ern appeals from justices of the peace to circuit court, so far as such rules are applicable; and their decisions of all local questions relating to the legality of school meetings, establishment of schools, and the location, buiding, repair or removal of schoolhouses, or transfers of persons for school purposes, and resignation and dismissal of teachers, shall be final."

In view of the above statute your question, I think, must be answered in the affirmative.


Mr. Clarence A. Jackson,
Director, Gross Income Tax Division,
Department of Treasury,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have before me your request that an official opinion issue with respect to the propriety of the payment of fees to county clerks and to sheriffs for services rendered with respect to warrants issued by the gross income tax division, where no money is realized upon such warrant. The question presented is as follows:

"Is the gross income tax division authorized to pay fees to the county clerk for entering a warrant in the judgment record and to pay fees, including mileage, to the sheriff, when no money is collected or realized upon such warrant?"

At the outset it should be noted that no question relating to an invasion of the sovereignty of the state by means of the collection of costs is here presented, since the exclusive inquiry is whether or not the General Assembly by use of certain language to be found in chapter 117 of the Acts of 1937 granted to the officers named above the privilege of receiving fees for actual and substantial additional services
necessitated by the issuance of warrants by the gross income tax division. The traditional rule that, in the absence of a statute providing otherwise, the State of Indiana or its governmental departments is not liable for costs.

See: People v. Kirkpatrick, 57 Cal. 353;  
Galpin v. City of Chicago, 249 Ill. 554, 94 N. E. 961;  
People v. Three Barrells Full, 238 N. Y. 175, 140 N. E. 234.

is in no wise drawn into controversy; it having been established early in the history of this state that the General Assembly is possessed of the power to provide for the payment of such charges from the State Treasury in instances specified by it.

Henderson v. The State, ex rel. Baldwin, Atty. Gen., 96 Ind. 437, at 444-45;  
1 R. S. 1852, Ch. 47, Sec. 4, page 306;  
10 Burns' Indiana Statutes Annotated 1933 Ed. 49-1503.

Therefore the response to your inquiry must be predicated upon the intention of the Legislature as expressed in the language which appears in Section 13-a of Chapter 117 of the Acts of 1937 (page 604 at pp. 628-629). The pertinent provisions of section 13-a are as follows:

"* * * Such officers shall be entitled to the same fees, to be collected in the same manner, as is now provided by law for like services. The sheriff shall also be entitled to retain for his services the amount of damages set forth in the warrant and as prescribed herein, but only when the full amount of the tax and penalty set forth in the warrant have been collected by him and transmitted to the department. * * *"

Your attention is specifically directed to the fact that the word "also" is utilized when the General Assembly provides for the retention of damages where the full amount of the tax warrant is collected; this clearly indicates that such damages are retained in addition to the amount to be received by the officer under other and different circumstances, i.e., when collection upon the tax warrant from the taxpayer
therein specified is not possible. Thus the Legislature provided us with positive evidence within section 13-a itself that the General Assembly well knew how to limit the payment of fees to instances wherein the officer actually collected the amount specified in the tax warrant. The fact that no such limitation was placed upon the language "* * * "of such officers shall be entitled to the same fees, to be collected in the same manner, as is now provided by law for like services * * *" is significant. It is important also to note that the fees referred to in the language quoted immediately above were to be collected in addition to the ten per cent damages to which the sheriff was entitled in case collection was actually made.

Significant also are the extremely harsh and drastic provisions relating to forfeits to the state and liability upon the official bond of the sheriff contained in section 13-a to be visited upon sheriffs who fail to perform diligently all of the services required by the Act with respect to such gross income tax warrants:

"* * * If, within the time prescribed in the warrant, the sheriff shall fail to file either such schedule, such statement of the taxpayer, or a statement sworn to by the sheriff that he has made a demand upon the taxpayer to make such schedule or statement and that such demand was refused the sheriff shall forfeit to the State of Indiana for each such failure the sum of twenty dollars ($20.00).

"* * * Should any inventory or schedule disclose any property upon which the sheriff might have made a levy and sale to satisfy or partially satisfy, any warrant, the failure of the sheriff to make such levy and/or sale shall constitute misfeasance in office, and shall subject the sheriff to liability upon his official bond, to the State of Indiana, in an amount equal to the amount which might have been collected upon the said warrant had such levy and/or sale been made. Such liability upon the part of the sheriff shall constitute a debt due to the State of Indiana, and may be recovered in any suit instituted by the Attorney-General in the name of the State of Indiana for that purpose * * *"
It seems apparent that the Legislative Body would not drastically penalize the failure to perform services if it believed that the officers in question were required to perform such acts without the hope of any compensation whatsoever in a majority of the cases arising under the Gross Income Tax Act.

For the reasons indicated above it is submitted that the General Assembly has demonstrated an intention to compensate the officers required to perform acts with regard to the warrants of the gross income tax division by permitting them to recover the fees mentioned.

It should be noted that while the term "fees" and "costs" are often used interchangeably as having the same application, nevertheless, costs and fees are essentially different. Originally fees were in strictness demandable the instant services were rendered, but an interrupted indulgence, at length ripened into a custom (which has received the sanction of judicial decision), that the party for whose benefit the services were rendered should not be called upon for payment until after the determination of the cause.

