OFFICIAL OPINION NO. 29

April 11, 1945.

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and Supervision
of Public Offices,
State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

Your letter of March 28, 1945, received requesting an opinion on the following questions:

> "(1) Are Chapter 92, Acts of 1945, and Chapter 172, Acts of 1945, both valid acts?
>
> "(2) If your answer to question No. 1 is in the affirmative, which act controls in case of a conflict in their provisions?
>
> "(3) Are the provisions regarding the minimum compensation, contained in either act, mandatory?
>
> "(4) Are the deputies and other assistants entitled to receive any additional compensation provided by either act during the current budget year?"

(1) In answer to your first question I wish to advise an examination of these two Acts reveals the following:

The title to both Chapter 92, Acts of 1945 and Chapter 172, Acts of 1945, is:

> "An Act to amend section 1 of an act entitled 'An Act to amend section 1 of an act entitled 'An Act to amend section 1 of an act entitled 'An Act to amend section 2 of an act entitled 'An act fixing the compensation of certain public officials, their deputies and assistants and fixing manner of payment thereof; authorizing the appointment of deputies and assistants; prescribing certain duties; making a division of deputy's and assistant's compensation unlawful and providing a penalty therefor; providing for the collection of fees and mileage and the disposition of same; repealing all laws in conflict therewith and fixing the time of taking effect,' approved February 16, 1933,' approved Febru-

> ary 26, 1935,' law without the approval of the governor (1937),' law without the approval of the governor (1943)."

Chapter 92 was approved by the Governor on February 28, 1945, and did not declare an emergency for the immediate taking effect of the Act. Chapter 172 was approved by the Governor on March 6, 1945, and by Section 2 declared an emergency for the immediate taking effect of the Act and provides the same shall be in full force and effect from and after its passage. Chapter 172 at the end of Section 1 also contains the provision: "No other act passed by the 84th session of the General Assembly shall be construed as repealing any of the provisions of this act."

In the case of Metsker v. Whitesell (1914), 181 Ind. 126, which was an action on a petition for the improvement of a county highway, the Court was called upon to construe and determine the validity of two Acts of the General Assembly of 1913, each of which Acts purported to amend Section 2 of the Highway Act of 1905, as to what materials should be used on highway construction. In reversing the case, and in holding the later Act declaring an emergency prevailed over the earlier Act which contained no emergency clause, the Court on pages 140 and 141 of the opinion says:

> "The above act of March 14, 1913, *supra,* purports to amend Section 62 of the highway act of 1905, so as 'to read as follows.' It grants authority to lay out or rebuild highways, and pave them with 'stone, gravel, brick, bituminous macadam, or other road material.' If a law, this act removes all limitations on the character of paving materials. The above act of March 15, 1913, purports to amend Section 62 of the highway act, so as 'to read as follows.' The provisions relating to materials to be used are the same as in the original act. Section 7711 Burns' 1908, Acts 1905, p. 521. The act contains an emergency clause. Is the act of March 14, 1913, in effect? We have here not simply the question of an implied repeal by repugnant provisions. Each of the acts of March 14 and 15, 1913, respectively, purport to amend the same section of the highway law so as 'to read as follows,' and the reading of the two

acts is radically different. Both acts cannot be in effect, for there is but one section numbered 62, and it can read only one way. Draper v. Falley (1870), 33 Ind. 465; Detroit, etc., R. Co. v. Barnes Paper Co. (1912), 172 Mich. 586, 138 N. W. 211. Section 21, Art. 4, of our Constitution provides that in amending, or revising, an act, the act, as revised or amended, shall be set forth at full length. It has been held, often and consistently, by this court, that an amendatory act which purports to amend an act or section that has already been amended, is void as an amendatory act because the act or section sought to be amended has no existence. Draper v. Falley, *supra;* Blakemore v. Dolan (1875), 50 Ind. 194; Reissner v. Hurle (1875), 50 Ind. 424; Cowley v. Town of Rushville (1878), 60 Ind. 327; Weatherhogg v. Board, etc. (1901), 158 Ind. 14, 62 N. E. 477; Sage v. State (1890), 127 Ind. 15, 26 N. E. 667; State, *ex rel.* v. Wheeler (1909), 172 Ind. 578, 89 N. E. 1, 19 Ann. Cas. 834. By the act of February 1, 1875 (Acts 1875 p. 166), Section 10 of an act of 1859 was amended with an emergency clause. By the subsequent act of February 26, 1875, it was sought to amend the same section of the act of 1859. This act had no emergency clause. In Lawson v. DeBolt (1881), 78 Ind. 563, the latter act was held invalid because Section 10 of the act of 1859 had already been superseded by the amendment of February 1, 1875. In *Ex parte* Sohncke (1906), 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 7 Ann. Cas. 475, 113 Am. St. 236, it was held that an act of a certain day designed to go into effect with the publication of the session acts, was repealed by an inconsistent enactment of the day following, taking immediate effect. In State, *ex rel.* v. Board, etc. (1908), 170 Ind. 595, 621, 85 N. E. 513, it was held that of two irreconcilable acts, passed at the same session, the one approved last, will prevail, even though both were designed to go into effect at the same time. Where an amendment is adopted without an emergency clause, the old act remains in force until the publication of the session acts. Cummins v. Pence (1910),

