Consequently, the position of Controller of the South Bend Public Transportation Corporation is not an "office" within the meaning of Article 2, § 9 of the Indiana Constitution.

Therefore, it is my opinion that the City Controller of South Bend could simultaneously serve as Controller of the South Bend Public Transportation Corporation.

OFFICIAL OPINION NO. 5

March 8, 1968

CRIMINAL LAW AND ENFORCEMENT—OFFICERS, COUNTY—Acceptance of Cash Bail or Other Deposit by Sheriff.

Opinion Requested by Mr. James A. Buck, Legal Deputy, Marion County Sheriff.

I am in receipt of your letter requesting an opinion as to whether the Sheriff of Marion County may accept cash bail or a cash deposit in lieu of bail when the office of the County Clerk is closed.

The nature of bail and of cash deposit in lieu thereof can be gleaned from the following judicial statements:

State v. Sandy, 138 Iowa 580, 116 N.W. 599, 600 (1908).

> "Technically considered, bail is the delivery of a person to the sureties on his bond, he being supposed to continue in their friendly custody instead of jail; so that the sureties on the bail bond become the bailees or custodians of the person of their principal, and may at any time, before the entry of forfeiture or possibly, judgment, be exonerated by his surrender

as provided by statute. Sections 5528, 5529, Code. Bearden v. State, 89 Ala. 21, 7 South. 755. The purpose is to assure his attendance on court as required, rather than to profit by the breach of the bond."

Also: *State v. Springer,* 206 La. 312, 19 So. 2d 147, 148 (1944); *Badolato v. Modinari,* 106 Misc. Rep. 342, 174 N.Y.S. 512, 514 (1919).

". . . Under the common law cash could not be accepted as or in lieu of bail. It is acceptable only when authorized by statute. Bishop's New Criminal Procedure (2d Ed.) vol. 1, § 264; 6 C.J. 1023; Eagen v. Stevens, 39 Hun, 311; McNamara v. Wallace, 97 App. Div. 76, 89 N.Y. Supp. 591."

Also: *Paton v. Teeter,* 37 Cal. App. 2d 477, 99 P. 2d 699, 700 (1940); *State v. Wisnewski,* 134 Wis. 497, 114 N.W. 1113, 1114 (1908).

". . . It appears from the showing made on the hearing below that the money put up as bail was furnished by the petitioner and deposited according to the provisions of section 4816, St. 1898, as amended, which provides, in effect, that the person required to give bail with sureties may, in lieu of the sureties, enter into his own personal recognizance without sureties, upon depositing with the court the amount thereof in money . . . . We think it clear from this statute that it contemplates that cash bail given by an accused person must be deposited by such person and applied by the magistrate or court as specified in the statute, and the surplus, if any, returned to such accused as the person depositing the same. This seems to be the rule laid down in other states under statutes quite similar to our own. State v. Owens et al., 112 Iowa, 403, 84 N.W. 529; State v. Ross, 100 Tenn. 303, 45 S.W. 673; Salter v. Weiner, 6 Abb. Prac. 191; Lyon v. Wilder et al., 56 N.Y. Super. Ct. 67, 1 N.Y. Supp 421; People ex rel Gilbert v. Laidlaw, 102 N.Y. 588, 7 N.E. 910. It is insisted, however, by appellant, that our statute by the use of the words 'rendering the

> surplus money if any there be [after payment of any fines or costs ordered] to the person depositing the same' implies that a person other than the accused may make the deposit. We cannot think that the statute is capable of such construction, but on the contrary confines the right of despoit as cash bail on the part of the accused to the accused himself. . . ."

Boaz v. Tate, 43 Ind. 60, 69-70 (1897) (a suit for false arrest based, *inter alia,* on the jailor's refusal to take a cash deposit in lieu of bail) :

> "The appellee insists that the officers arresting him and the sheriff's bailiff were authorized and required to take bail, and to accept for that purpose the money and property offered by him. He refers us to 2 G. & H. 397, secs. 38 and 40. The first provides, that any officer authorized to execute a warrant in a criminal action may take the recognizance and approve the bail. That does not authorize him to fix the amount of the bail. The other section provides, that the defendant may, in the place of giving bail, deposit with the clerk of the court to which he is held to bail the sum mentioned in the order. That section did not authorize the officers having the appellee in custody to accept of property or money as a pledge or security for his appearance to answer the charge. Those sections of the statute were not intended to apply and have no reference to arrests like the one under consideration. They relate entirely to arrests made under warrants issued from courts of record."

From the cases above (and a multitude of others) the following principles can be deduced:

1. "Bail" is the release of a prisoner to the custody of his sureties.
2. The sureties post a bond guaranteeing the appearance of the prisoner.
3. The sureties may post a cash bail only if permitted by statute.

4. The prisoner may make a cash deposit in lieu of bail only if permitted by statute.

5. The pertinent statute may provide for either or both a cash bail and a cash deposit in lieu of bail.

6. A cash bail or a cash deposit in lieu of bail may be submitted only to the officer or officers authorized by statute to receive the same.

With these principles in mind we may now examine some of the Indiana statutes on this subject.

