OFFICIAL OPINION NO. 6

January 31, 1945.

Hon. Ralph F. Gates, Governor
State of Indiana,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of January 30, as follows:

> "Due to the death of the City Judge of Michigan City, there is now a vacancy existing, over which I understand there has arisen some controversy concernin the filling of the position. There seems to be some question as to whether the authority for filling this position is vested in the Mayor or the Governor.
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> "In order that I may know how to properly proceed when the question is presented to me, I am herein asking an official opinion from your office as regards the matter."

An examination of the statutes upon the question of appointment to fill vacancies in the office of city judge, discloses some confusion therein. Prior to 1901, vacancies in office of city judge or its equivalent, under the statutes then in force, were filled by the mayor. In the Act of 1901, Chapter XCII., page 137, it was provided:

> "In the case of a vacancy in the office of the municipal judge, the Governor of the State of Indiana shall fill such vacancy by appointment, and the person so appointed shall hold such office until his successor is elected and qualified."

In the case of State *ex rel.* v. Berghoff (1901), 158 Ind. 349, the Supreme Court had before it the question as to who would appoint to fill a vacancy in the office of a city judge under the Act of 1901, and held that the appointment to fill the vacancy would be made by the Governor. The court said, at page 356:

> "* * * The real point of inquiry is, was there a vacancy in the office of municipal judge of the city of Fort Wayne on May 9, 1901? If a vacancy existed at that time, the power of the Governor to fill the vacancy by appointment admits of no dispute. Constitution, Sec. 18, article 5."

In 1905, the laws relating to cities and towns were codified as Chapter 129 of the Acts of 1905, page 219. This Act, by Sec. 45, provided that in the event of a vacancy occurring in an elective office of any city, except mayor or councilman, the mayor should appoint to fill such vacancy for the unexpired term. Under that Act the office of city judge was elective. Said Act, by Section 80, Clause 6, page 266, made it the duty of the mayor to fill, by appointment, vacancies for unexpired terms in the offices of such city, except in the office of mayor or councilman. Section 218, page 378, of said Act provided that in the case of a vacancy in the office of city judge, the mayor shall appoint a successor, who shall hold such office during the unexpired term.

Thus, Acts of 1905 contained three separate sections, each providing that the mayor should fill any vacancy in the office of city judge for the unexpired term. While this law was in effect, the question as to who should appoint to fill a vacancy in the office of city judge was before the Supreme Court in the case of State *ex rel.* Gleason v. Gerdink (1909), 173 Ind. 245. The Court in that case referred to the "Berghoff" case, saying at page 240:

> "In the case of State *ex rel.* v. Berghoff (1902), 158 Ind. 349, the statute creating the office of city judge provided that the vacancy should be filled by the Governor, which made it undoubtedly competent for the Governor to appoint 'in the manner prescribed by law', not in virtue of article 7, Sec. 1, of the Constitution. If there should be doubt as to this question, we may have recourse to the practical construction placed upon these provisions of the Constitution by a long and substantially uniform course of legislation."

In the latter case, the court held that article 7, Section 1, of the Constitution did not apply to the office of city judge,

but that a vacancy in such office should be filled in the manner provided by the Legislature, and that, under the 1905 Act, the vacancy would be filled by the mayor for the unexpired term. The vacancy and the appointment in question in the above case occurred in November, 1908.

In 1909, the General Assembly amended various sections of the Act of 1905, including Section 45. Section 45, as amended, reads, in part, as follows:

> "* * * Section 45. In the event of a vacancy occurring in an elective office of any city except the office of mayor or councilman and city judge, by reason of death, resignation or other causes or in case of disability of any such officer to perform the duties of his office, it shall be the duty of the mayor or acting mayor to fill such vacancy by appointment for the unexpired term subject to the approval of the common council. In case of a vacancy in the office of mayor the city comptroller in all cities having such office shall act as mayor: *Provided,* That such officer while acting as mayor shall not perform any duties as comptroller but shall appoint a suitable person to act as comptroller during such time. *In the event of the death, resignation or removal of any city judge, such appointment shall be made by the Governor of the State.* * * *"

This section now appears as Section 48-1246 Burns' R. S. 1933. Neither Section 80 nor Section 218 above referred to were amended. Thus, the last amendment provides that the vacancy in the office of city judge shall be filled by appointment by the Governor for the unexpired term.

It has been held that when the Legislature enacts an amendment, it indicates thereby that it intends to change the original Act by creating a new right or withdrawing an existing one. In Sutherland on Statutory Construction, 3rd Edition, Section 1930, it is said:

> "Because it is defined as an act that changes an existing statute, the courts have declared that the mere fact that the Legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing

one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights."

