

In at least two cases the Indiana Supreme Court has held that a person entitled to a per diem by law is not entitled to additional compensation for night work, since a per diem has reference to a day of twenty-four hours or a portion thereof.

Monroe, Auditor v. State ex rel. Willard (1901),
157 Ind. 45, 48;

Board of Commissioners of Randolph County v.
Board of Commissioners of Henry County
(1901), 27 Ind. App. 378, 406.

Likewise, the Legislature has stated that in construing a statute the term "month" is to be construed as a calendar month unless otherwise expressed. (Burns' 1933, Sec. 1-201.) Under this statute the term "month" as used in Section 50 of the Indiana Election Code, above set forth, is to be construed as a calendar month, and the obvious intention of the Legislature was that no employee of a county registration board in the counties mentioned in said Section 50 was to be paid more than \$150.00 for a calendar month.

Based upon the foregoing reasons and authorities it is my opinion that the clerical help of the Board of Registration of Marion County who have worked overtime are not entitled to any extra compensation over and above their salary of \$150.00 per month.

OFFICIAL OPINION NO. 39

April 12, 1946.

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

Dear Sir:

I am in receipt of your letter of April 2nd, 1946, asking my official opinion in regard to the following questions:

"1. Where a judge of the circuit court is eligible to and receives the salary of \$4,800.00 per year, estab-

lished by Chapter 242 of the Acts of 1945, is he entitled to also receive the per diem provided by Chapter 295 of the Acts of 1945?

"2. Is a judge receiving such salary of \$4,800.00 entitled to receive a per diem of \$5.00 per day for the time he actually serves in trying causes on change of venue?

"3. Is a judge who receives the statutory salary of \$4,800.00 entitled to receive a per diem for the day in which he tries cases as special judge in another circuit?"

Section 1 of Chapter 242 of the Acts of 1945 (Sec. 2-1417, Burns' 1945 Supp.) establishes an annual salary of \$4,800.00 per year to be paid by the state to each circuit judge.

In Official Opinion No. 6 of this office, dated January 24, 1946, and addressed to the Hon. A. V. Burch, State Auditor, the conclusion is reached:

"* * * a judge appointed to fill out an unexpired term whose appointment was made after December 12, 1945, would be entitled to a salary of forty eight hundred dollars (\$4800.00) per year to be paid from state funds."

Section 2 of Chapter 242 of the Acts of 1945 is as follows:

"Sec. 2. The salary herein provided for shall be paid and received in lieu of any and all other salary or compensation now or heretofore paid such judges by the State of Indiana for any and all judicial services including any compensation paid to such judges for services as judge of any juvenile court in all counties having less than 250,000 population according to the last preceding U. S. census."

Since each question which you have submitted involves a different statute in relation to Chapter 242, above quoted, I will discuss these different acts in relation to the above statute separately.

I.

Chapter 295 of the Acts of 1945 insofar as it is pertinent is as follows:

“Whereas, the 1933 fee and salary bill fixed fees and salaries at a time of world-wide depression; and

“Whereas, since that time the United States Supreme Court has decided that salaries of officers and employees of political subdivisions of the state are subject to Federal income taxes which have progressively increased; and

“Whereas, since 1933 the legislature has created the Indiana Welfare Department which today spends thirty millions of tax dollars and a great share of the work of collecting this money and administering its expenditure falls upon the county officials and for this additional burden no extra compensation has been granted; and

“Whereas, in numerous counties over the State of Indiana there are located defense plants, army camps, proving grounds, air bases or shipyards and these war projects employ thousands of workers; and

“Whereas, these workers to a large extent were not residents of the counties that are near these plants until they gained such employment; and

“Whereas, this great influx of population has created a great and ever increasing problem for every governmental unit in these counties; and

“Whereas, the county officials in each of these counties have had their work and responsibility greatly increased and often doubled by this tremendous rise in population; and

“Whereas, the 1933 salary act and all acts amendatory and supplementary thereto did not and could not take this increase in population into consideration when the salaries of these officials were fixed in direct ratio to the population of the various counties in 1933; and

“Whereas, every session of the legislature since 1933 has imposed additional duties upon such county officials without an increase of compensation; Now, therefore

“Section 1. The auditor, assessor, clerk of the circuit court, sheriff, recorder, judges of the circuit or superior courts and treasurer of each county in this state having a population of less than seventy-five thousand according to the last preceding United States census, and in which is located a defense plant, or an army camp, or a naval air base or station or a proving ground, or a shipyard, and in each county contiguous or near to such a county shall each be paid a per diem of one dollar and seventy-five cents for each day such official shall be engaged in the official duties of his office, said per diem to be in addition to all others (other) provisions of law for his compensation.

“* * *

“Sec. 9. This act shall expire by limitation at midnight of March 31, 1947.”

Since this act provides that the per diem is to be in addition to all other provisions of law for the officers' compensation there is no limitation in the text of the act which would prevent its application to a certain judge receiving the increased salary provided by Chapter 242.

Likewise the per diem provided in Chapter 295, being payable by the county, is not prohibited by Section 2 of Chapter 242, which prohibits payment of additional compensation *by the state*.

However, the preamble of Chapter 295 recites the inadequacy of the fees and salaries fixed in the 1933 fee and salary bill by reason of the fact that such salaries have since become subject to federal income taxes and by reason of additional duties caused by the creation of the welfare department, the influx of defense workers and additional duties imposed by the General Assembly. In other words, the Legislature clearly indicates in the preamble an intention to correct the inadequacy of salaries which were set some years ago.

It is a primary rule of statutory construction that the sole purpose of all rules of construction is to ascertain the intent of the Legislature and to apply the law according to the intent expressed by the Legislature. In determining the legislative intent the preamble of the Act, if any, should be considered.