174 Ind. 115, 91 N. E. 529. When the act of March 14, 1913, was adopted, Section 62 of the original highway act was in existence, and, consequently, when the act of March 15, 1913, *supra,* was passed, Section 62 of the original act of 1905 was constitutionally amended, and thereafter ceased to exist; and when the session laws were subsequently published, there was no Section 62 of the act of 1905 to which the amendatory act of March 14 could apply. Had there been no emergency clause to the act of March 15, nevertheless it would have superseded the act of March 14. State, *ex rel.* v. Board, etc., *supra.* Viewed from either standpoint, the act of March 15 must prevail, and we therefore hold that the act of March 14, *supra,* is void."

Also see: Newbauer v. State (1928), 200 Ind. 118, 122.

An examination of both Chapter 92, Acts of 1945 and Chapter 172, Acts of 1945, reveals they each deal with the appointment, and the minimum and maximum salaries, of deputies of the same county officers.

Applying the law as announced in the foregoing authorities to these two Acts of the 1945 General Assembly, I am of the opinion that Chapter 172 controls and supersedes Chapter 92 of the Acts of 1945. Chapter 172, being the last Act passed by the Legislature, contained an emergency clause, and became effective on March 6, 1945 when approved by the Governor. Therefore, since each of said Acts seeks to amend the same section of a former statute, that section of said former statute is now no longer in existence or subject to amendment by Chapter 92 of the Acts of 1945.

(2) The answer to your question number one obviates the necessity of an answer to your question number two.

(3) In answer to your third question I wish to advise an examination of Chapter 172 of the Acts of 1945 reveals the Legislature has in detail provided for the minimum and maximum compensation to be paid deputies appointed for the various county officers therein specified. The counties are grouped into a number of classes by classification according to population of the counties. The Act further provides in certain instances for a chief deputy whose minimum and

maximum salary is set out in such counties according to classification by population.

From the clear provisions of such statute I am of the opinion the compensation of each of said deputies or such chief deputies, as the case may be, cannot be fixed at less than the minimum compensation therein provided nor at more than the maximum compensation stated. The Act is mandatory to that extent as to the salary of such deputies or chief deputies under the classification of counties set out in such Act.

(4) In answer to your fourth question I desire to point out that Chapter 172 of the Acts of 1945 is subject to the following well established rules of statutory construction:

Statutes must be construed as a whole in order to determine the legislative intent.

> Snider v. State, *ex rel.* Leap (1934), 206 Ind. 474, 478;
> State v. Ritter's Estate (1943), 221 Ind. 456, 48 N. E. (2d) 993, 998.

Courts will look to the general purpose and scope of a statute to determine the legislative intent.

> City of Indianapolis v. Evans (1940), 216 Ind. 555, 567;
> State, *ex rel.* Bailey v. Webb (1939), 215 Ind. 609, 612.

A change of legislative intent will be presumed from a material change in the wording of the statute.

> State, *ex rel.* Neal v. Beal (1916), 185 Ind. 192, 197;
> Chism, *et al.* v. State of Indiana (1932), 203 Ind. 241, 244.

Applying the foregoing rules of statutory construction to Chapter 172 of the Acts of 1945 it is to be noted this section, prior to its amendment, was 49-1002 Burns' 1943 Supplement, same being Acts 1933, Chapter 21, Section 2, as amended by Acts 1935, Chapter 84, as amended by Chapter 45, Acts 1937, and as amended by Chapter 261, Acts 1943.

A comparison of the provisions of Section 49-1002 Burns' 1943 Supplement with the provisions of Chapter 172 of the Acts of 1945 reveals a number of important changes in this law. Under the provisions of Chapter 172 of the Acts of 1945 both the minimum and maximum salaries of deputies of each of the county officers, in each of the classifications as to counties, has been consistently increased. Chapter 172 of the Acts of 1945 further authorized the county auditor, the county treasurer, the clerk of the circuit court, the county sheriff and the county recorder in counties having a population in excess of fifteen thousand (15,000) to each appoint one (1) first or chief deputy with the approval of the board of county commissioners. In the statute prior to the 1945 amendment these officers were only authorized to make such appointments in counties having a population in excess of twenty-five thousand (25,000). By Chapter 172, Acts 1945, certain county officers are entitled to appoint deputies who are not included in the prior statute, to-wit: the county surveyor and the county assessor. Otherwise, such statutes are somewhat similar in that they provide generally for the approval of such appointments by the board of county commissioners, and for the fixing of such salaries by the county council within the limits therein prescribed. The 1945 amendment, however, also provides the board of county commissioners shall recommend to the county council the amount of the salaries of each of such deputies, within the limits therein prescribed.

