ments, and the intention of the Legislature in passing the Coroners' Salary Act, it is my opinion that a licensed veterinarian is a "physician" within the meaning of the Coroners' Salary Act and is entitled to one and one-half times the base salary for a county coroner while serving in such office.

OFFICIAL OPINION NO. 37

October 18, 1968

CITIES AND TOWNS—JUDICIAL OFFICERS—Appeal of judgment of conviction from town court—Jurisdiction of appeal

Opinion Requested by Hon. John W. Donaldson, State Representative.

> "Is there an appeal from a judgment of a town court created pursuant to Acts 1961, Chapter 76, to the criminal court or Circuit court of the county pursuant to Acts 1905, Chapter 169, as amended?"

The authority for the creation of town courts in towns was provided by the Legislature through Acts 1961, ch. 76, which amended Acts 1905, ch. 129, by adding thereto three new sections numbered 215a, 215b and 215c, the same being Burns IND. STAT. ANN. §§ 4-6026, 4-6027 and 4-6028 respectively. The Act (which does not apply to any town located in a county having a population of more than 200,000) provides for the creation of the court, the operation of the court and the election of the judge, and, in Burns § 4-6027, describes his jurisdiction thusly:

> "He shall have and exercise, within the county in which such town is located, the powers and jurisdiction now

> or hereafter conferred upon the justices of the peace in all cases of crimes and misdemeanors, except as otherwise herein provided. He shall have exclusive jurisdiction of all violations of the ordinances of such town. He shall also have original concurrent jurisdiction with the circuit court or criminal court in all cases of petit larceny and all other violations of the laws of the state wherein the penalty provided therefor cannot exceed a fine of five hundred dollars and imprisonment in the jail or Indiana State Farm not to exceed six months, or either or both: Provided, That the town judge if, in any case brought before him charging any person with a crime or misdemeanor, is of the opinion that the punishment which he is authorized to assess is not adequate to the offense, may so find, and in such cases he shall hold such prisoner to bail for his appearance before the proper court, or commit him to jail in default of such bail."

The Act makes no mention of appeals from town courts and so any right to appeal must be based on some other provision of law.

Such other provisions can best be analyzed if we first consider the constitutional provisions relating to the Indiana Supreme Court. Article 7, § 4, of the Indiana Constitution provides:

> "The Supreme Court shall have jurisdiction, coextensive with the limits of the State, in appeals in writs of error under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the General Assembly may confer."

In discussing the provision above the Supreme Court, in *Warren* v. *Indiana Tel. Co.*, 217 Ind. 93, 107, 26 N.E.2d 399 (1940), said:

> "It is to be noted that the jurisdiction of this court in appeals and writs of error is absolute, which is quite different than if the Constitution had provided that

> such jurisdiction should be exercised in such cases as the Legislature might direct. The only power of the General Assembly over such jurisdiction is to regulate and restrict it. The words, 'regulate and restrict,' as used in the Constitution, have long had a clear and definite meaning. They do not imply the right to prohibit or forbid."

The absolute authority of the Supreme Court can be readily contrasted with the authority of the Appellate Court, a court not provided for by the Indiana Constitution. In discussing its authority, the Appellate Court, in *Arnholt* v. *City of Columbus,* 127 Ind. App. 116, 118, 138 N.E.2d 906, 907 (1956) said:

> "However, the right to appeal is not wholly statutory. The Supreme Court has held that it has constitutional appellate jurisdiction of which it cannot be deprived by the legislature through action or inaction. *Warren* v. *Indiana Telephone Co.* (1940), 217 Ind. 93, 26 N.E. 2d 399; *Joseph E. Seagram & Sons* v. *Board of Com'rs., etc.* (1943), 220 Ind. 604, 45 N.E.2d 491. This court has no such constitutional jurisdiction. We were created by statute and our jurisdiction is conferred by statute and therefore we are of the opinion that jurisdiction of this appeal rests in the Supreme Court."

Thus, the Supreme Court is given appellate jurisdiction by the Constitution, and that jurisdiction cannot be denied by the General Assembly. The Appellate Court is given appellate jurisdiction by the General Assembly and can exercise no greater jurisdiction than that granted to it by the General Assembly.

This introductory discussion, while seemingly irrelevant, provides a necessary background for the answer to your question.

Article 7, § 8, of the Indiana Constitution provides:

> "The Circuit Courts shall each consist of one Judge, and shall have such civil and criminal jurisdiction as may be prescribed by law."

Circuit Courts, like the Supreme Court, are created by the Constitution. Circuit Courts, unlike the Supreme Court, are given no jurisdiction by the Constitution, but rather are expressly limited by that instrument to exercising only the jurisdiction they may be granted by the General Assembly.

Needless to say, superior courts, juvenile courts, criminal courts, probate courts and all other courts having jurisdiction throughout a circuit are all created by the Legislature and may exercise only that jurisdiction granted them by the Legislature.

Circuit courts and criminal courts are given some appellate jurisdiction by Acts 1905, ch. 169, § 81, as last amended by Acts 1965, ch. 59, § 1, the same being Burns § 9-721, which provides:

> "Any prisoner, against whom any punishment is adjudged by a justice of the peace, mayor or judge of a city court, municipal court or magistrates court, may appeal to the criminal court, and, if there be none, then to the circuit court of the county, within thirty (30) days after such judgment. In case such prisoner, within such thirty (30) days, enters into recognizance for his appearance at the current term of such court, if such court is in session, or at the next term of such court, if such court is in vacation, and causes to be filed in such court, within forty-five (45) days, all other papers, documents and transcripts necessary to complete his appeal, then such appeal shall stay all further proceedings on the judgment in the court below. Provided, That such prisoner may remain in jail on his sentence instead of furnishing a recognizance and such appeal without recognizance shall not stay the execution of the court below."

The above statute does not specifically authorize an appeal from a town court to a circuit or criminal court, nor is there any other statute that does authorize such appeals.

Thus, the only way that a circuit or a criminal court could have jurisdiction to conduct an appeal from a town court would be if Acts 1961, ch. 76, creating town courts could be

construed as amending by implication Burns § 9-721 concerning the appellate jurisdiction of such courts. Amendments by implication are possible, but such amendments occur only when there is conflict between an earlier and later statute. See *State* v. *Larue's Inc.*, 239 Ind. 56, 63, 154 N.E.2d 708, 712 (1958) and cases cited therein. In the present case there is no conflict between statutes, nor could there be any conflict between a statute which creates a court without providing for appeals from that court and another statute that provides for appeals from an entirely separate and distinct court. It is, therefore, my conclusion that there is no appeal from a criminal trial in a town court to either the circuit or criminal court of the county wherein the town is located.

It must be remembered, however, that this conclusion is merely advisory and has no binding effect on a court. "It has been repeatedly held that the first duty of a court is to determine its jurisdiction. . . ." *Arnholt* v. *City of Columbus, supra.* Should a defendant convicted in a town court appeal to a circuit or criminal court, then it would be the duty of the judge of that court to determine if such an appeal is authorized by statute. Needless to say, an amendment of Burns § 9-721 to specifically include town judges (as was done by Acts 1945, ch. 234, to specifically include the magistrates courts created by Acts 1939, ch. 164) would eliminate the problem. Since there are only a few town courts in the entire state, and since burdening the Supreme Court of Indiana with appeals from these courts would be ludicrous, I suggest that an early order of business at the next session of the Legislature be to fill the hiatus in the statute (Burns § 9-721) and require their appeals to go to the circuit or criminal court of the county.