Huff v. Fetch, *et al* (1924), 194 Ind. 570, 576.

In that case the body of the Act, strictly construed, apparently prohibited any cutting into, through or upon the line of any fresh water lake, but the preamble to that act and its title indicated a legislative purpose of preserving the established water level of these lakes and the court held that the body of the Act was thus limited to the construction of those ditches which would injuriously affect the water level of the lakes.

Therefore, I am of the opinion that Chapter 295 is only applicable in those cases where the salary of the official has become inadequate through passage of time and would not be applicable to a circuit judge receiving an increased salary established by the 1945 General Assembly.

II.

Section 1 of Chapter 51 of the Acts of 1943 (Sec. 2-1417, Burns' 1945 Supp.) contains the following provisions:

“* * * The regular judge of the court trying any cause on a change of venue shall be allowed the sum of five dollars per day or any part of a day for the time actually served in trying such cause, which shall be paid by the county from which such change of venue was originally taken the same as the other expenses of such trial are paid; such per diem shall be paid to the judge of the court so trying said cause and shall be in addition to the regular salary paid to said judge, provided, however, that the provisions of this act shall not apply to any regular Judge, receiving a salary greater than the statutory salary of Forty (Forty) Two Hundred Dollars (\$4,200.00), paid by the State. * * *”

If the proviso, above quoted, is given a full, literal effect as a limitation it will eventually be impliedly repealed by Chapter 242 of the Acts of 1945, because by that Act every circuit judge will receive more than \$4,200.00 per year. Such an implied repeal is not to be favored. The court announced the rule in *Medias v. Indianapolis* (1939), 216 Ind. 155, 162, as follows:

“While the repeal of statutes by implication is recognized, this is not favored and that conclusion will not be indulged unless the later act is so repugnant to the earlier as to render the repugnancy or conflict between them irreconcilable. A court will always, if possible, adopt that conclusion which, under the particular circumstances in a given case, will permit both laws to stand and be operative. * * *”

Therefore, this proviso must be examined to see if there is any possible construction which would avoid its repeal by implication. I believe that such a construction is not only possible but also expresses the real intent of the General Assembly.

I am of the opinion that in mentioning the amount of the state's salary the Legislature was merely identifying the then existing particular statutory salary it had in mind to distinguish it from the additional salary paid by the counties under statutory authority. The designation of the amount would, therefore, be analogous to the title given to a person in a statute or pleading and which is not given an independent effect under the rule of *descriptio persona*. It is descriptive and not a limitation.

I am, therefore, of the opinion that such judges are entitled to receive a statutory salary from the state of \$4,800.00 per year and also a per diem of \$5.00 per day for each day they are engaged in trial of cases on change of venue.

III.

Section 1 of Chapter 200 of the Acts of 1941 (Sec. 2-1416, Burns' 1945 Supp.) provides as follows:

“When a judge or any practicing attorney is called upon to preside in the place of the regular judge, either

at a regular or an adjourned term, whether selected from the bench or bar, he shall be allowed the sum of ten dollars (\$10.00) per day, for each day or part thereof actually served, and five cents (5c) for each mile necessarily traveled each day in going to and returning from the place where the court is being held, to be paid as follows: On the presentation of an order made by the court for the allowance, specifying the days of service and the number of miles necessarily traveled each day of service, supported by the affidavit of the special judge that he actually served such days and necessarily traveled such number of miles each day; and an affidavit of the regular judge stating the reason for the services of such special judge, the same shall be paid out of the county treasury for the time being, for which the county shall have credit on settlement with the treasurer of state: Provided, That such special judge is called to preside in cases of change of venue, or when such regular judge shall have a pecuniary interest in, be a party to, or be related to any party to said suit by blood or marriage, or may have been of counsel in such cause pending, or may be absent on account of serious illness of himself, or death or serious illness in his family."

It will be noted that in sitting as special judge under this statute the regular judge does not sit in his own court nor does he sit by virtue of his office as judge. His services as special judge in another circuit are rendered wholly independently of his office as judge of the circuit court. They are rendered under a separate and distinct appointment in each case in the making of which appointment he stood upon an equal footing with other members of the bar.

The provisions of Section 2 of Chapter 242 of the Acts of 1945 are that the \$4,800.00 salary is paid and received "in lieu of any and all other salary or compensation now or heretofore paid *such judges* by the State of Indiana for any and all judicial services * * *." The per diem paid to a circuit judge sitting as special judge is not paid to him as "such judge" but is paid to him entirely apart and distinct from his office for independent services independently performed

and I do not believe that such per diem as special judge falls within the provisions of Section 2 of Chapter 242.

Conclusion

I am, therefore, of the opinion that your questions should be answered as follows:

1. Where a judge of the circuit court is eligible to and receives the salary of \$4,800.00 per year, established by Chapter 242 of the Acts of 1945, he is not entitled to receive in addition thereto the per diem provided by Chapter 295 of the Acts of 1945.

2. A judge receiving such salary of \$4,800.00 is entitled to receive the per diem of \$5.00 per day for the time he actually serves in trying causes on change of venue.

3. A judge receiving the statutory salary of \$4,800.00 per year is entitled to receive the per diem provided by law for the days during which he tries cases as special judge in another court.

OFFICIAL OPINION NO. 40

April 15, 1946.

Hon. Roy J. Jorg, Member,
State Board of Tax Commissioners,
State House,
Indianapolis 4, Indiana.

Dear Sir:

Your letter of April 5, 1946, has been received in which you request an official opinion on the following questions:

“1. Is the classification of townships set forth in Section 1 of Chapter 242 of the Acts of 1943 a valid classification under the constitution of Indiana?”

“2. If not, to what townships do the provisions of this Act apply, if any?”