Further applying the aforesaid rules of statutory construction to Chapter 172 of the Acts of 1945 it is clear the Legislature in increasing the minimum and maximum salaries of each of such deputies was fully cognizant of the increase in the cost of living now prevailing during the war emergency. By declaring an emergency for the taking effect of such statute the Legislature clearly intended the Act to be immediately effective to meet such emergency. From a change in the language used in such statute it is apparent the Legislature desired such change to be made, and by declaring an emergency that such change be immediately effective. By the inclusion of new county officers in the list having the right to make such deputy appointments the Legislature intended such provisions to be effective on the Governor's signature. It cannot be presumed the Legislature intended this Act to be-

come effective as to two new county officials therein named, and their deputies, and to exclude such benefits from deputies whose appointments had previously been authorized by such Act prior to its last amendment.

Under Chapter 172 of the Acts of 1945 such deputies are appointed by the officer with the approval of the board of county commissioners, in all except certain cases, and when the board of county commissioners has recommended to the county council the salary of each of such deputies within the schedule provided in said Act, it then becomes the duty of the county council to fix the salary of such deputies at not less than the minimum salary set forth in said statute, and at not more than the maximum salary contained in such schedule. Except for a discretion vested in the county council for the fixing of such salaries between the minimum and maximum compensation therein specified, the salary of such deputies has to that extent been fixed by statute.

The law is well settled in this State that where the salary of an officer is fixed by statute, the board of county commissioners or the county council may be mandated if they refuse to take the required action necessary to authorize the payment of, or appropriate money for, payment of such salary.

Blue v. State, *ex rel.* Powell (1936), 210 Ind. 486, 489;

Board of Commissioners of Allen County v. State, *ex rel.* Lockhart (1939), 216 Ind. 125.

It is also well settled that any arbitrary refusal by the board of county commissioners or any other governing body, to act in compliance with the requirements of a statute, is subject to review for the benefit of any person affected thereby.

Board of Commissioners of Shelby County v. Hack (1941), 109 Ind. App. 106, 114, 115.

From the foregoing, in answer to your fourth question, I am of the opinion the deputies and other assistants specified in Chapter 172 of the Acts of 1945 are entitled to receive during the current budget year the additional compensation provided for in said Act.

In reaching this conclusion I am aware of the ruling of the Supreme Court in the case of O'Rourke v. Board of Commissioners of Lake County (1939), 215 Ind. 195, 199, wherein the Court held that the amendment of the original statute herein referred to by Chapter 45 of the Acts of 1937, did not become effective during the current budget year. However, this case may be distinguished in that Chapter 45 of the Acts of 1937 did not declare an emergency, and became effective only on the promulgation of the laws by the Governor. The Supreme Court in construing said statute held that any action by the county council must declare an emergency to exist under the Budget Act. However, it is to be noted no authorities are cited in such opinion in support of such construction of said statute except to refer to the provisions of said Act.

I am further of the opinion such increase in salary of a deputy under the provisions of Chapter 172 of the Acts of 1945, *supra,* is not violative of Article 15, Section 2 of the Constitution of Indiana, as amended 1926, which provides as follows:

> "When the duration of any office is not provided for by this Constitution, it may be declared by law; and, if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the general assembly shall not create any office, the tenure of which shall be longer than four (4) years, nor shall the term of office or salary of any officer fixed by this constitution or by law be increased during the term for which such officer was elected or appointed."

for the reason such deputies do not have a "term" within the meaning of such constitutional provision. This was necessarily held by the Supreme Court in the case of O'Rourke v. Board of Commissioners of Lake County (1938), 215 Ind. 195, 199, *supra,* in making such decision. On this question also see the case of Roth v. State, *ex rel.* (1902), 158 Ind. 242, where the Court in holding police officers who hold their appointment "until removed for cause," are not employed contrary to the provisions of Article 15, Section 2 of the Indiana Constitution on the ground that such appointment is for a period of more than four years and were not "officers" within

the meaning of such constitutional provision, said on page 265 of the opinion:

> "* * * It may be questioned as to whether this provision of the Constitution has any reference or application whatever to persons who are merely deputies of an officer, who ordinarily, as a rule, continue in their employment at the will or pleasure of their chief or principal, by whom they are selected or appointed. * * *"

Summarizing the foregoing answers to your questions I am of the opinion Chapter 172 of the Acts of 1945 is controlling and Chapter 92 of the Acts of 1945 is a nullity; that the county council must fix the salaries of the deputies and other assistants referred to therein at not less than the minimum nor more than the maximum salary for each of such deputies or assistants in each of the classifications set out in such statute; and that such deputies and other assistants are entitled to receive the additional compensation provided by Chapter 172 of the Acts of 1945, during the current budget year, to be prorated from the effective date of the Act to the end of this year.