"* * * * When, to avoid the vexation of an original suit for a trifling demand, it became a practice to include them in the execution as if they were paid out of the successful party's costs. But they were, in truth, not so, as they might be recovered by the officer in a suit in his own name. In the identity of the usual mode of collection alone is there the least resemblance between costs and fees."


This primary liability of the person occasioning the services of the officer to pay the fees therefor regardless of the ultimate outcome of the case is tacitly recognized even in our statutory provisions permitting costs to be recovered from the losing party. The statute reads:

"In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law."

2 Burns' Indiana Statutes Annotated, 1933 Ed., 2-3001.
This is a recognition of the principle that parties are presumed to pay their own costs as they accrue.

"The expenses which the parties incur during the progress of a cause, for the services of officers and the attendance of witnesses, are properly called fees. They are due as soon as the services are rendered, and if not paid, may be collected from the party requiring the services."

Nelson v. Turner, 7 Ind. 36 at 37.

"The plaintiff is supposed to pay costs to the officers as he makes them (however seldom they are thus paid in fact), and if he recovers judgment against the defendant, he also recovers the costs he is supposed to have thus paid."

Martindale v. Tibbets, 16 Ind. 200 at 201.

"The law contemplates that a party to a suit pays his own costs; their payment may be enforced against him by fee-bill."

Taylor v. Wright, Admir., 93 Ind. 121 at 123.

The consideration of the fact that fees and costs differ essentially, and that fees were originally payable at the time that the service was rendered, is particularly pertinent to the question which you present where no court intervenes to determine the liability of the parties to the officers for such fees, and where, by virtue of a large volume of additional services, it would appear that the determination of the person primarily liable for the payment of such fees (if collection cannot be made from the other party) is important. For "whenever the General Assembly authorizes by new legislation the imposition and collection by a public officer of new and additional fees for the discharge of new and additional duties, * * * such fees, * * * when imposed and collected, belong to and are the property of such public officer, unless the law making power has clearly indicated, in such legislation, that such fees shall be applied in a different way, or to a different purpose.

Henderson v. The State, ex rel. Baldwin, Atty. Gen., 96 Ind. 437 at 441.
The fees to which reference is made by the language employed in section 13-a which has been quoted are those due to the clerk of the circuit court by virtue of the provisions of 10 Burns’ Indiana Statutes Annotated, 1933 Ed., 49-1301, and the fees to which the sheriff is entitled are those specified by 10 Burns’ Indiana Statutes Annotated 1933 Ed., 49-1311.

With reference to the clerk’s fee it should be noted that the primary liability of the person for whom the services were actually rendered is preserved by the provisions of 10 Burns’ Indiana Statutes Annotated 1933 Ed., 49-1304, which reads as follows:

“Plaintiffs in actions and defendants entering appearances to the same shall assume common liability on fee-bill for payment to clerks of the clerk’s fees in court actions provided by this Act.”

Since these fees are for specific additional services required by the Gross Income Tax Act and rendered, I am of the opinion that the respective officers are entitled to the prescribed fees whether the amount reflected by the warrant is ultimately collected or not. It should be specifically noted, however, that such officers are entitled to the fees in question only when the services have actually been performed.

10 Burns’ Indiana Statutes Annotated 1933 Ed., 49-1416.

For examples: The sheriff can only charge for the number of miles actually and necessarily traveled in the service of process.

Board of County Commissioners v. Pressly, 81 Ind. 361.

Ordinarily of course, the fees to which the clerk and sheriff are entitled are collected from the person against whom the process issues. However, your inquiry is limited to the situation which arises when no payment of any kind results from the issuance of such warrant or writ. The services which are rendered by these officers are an integral part of the administrative enforcement of the Gross Income Tax Act. These duties are made mandatory upon such officers by the very provisions of that Act. Therefore, when such services are rendered the clerk and sheriff will, under the provisions of
the section 13 of chapter 117 of the Acts of 1937, be entitled
to the payment of the fees in question. It will be noted that
my opinion is in keeping with the conclusion expressed by a
predecessor in this office and reported in the official opinions
of the Attorney-General, 1894-1896, pp. 4-5, dated January
4, 1895.

UNEMPLOYMENT COMPENSATION, DEPARTMENT OF:
Payment of fees of county clerks and sheriffs for serving
writs, warrants and other processes out of the adminis-
trative funds of the Unemployment Compensation Di-
vision.

July 30, 1938.

Mr. Clarence A. Jackson, Director,
Unemployment Compensation Division,
Department of Treasury,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have before me your request that an official opinion issue
with respect to the payment of fees by the Unemployment
Compensation Division to county clerks and to sheriffs for
serving writs, warrants and other processes issued by that
division. These questions will be answered in the order in
which you have presented them.

"1. Are funds available from sources within the
state for the payment of such fees?"

It is understood that the foregoing question has reference
to the existence or non-existence of an appropriation made by
the General Assembly specifically designed for the payment
of such fees, in contrast to funds available to the Unemploy-
ment Compensation Division itself. Please be advised that
chapter 114 of the Indiana Acts of 1937 (par. 518 to 600)
does not make any specific appropriation for the payment of
fees to county clerks or to sheriffs for such services. There
are no funds available for the payment of fees to clerks and
sheriffs for serving processes issued by the Unemployment
Compensation Division with the exception of the funds avail-
able for the administration of the Unemployment Compensa-
tion Act.