The above quotation is supported by a long list of authorities cited thereto. Under said authorities it must be presumed that the General Assembly, in amending the 1905 law in 1909, to provide that a vacancy in the office of city judge be filled by appointment by the Governor, intended thereby to change the law as it then existed by withdrawing the appointive power from the mayor and vesting it in the Governor.

It is, also, a rule of statutory construction that, in case of conflict, the last expression of the Legislature shall control. In the case of Pitzer v. Indiana State Board of Medical Registration and Examination et al. (1932), 94 Ind. App. 631, the court had before it the Medical Act of 1897. Section 5 of that Act had been amended in 1901. This amendment presented the question as to whether Section 5, as amended in 1901, was in conflict with Section 2 of the 1897 Act, which had not been amended, and if so, which prevailed. In view of the fact that this opinion discusses the same kind of a situation presented by your request, I quote rather fully, beginning at page 637:

"It is a well settled rule of statutory construction that repeals by implication are disfavored. Straus Bros Co. v. Fisher (1928), 200 Ind. 307, 163 N. E. 225. Where two acts or sections of different dates are seemingly repugnant to each other, they must, if at all possible, be so construed that the latter will not operate as a repeal of the former. But, if, in any case, it is impossible for both statutes to remain in force, if to continue any portion of the prior statute in force will destroy any portion of the latter statute, it must be held, that to that extent the prior statute is not in force, but that the prior statute has been repealed by implication to the extent that the new law is in irreconcilable conflict with the prior law. See the Jeffersonville, Madison and Indianapolis R. R. Co., *et al.* v. Dunlap (1887), 112 Ind. 93, 13 N. E. 403. If there is a conflict in the provisions of two statutes which cannot be harmonized, the earlier in point of

enactment is repealed by the later. 'The last word stands.' Stiers v. Mundy (1910), 174 Ind. 651, 92 N. E. 374. 'Where there are several statutes co-existing and the last of them is repugnant to the others, it impliedly repeals the others; that is, where they cannot all stand and be enforced.' Carvor, *et al.* v. Smith, *et ux.* (1883), 90 Ind. 222. 'Where an amendment is made that changes the old law in its substantial provisions, it must, by a necessary implication, repeal the old law so far as they are in conflict.' Longlois v. Longlois (1874), 48 Ind. 60.

"We are aware of the rule that there is no irreconcilable conflict between statutes unless substantial harmony is impossible, after application of every recognized rule of statutory construction. But, after applying every recognized rule of statutory construction, we are unable to see upon what hypothesis the two sections in question could be construed to secure substantial harmony for the reason that by Sec. 12235, a graduate of a school not meeting the minimum requirements of the appellee board, is entitled to an examination and if such applicant shall pass such examination satisfactory to said board, he shall be entitled to a license to practice, while Sec. 5, Sec. 12239, which was amended two years after Sec. 2 of the same act was amended, clearly declares that 'No certificate shall be issued to any person whomsoever until he shall have satisfied the said board that he has graduated at a reputable medical college, as in this section set forth, maintaining a standard of medical education as above prescribed. * * *'

"It is impossible to reconcile these two sections so that both can stand. We hold, therefore, that the earlier section 2, being Sec. 12235 Burns' 1926, is repealed by implication by the later section Sec. 5, being Sec. 12239 Burns' 1926, insofar as the former is in conflict with the latter."

A petition to transfer to the Supreme Court in the above case was denied.

Section 45 of the 1905 Act, as amended in 1909, is clearly in irreconcilable conflict with the other sections of said Act

upon the question of the appointing power to fill vacancies in the office of city judge.

An examination of the state records shows that during the last twenty years vacancies in the office of city judge have been filled by appointment by the Governor, in sixteen instances, two of which appointments were made in 1942. While this practical construction is not conclusive, as was stated in the "Berghoff" case, *supra,* this practical construction over a period of twenty years is entitled to weight.

It is my opinion that the vacancy in the office of city judge of Michigan City should be filled by appointment by the Governor.

OFFICIAL OPINION NO. 7

February 14, 1945.

Hon. Ralph F. Gates, Governor
State of Indiana,
State House,
Indianapolis, Indiana.

My Dear Governor:

Your letter of February 8th requests an official opinion as follows:

> "I would like to know whether we have any right to issue travel orders for people who are not employees of the state."

Although a state official is not an employee of the state, you would be authorized to issue an out-of-state travel order for a state official, if the state official be upon business of the state in connection with his official duties or authorities.

It is possible to conceive of a situation where the interests of the state should be represented and best served outside of the State of Indiana by someone who was not a state official or a state employee. For instance, there might be a conference in some other state which concerns matters of great importance to the State of Indiana, and it might be very desirable to have some person attend this conference who would not be an officer or an employee of the state, but who has special