as contained in the resolution and in this action adopting
the recommendations of the committee. It is, therefore, clear,
in my opinion, that your question must be answered in the
negative.

Further, supporting this conclusion, you are referred to
Burns' Indiana Statutes Annotated 1933, Section 49-1809,
which provides among other things that: "The Treasurer of
State is expressly prohibited from paying any money out of,
or transferring any money, from the treasury of state, except
upon the warrant of the Auditor of State"; and Section
49-1810, which provides in part that: "The auditor of state
shall, at no time, draw a warrant upon the treasurer of state
unless there be money in the treasury belonging to the fund
upon which the same is drawn to pay the same, and in con-
formity to appropriations made by law" * * * (our italics);
also Section 10-3715 providing a penalty for the issuance by
the auditor of an illegal warrant. While, of course, these
sections to which I have referred, are laws only, as distin-
guished from constitutional provisions, and subject to legis-
lative repeal either expressly or by implication, it certainly
cannot be considered that they may be repealed by resolution.

Your question is answered in the negative.

POLICE, INDIANA STATE: Right of justice of the peace
to charge prosecutor's fee if prosecutor is present at
hearing.

January 24, 1940.

Mr. Don F. Stiver,
Supt., Indiana State Police,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of January
22nd requesting an official opinion relative to the legal right
of a justice of the peace to charge a prosecutor's fee in the
absence of the prosecutor.
I call your attention to section 9-706 Burns Indiana Statutes Annotated 1933, which reads as follows:

"It shall be the duty of such justice and of any city judge to give the defendant an opportunity for time to employ counsel, if he so desires, and the justice shall also notify the prosecuting attorney or his deputy of the proceeding, if either of them is present within the county, giving them an opportunity to be present, and in all cases where the prosecutor or deputy attends and there is a finding of guilty, a fee of $5.00 shall be taxed in favor of the prosecutor."

Also section 49-2511, Burns Indiana Statutes Annotated 1933, which recites in part as follows:

"The prosecuting attorney's fees shall be as follows: * * * docket fee before a justice of the peace, on a plea of guilty, or on conviction, $5.00."

I now call your attention to the case of the State ex rel. Orr v. Jackson, et al., 68 Ind. 58, in which the court said at page 63:

"We are clearly of the opinion that it is not the duty of justices of the peace to tax a docket fee of $5.00 for the prosecuting attorney, as a part of the costs, against the defendant, in any criminal case where there is a judgment rendered for fine and costs, unless such prosecuting attorney, in person or by deputy, has appeared and prosecuted such criminal case on behalf of the State, before such justice."

From these quotations I am of the opinion that it is the duty of the justice of the peace to notify the prosecuting attorney of the proceedings, whether the plea may be guilty or not guilty, giving the prosecuting attorney a reasonable opportunity to be present. If he or his deputy does appear and the defendant pleads guilty or is convicted, a docket fee of $5.00 should be taxed. If he does not appear either in person or by deputy, no fee should be taxed.