just compensation be paid. Constitutional principles are to be construed in the light of common law rules.

State, *ex rel.* v. Ellis (1916), 184 Ind. 307, 313, and authorities cited.

If the right to recover interest were a constitutional rather than a purely statutory right, there would have been no occasion for the enactment of the general interest statute and the numerous other statutes governing and regulating the collection of interest. The opinions of the courts of this jurisdiction and of other jurisdictions hold that the right to collect interest is purely statutory.

33 C. J. 182, 183, 187 and authorities cited;
Smith v. Thomas (1869), 31 Ind. 280;
Johnson v. Jones (1916), 62 Ind. App. 4, 8;
U. S., etc. Co. v. Sperry (1890), 138 U. S. 313;
Morley v. Lake Shore, etc. R. Co. (1892), 146 U. S. 162;
Norcross v. Cambridge, 166 Mass. 508, 511;
Blakeslee's Warehouses v. Chicago (1938), 369 Ill. 480, 483, 484.

Since the date of the rendition of the judgment in the case of State v. Pickering, *supra,* the General Assembly of Indiana has enacted a statute relative to the liability of the State for interest in actions or proceedings in which judgments may be rendered against it. This act, by virtue of an emergency clause, became effective upon its approval by the Governor on March 8, 1947. The title and Section 1 of this act read as follows:

"An Act concerning the allowance of interest on claims or judgments against the State or payable out of funds of the State.

"That in actions or proceedings in which the State or any board, commission, agency or official is authorized by law to sue or be sued and in which a money

judgment is authorized by law to be entered and to be paid out of state funds in the custody of the State or in the custody of any such board, commission, agency or official, interest shall attach to any such final judgment so entered at the rate of six (6) per centum per annum beginning with the forty-fifth (45th) day after the rendition thereof and not otherwise: Provided, That this act shall not be construed to apply to judgments rendered against the State in actions or proceedings duly authorized to be brought against the State of Indiana in the Court of Claims for the payment of which no appropriation has been previously made; nor shall this act be construed as authorizing actions or proceedings against the State or any agency of the State."

This statute, I think, governs the recovery of interest against the State in all proceedings by or against the State in which money judgments may be entered against the State, excepting cases in which the statutes provide otherwise; and, since neither the statute governing proceedings in Eminent Domain (Sec. 3-1701 *et seq.* Burns' 1933) nor the provision of the State Highway Act (Sec. 36-118 Burns' R. S. 1933) granting the power of Eminent Domain to the Highway Commission authorizes the recovery of interest, I think this statute applies to condemnation proceedings and therefore precludes the allowance of interest until forty-five (45) days after the rendition of final judgment.

Although the Legislature has the right to regulate the collection of interest on existing judgments, Morley v. Lake Shore, etc. R. Co. (1892), 146 U. S. 162, more than forty-five days had elapsed since the rendition of judgment in State v. Pickering at the time the new statute became effective and, therefore, interest would accrue upon the full amount of the judgment unless previous payment had been made. So far as the State is concerned, I am of the opinion that payment in the case of State v. Pickering had been made.

There is only one method by which the State may make payment of such a judgment and that is upon voucher which is submitted to the clerk of the court. Section 9, Acts 1933,

page 67; 36-109 Burns' 1933 R. S. It necessarily requires time for the voucher to then go through the routine of approval and payment. If the date of receipt of the voucher could not be said to fix the time of payment, the computation of interest would present exceedingly difficult practical problems because there would always be an interim between submission of the voucher to the clerk and its payment and the issuance of a warrant. In my opinion the law contemplates no such result.

Specifically then, my answer to your fourth and fifth questions is that the State is liable for interest upon a judgment in condemnation if the voucher for payment thereof has not been submitted to the clerk within forty-five days after the rendition of the judgment.

OFFICIAL OPINION NO. 11

March 31, 1947.

Hon. Edwin Steers, Sr.,
Member, State Election Board,
108 East Washington Building,
Indianapolis, Indiana.

Dear Mr. Steers:

I have your letter of recent date in which you ask an official opinion on the following questions:

> "1. The city of Whiting is a 4th class city, having five councilmanic districts and seven councilmen. A candidate filing for the office of councilman in the primary for a certain councilmanic district must be a resident of that district. In the election, all of the voters of this city are entitled to vote for councilmen other than the one from the voter's councilmanic district. Is it, therefore, possible that of the seven councilmen to be elected that six councilmen could be elected from two councilmanic districts (the district councilmen and aldermen at large both on the Republican and Democratic tickets)?