officer is removable at pleasure, or such an intention cannot be inferred from language used, then such officer cannot be removed except for cause.

(4) Your opinion request apparently does not involve cases where the statute expressly provides that the officer can only be removed for cause. An example of such an Act is House Enrolled Act No. 361, the State Police Code, passed by the last session of the General Assembly, which expressly provides that members of the Board can only be removed for cause. I, therefore, do not cover statutes of this type in this opinion. However, in this connection see:

Shira v. State, *ex rel.*, 187 Ind. 441, 444;
Bannerman v. Boyle, 160 Cal. 197, 205;
Lucas v. Futrall, 84 Ark. 540, 551;
Jacques v. Little, 51 Kans. 262;
Harrington v. Smith, 114 Kans. 262;
Howard v. Bell Co. Board of Education, 247 Ky. 586;
Hagerty v. Shewd, 75 N. H. 393.

I trust this will give you the information desired by you to enable you to apply the same to any specific commission which you may have in mind.

OFFICIAL OPINION NO. 27

April 7, 1945.

Hon. Joseph McCord, Director
Department of Financial Institutions,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of March 9th in which you make the following inquiry:

> "The question has arisen, in this department, as to whether we have the right under the provisions of Section 63 of the Indiana Financial Institutions Act, to approve claims by attorneys for fees on account of serv-

ices rendered in connection with the enforcement of shareholders' liabilities in closed banks.

"Since a number of such claims will be presented to the department in the very near future we would appreciate your opinion in the matter."

Section 63, p. 176, Chapter 40 of the Acts of 1933, as amended in 1935 (18-323 Burns' 1933 R. S., Supplement), provides for the enforcement of shareholders' liability in insolvent financial institutions upon suit by the Department of Financial Institutions in the name of the state. The latter portion of that section reads as follows:

> "* * * Any amount collected by the department from the shareholders, as provided in this section, and remaining *after the payment of the costs and expenses of making such collection,* the payment in full of the debts and liabilities of such financial institution, and the costs and expenses of liquidating such financial institution, including attorneys' fees, shall be returned pro rata to the shareholders from whom such collection was made, but the costs and expenses of liquidating such financial institution and/or its assets shall not be paid out of such amount unless and until all creditors have been paid in full. * * *" (Emphasis ours.)

It is clear upon reading the quoted portion of the section, that the department is authorized to pay the costs and expenses of making collection from stockholders from sums so collected. The sole question is, what items are to be included within the term "costs and expenses of making such collections." A construction of that provision is somewhat complicated by the fact that in a later clause the term "costs and expenses" is used in speaking of "cost and expenses of liquidating such financial institution," and in the latter case attorneys' fees are specifically enumerated. However, in any determination of the scope of the phrase "costs and expenses of making such collection," it is necessary to bear in mind that in order to make collection in cases where the shareholders shall "fail, neglect or refuse to pay the amount so demanded," it may be necessary for the department to employ counsel to enforce collection. With that in mind it does not

appear that "costs and expenses" is used in the narrow sense of costs of litigation between party and party wherein the costs are provided by statute. In a suit to enforce stockholders' liability court costs would be awarded the prevailing litigant as a matter of law and it would be unnecessary to provide by statute for their payment out of the funds collected from shareholders. The more reasonable interpretation is that "costs and expenses of making such collection" is used in a broad sense to include the expenses incurred by the department in the employment of counsel and other incidental expenses necessary to effect a recovery of the stockholders' liability.

In Section 65, p. 176, Chapter 40 of the Acts of 1933, as amended (18-325 Burns' 1933 R. S., Supplement), the term "costs and expenses" is again used in connection with liquidation in the same Act in the phrase "costs and expenses incurred by the department in liquidating the affairs of any financial institution." In that section the term is elaborated as follows:

> "* * * The cost and expenses so paid shall include the court costs; the compensation of each regular officer or employee of the department, for the time actually devoted by such officer or employee to the liquidation of such financial institution, at not to exceed the compensation paid to such officer or employee for the performance of his regular duties; the actual expenses of each such regular officer and employee, necessarily incurred in the performance of his duties; the compensation and necessary expenses of any special representative, assistant, accountant, agent or attorney employed by the department; and, in addition thereto, such reasonable general overhead expenses as may be incurred by the department in the liquidation of the affairs of such financial institution, which shall be ascertained, determined and fixed by the department."

The inclusion of the items to be included in costs and expenses in this section provides a persuasive argument that costs and expenses as used in connection with making collection of

shareholders' liability should not be given a narrow construction.

Although the case on its facts is not in point, the reasoning employed in Davidson v. Munsey, 80 Pac. 743 (1905) Utah, might well be applied to this situation. At page 744 the court said:

> "* * * It would seem that the Legislature, by making use of the word 'expenses,' and associating it with that of 'costs,' intended that something more than the usual or ordinary costs that are allowed to the prevailing party in civil actions generally might be allowed * * *. The word 'expenses' is not so restricted, and may include items of expenditure in the prosecution of an action or proceeding which are not governed and regulated by statute, and which are not allowed as a matter of course to the prevailing party. * * * Therefore we are of the opinion, and so hold, that the court proceeded entirely within the statute in allowing plaintiff a reasonable attorney's fee. * * *"

See also: *In re* Loudenslager's Estate, 167 Atl. 194 (1933) N. J., and *In re* Keystone Realty Holding Co., 117 Fed. (2d) 1003 (1941). At page 1006 in the latter case, in speaking of the Chandler Act and the equitable nature of bankruptcy, the court discusses the meaning of the term "reasonable costs and expenses" as follows:

> "* * * The equitable doctrine upon which the act proceeds is that the reasonable costs and expenses of recovering or preserving a fund are chargeable upon the fund. * * * Under such circumstances a court of equity may award 'costs as between solicitor and client,' which include counsel fees and such expenses of the litigation as are not ordinarily taxable as costs between party and party. * * *"

In the light of the above considerations, I am of the opinion that the claims for attorneys' fees, in so far as those fees are incurred for the enforcement of shareholders' liabilities, may be paid from the sums realized from shareholders.