Acts 1905, ch. 169, entitled "AN ACT concerning public offenses" contains the following provisions in relation to bail and cash deposits in lieu of bail:

Section 24, Burns § 9-1014:

> "The court, on the first day of each term, must order the amount, in which persons charged by an indictment or affidavit are to be held to bail, and the clerk must enter such order on the order book, and he must indorse the amount on each warrant when issued. If no order fixing the amount of bail has been made, the sheriff may present the warrant to the judge of the circuit or criminal court, and such judge must thereupon indorse the amount of bail to be required."

Section 145, Burns § 9-1025:

> "Any officer authorized to execute a warrant in a criminal action, may take the recognizance and approve the bail; he may administer an oath and examine the bail as to its sufficiency."

Section 146, Burns § 9-1026:

> "The defendant may, in the place of giving bail, deposit with the clerk of the court to which the defendant is held to answer, the sum of money mentioned in the order, and upon delivering to the sheriff the certificate of deposit, he must be discharged from custody." (Since repealed; see discussion *infra*.)

Section 148, Burns § 9-1028:

> "When any person is committed for want of bail, and the amount of bail is specified in the warrant of commitment, the sheriff may take the recognizance and approve the bail."

Section 149, Burns § 9-1029:

> "Every recognizance taken by any peace officer, must be delivered by him forthwith to the clerk of the court to which the defendant is recognized. The clerk must thereupon record the recognizance, and, from time of filing, it shall have the same effect as if taken in open court."

Thus, the 1905 Act would permit a sheriff to release on the bond of sureties any prisoner he has arrested with a warrant whereon the bail is specified, or any prisoner committed for want of a specified amount of bail whether arrested with or without a warrant. A prisoner may obtain his release by depositing with the clerk of the court a cash deposit in lieu of bail. The 1905 Act would not permit the sheriff to accept a cash deposit in lieu of bail, nor would it permit the surety to post a cash bail.

In 1961, the General Assembly enacted further legislation concerning bail and bail bondsmen. Acts 1961, ch. 263, § 31, the same being Burns § 9-3725, provides:

> "When the defendant has been admitted to bail, he, or another in his behalf, may deposit with an official authorized to take bail, a sum of money, or nonregistered bonds of the United States, or of the state, or of any county, city or town within the state, equal in market value to the amount of such bail, together with his personal undertaking, and an undertaking of such other person, if the money or bonds are deposited by another. Upon delivery to the official in whose custody the defendant is of a certificate of such deposit, he shall be discharged from custody in the cause.

> "When bail other than a deposit of money or bonds has been given, the defendant or the surety may, at any time before a breach of the undertaking, deposit the sum mentioned in the undertaking, and upon such deposit being made, accompanied by a new undertaking, the original undertaking shall be cancelled."

The statute above clearly authorizes both cash bail and a cash deposit in lieu of bail. It further authorizes any "official authorized to take bail" to accept either a cash bail or a cash deposit in lieu of bail.

The 1961 Act, however, does not specify who is an "official authorized to take bail," and so that phrase must be construed as referring to any officer authorized to take bail by the laws of Indiana. As noted above, Acts 1905, ch. 169, §§ 145 and 148 (Burns §§ 9-1025 and 9-1028), authorize a sheriff to take bail for persons in his custody whenever the amount of bail is specified in either the warrant of arrest or the warrant of commitment. It would thus appear that a sheriff is not only authorized but required to accept either cash bail or a cash deposit in lieu of bail by the above statute.

If that interpretation of the 1961 statute is correct, then the limitation contained in Acts 1905, ch. 169, § 146, Burns § 9-1026, set out in full above, that the prisoner may make cash deposit in lieu of bail only with the clerk of the court, would be obsolete. The same inference was reached by the 1963 General Assembly. Acts 1963, ch. 13, consists of two sections, the first of which amends the title of the 1961 Bail Bondsman Act, and the second of which provides:

> "Acts 1905, c. 169, ss. 146, 147, 153, 156, 157, 158, 159, and 162 relating to bail, return of money upon special bail, surrender of defendant, and forfeiture are hereby specifically repealed as superseded by Acts 1961, chapter 263."

Therefore, assuming the amount of bail has been specified in either the warrant of arrest or the warrant of commitment, it is my opinion that the Sheriff of Marion County (and of other counties) is both authorized and required to accept either a cash bail tendered by sureties or a cash deposit in lieu

of bail tendered by the prisoner. It is my further opinion that the authorization and duty of the sheriff to accept a cash bail or a cash deposit in lieu of bail exists whether or not the clerk of the court is available at the time.

OFFICIAL OPINION NO. 6

March 27, 1968

CITIES AND TOWNS—OFFICERS, COUNTY—Crediting of Interest on Municipal Funds. Investing Taxes Collected in Certificate of Deposit.

Opinion Requested by Mr. Bryce Bottom, Deputy State Examiner.

I am in receipt of your request for an opinion concerning the crediting of interest received on municipal funds invested in certificates of deposit. Your specific questions were:

"1. Does the 1967 Act require that interest earned on certificates of deposit be placed in the 'general fund' of the particular city, county or other governmental unit, even though invested from special funds of a municipality, such as municipal utility funds, the motor vehicle highway fund, pension funds, etc.?

"2. May property taxes collected by the county treasurer be invested in certificates of deposit pending distribution to the municipal corporations and, if so, does the interest become a part of the county general fund?"

Acts 1967, ch. 84, amends the Depository Act of 1937 (Acts 1937, ch. 3) by adding to its 16th section a new subsection (e) which reads as follows: