JUDICIAL OFFICERS—COUNTY OFFICERS—Compensation to special judges—Duties of county auditor and county treasurer.

Opinion Requested by Hon. John P. Gallagher, Auditor of State.

This opinion is in response to your recent questions concerning the compensation of special judges appointed under the provisions of Rule 1-12, Rules of the Supreme Court of Indiana, and compensated out of the State Treasury. The rule describes the procedure to be customarily followed in trial courts for the appointment of special judges, and also provides for the appointment of special judges by the Supreme Court under special conditions.

Clause (14) of the rule provides that all special judges appointed in accordance with the rule “shall be paid as compensation for their services the sum of Twenty-five dollars ($25.00) per day or part thereof actually served” (plus expense provisions not pertinent to your questions). The rule further provides that those “special judges appointed by the Supreme Court” are to be paid out of the county treasury “for the time being,” and also provides for state reimbursement to the county. Identical provisions for the method of paying special judges are contained in Acts 1881 (Spec., Sess.) ch. 38, §258, as last amended by Acts 1947, ch. 175, §§ 1 and 2, the same being Burns IND. STAT. ANN. §2-1416. This statute would apply as to method of payment to amount of payment) to all special judges selected pursuant to Rule 1-12 in courts presided over by state-paid regular judges, but who are not appointed by the Supreme Court.
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Your questions are substantially these:

1. Is a special judge who presides in more than one case in the same court on the same day entitled to only $25.00 (plus expenses, if applicable) for such services or is he entitled to $25.00 for each such case?

2. If not entitled to more than $25.00 (exclusive of expenses) for all services rendered as special judge in the same court on the same day, is a special judge who serves in two or more courts on the same day entitled to a fee of $25.00 for each court in which he so presides that day?

3. If a county auditor is presented with an order of court, allowing compensation to a special judge in excess of the sum to which he is lawfully entitled, does the county auditor have the right or duty, or both, to refuse to issue his warrant for payment of the excess?

4. If a county treasurer takes credit on his settlement with the State Treasurer for payments to special judges in excess of the sum to which such special judges were lawfully entitled, can the Auditor of State legally refuse to approve the settlement?

5. If the Auditor of State can and does legally refuse to approve such a credit, what remedies, if any, does the state have to recover or to recoup the excess of the credit taken over that which should have been taken, and specifically, may the Auditor of State legally withhold distribution of state collected taxes to the county until the county treasurer makes a proper settlement with the state?

While older cases and statutes (including the original version of the hereinafter quoted special judge statute) seem to use the term “special judge” to describe all judges who sit in place of the regular judge of any court, the modern practice is to use the term to designate only one type of such judge. The term “special judge” is defined and differentiated from the term “judge pro tem” or “judge pro tempore” in the following quotation from State ex rel. Hodshire v. Bingham, 218 Ind. 490, 491, 33 N.E.2d 771, 134 A.L.R. 1126 (1941) (also quoted in 1950 O.A.G. p. 273):
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“A judge pro tem, is appointed for the term or some part thereof, during which time he exercises all the functions of the regular judge. . . . A special judge is appointed to act in a particular case and his authority continues until the same is finally disposed of, unless the venue is changed.” (Emphasis added.)

This opinion will be concerned only with special judges as so defined since such judges are the only special judges selected pursuant to Rule 1-12.

First. The statute which provided for the pay of special judges until paragraph (14) was added to Rule 1-12 of the Supreme Court of Indiana is Acts 1881 (Spec. Sess.) ch. 38, § 258, as last amended by Acts 1947, ch. 175, §§ 1 and 2, being § 2-1416, which reads:

“When a judge [or any practicing attorney] is called upon to preside in the place of the regular judge, [either as a special judge or judge pro tempore,] either at a regular or an adjourned term, whether selected from the bench or bar, he shall be allowed the sum of (five) [ten] dollars per day (for the time actually served, and in going to and returning, to) [, for each day or part thereof actually served, and mileage in the sum of five cents for each mile necessarily traveled each day in going to and returning from the place where the court is being held. If such special judge or judge pro tempore be a resident of another county, he shall be paid an additional sum of ten dollars for each day or part thereof actually served, making a total of twenty dollars. He shall] be paid as follows: On the presentation of an order made by the court for the allowance, specifying the (time of service) [days of service and mileage, if any], supported by (an) [the] affidavit of the special judge(, that he actually served such (time) [days], [and the miles necessarily traveled;] and an affidavit of the regular judge (, if any,) stating the reason for such service of such special judge [or judge pro tempore], the same shall be paid out of the county treasury for the time being, for which the county shall have credit on settlement (of the Treasurer with the
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State) [with the treasurer of state] (Provided, That in all cases where a special Judge shall be called, the compensation paid as herein provided, shall be deducted by the Auditor of State from the pay of such regular Judge, except when such special Judge is called to preside in cases on change of venue, or when such regular Judge shall have a pecuniary interest, be a party to, or be related to any party to said suit by blood, or by marriage, or may have been counsel in any cause pending, or may be absent on account of serious illness of himself or family).

"[Provided however, that in Change of Venue from one court to another court of the same county, or from one Judge to another Judge of the same county, the compensation provided for herein shall not apply, unless such other court or Judge to which the change is taken, shall be situated in another City in the same county.]" (Omission of the bracketed words presents the 1881 Act; omission of the parenthesized words presents the 1947 Act which is now the law.) (Note: A misprint in Burns [1968 Repl.] results in the last three words of the first paragraph being shown as "treasury of state" rather than "treasurer of state.")

The statute, in its original and all amended versions, has always fixed the special judge's compensation for services at "_________ dollars per day." The original version was interpreted in City of Columbus v. Rynerson, 195 Ind. 620, 629, 148 N.E. 602 (1925). The specific question in that case was whether the statute authorized separate payment for each case handled in a given day or specified the payment for a given day's services no matter how many cases were handled. The court, at 629 of 195 Ind. (604 of 148 N.E.) said:

"The words or phrases of the statute . . . necessary to its construction, are not technical. The signification of the statute is that the compensation to be allowed special judges for services is limited, the limit being 'the sum of five dollars per day for the time actually served, and in going to and returning.'"
Insofar as the amount of the special judges' per diem is concerned, Burns § 2-1416 seems to be superseded by paragraph (14) of Rule 1-12 of the Rules of the Supreme Court of Indiana, raising the $10.00 to $25.00. That paragraph (first added to Rule 1-12 by the amendment of September 25, 1963), as amended May 1, 1967, retroactively effective April 1, 1967, reads as follows:

“(14) Special judges in all cases appointed under the provisions of this Rule 1-12 shall be paid as compensation for their services the sum of Twenty-five dollars ($25.00) per day or part thereof actually served, and in event they reside outside the county in which they serve as special judges, they shall be entitled to mileage in the sum of Ten cents (10¢) for each mile necessarily traveled each day in going to and returning from the place where the court is being held, plus motel or hotel accommodations and reimbursement for meals. Compensation for special judges appointed by the Supreme Court shall be paid as follows: On presentation of an order made by the court below for the allowance, specifying the time of service, supported by an affidavit of the special judge that he actually served such time, stating the reason for the service of such special judge, the same shall be paid out of the county treasury, for the time being, for which the county shall have credit on settlement of the treasurer with the state.

“Provided, however, that in change of venue from one court to the [another] court of the same county or from one judge to another judge of the same county, the compensation provided for herein shall not apply unless such other court or judge to which the change is taken shall be situated in another city in the same county.”

The rule, it will be noted, just as does the statute, states the rule for measuring compensation in terms of time served rather than in terms of cases presided over or acts performed. Under the statute the special judge “shall be allowed” and under the rule “he shall be paid” a fixed sum which, in each,
is "—— dollars per day ... or part thereof actually served." The slight difference in wording between the several versions of the statute and the rule do not appear to vary the meaning in the least insofar as the question is whether a special judge is to be paid by the case or by the day. I can, therefore, find no reason, based on language change (and no other reason has been suggested), for deviating from the answer which has been given by Indiana Attorneys General consistently over the years and by the Indiana Supreme Court the one time it answered that question. A special judge who acts upon more than one case in the same court on the same day is entitled to only $25.00 (plus expenses) for such services. *City of Columbus v. Rynerson, supra,* [195 Ind. 620, 148 N.E. 602 (1925)]; 1938 O.A.G. p. 253; 1942 O.A.G. p. 102; 1950 O.A.G. p. 273.

Second. The question of whether a judge or attorney who sits as special judge in different courts of the same county on the same day is entitled to compensation for each court in which he serves has previously been answered in an Attorney General's Opinion. In 1942 O.A.G. pp. 102, 104, the then Attorney General stated:

"In allowing the county credit for amounts paid to a special judge, the General Assembly intended to authorize a county to obtain credit for one payment to one person for a single day's service in the court in which he may have sat as special judge. The statute contemplates that one who serves as special judge in a court of the county, for the reasons named, shall have a day's pay for his services even though his services are required for only a part of the day. The Court's interpretation of the similar statutory provision considered in *City of Columbus v. Rynerson, supra,* indicates that payment is to be made on the basis of days served in a court as special judge and not according to the number of cases heard.

"But there is nothing in Section 2-1416, in the statute involved in the case of *City of Columbus v. Rynerson,* or in the Supreme Court's interpretation of that statute which indicates that one who serves as special judge
in two or more courts on a single day shall not be paid for a day's service in each court. That the General Assembly has the authority to so limit the compensation cannot be denied, but it cannot be said that the General Assembly has so exercised that authority. The failure to so limit the compensation cannot be said to be unreasonable or inconsistent when considered in connection with the fact that specific provision is made, and upheld by judicial decision, for the payment of compensation for serving as a special judge to a duly elected or appointed judge of another court who is receiving the regularly authorized salary incident to the office which he holds.

James v. Cammack, 139 Ky. 223, 129 S.W. 582; In re Judges' Compensation, 4 Pa. Co. 596.”

This opinion, written before the 1947 addition of the proviso concerning regular judges serving in other courts situated in the same city, is a proper interpretation of the statute as it then existed, and absent any change in that statute, would constitute sufficient authority for concluding that any special judge is to be compensated separately for each court in which he presides on any given day. The statute, however, has since been changed, and changed in a manner that supports the general conclusion expressed in the Attorney General's Opinion.

The Opinion concludes that any person, whether a regular judge or a member of the bar, who sits as a special judge in any court is entitled to compensation for such service in that court whether or not he serves as a regular or a special judge in any other court that same day. The proviso, written into the statute by Acts 1947, ch. 175, § 2 and added, in identical language, to the rule by an order made by the Supreme Court on May 1, 1967, (retroactively) effective April 1, 1967, apparently applies only to regular judges of courts who act as special judges in another court of the same county and which other court is not located in another city of the same county. To such a special judge “the compensation provided for herein
shall not apply.” Applying the maxim expressio unius est exclusio alterius conversely (3 Sutherland Statutory Construction [3rd Ed.] 413 § 4915, n. 6) it logically follows that by expressly excluding from “the compensation provided for herein” only those special judges who are already judges and who are called to “preside in place of the regular judge” because of a “Change of Venue from one court to another court of the same county, or from one Judge to another Judge of the same county” (and then only if such other court or Judge is not situated in another city), the Legislature and the Court intended compensation to apply in all other situations in which a judge or practicing attorney presides as a special judge in place of the regular judge.

The conclusion, then, is inevitable. Any person who presides as a special judge in any court on a given day is entitled to compensation for so presiding in that court no matter what else he may have done in other courts on that same day, except that if that person be a regular judge of a court situated in the same city he is not entitled to any compensation.

Third. The authority of the county auditor in relation to an order of the court allowing an excessive amount of compensation to special judges presents a somewhat more complex problem.

The statute and the rule both appear to place the initial responsibility on the court (which is to say, on the regular judge of the court) in which the special judge serves to audit the amount claimed by the special judge as compensation. Both the rule and the statute (in almost identical language) states that the special judge shall be paid on presentation of an order made by the court. The fact that by statute and rule “the allowance” is by “order made by the court” which “shall be paid” has led some judges and county auditors to believe that whatever total amount the regular judge allows to any judge or practicing attorney who serves as special judge cannot thereafter be challenged because it is a court order. In my opinion, however, such an order or allowance is not a judgment, decree or judicial order merely because it has been made by the regular judge of a court of general jurisdiction.
In *State v. Jamison*, 142 Ind. 679, 683, 42 N.E. 350, 351, (1895) the Supreme Court had this to say about the contention that an *ex parte* allowance should be conclusive:

“To assert the doctrine that a court is authorized, *ex parte*, to make an extraordinary allowance against a county, and enforce the payment thereof, by mandate, through the auditor, without giving it an opportunity to examine into the validity or merits of the claim or allowance, or to contest the same through its own legally constituted agents, in a proper court, would in effect militate against the ancient maxim of jurisprudence, that everyone is entitled to his day in court, and no one shall be condemned: unheard.

“The auditor, generally speaking, is not the agent of his county. Therefore, if the court could make large allowances to parties for their services in and about the administration of justice, and, by an *ex parte* order, make them absolute and conclusive, and compel the payment thereof out of the public funds, by a mandate against the auditor, without giving the county liable therefor the right by its proper agents to examine into the validity of the allowance, or be properly heard in defense thereto such a proceeding or action of the court might result in subjecting the public money to the payment of unlawful and exorbitant demands. Such a result the law does not intend, and it is the duty of the courts to so construe it is to avoid this mischief, at least, so far as practicable.”

A full discussion of the effect of an *ex parte* order would involve consideration of a number of variables, including the inherent power of the court to protect its jurisdiction, the existence or non-existence of applicable statutes, the various parties that might be involved, and the various remedies that might be followed by the recipients of the order, and is thus much too broad a subject to be fully explored in this opinion. See, for example, *Knox County Council v. State*, 217 Ind. 493, 29 N.E.2d 405, 130 A.L.R. 1427 (1940); *Board of Comm'rs of Vigo County v. Stout* (1893), 136 Ind. 53, 35 N.E. 683, 22 L.R.A. 398; *Carlson v. State ex rel. Stodola*, — Ind. —, 220

There is, however, an early Indiana case that is pertinent to the present question. Monroe v. State, 157 Ind. 45, 60 N.E. 708 (1901), was an action against a county auditor to mandate him to issue his warrant in payment of juror's fees allowed by the court to jurors who had been kept together both night and day during a trial and were allowed, by the court, two per diems for each twenty-four hour period. In rejecting the contention that the court's allowance "was in the nature of a judgment by which the county was bound and was not subject to collateral attacks," the Supreme Court said, beginning on page 47 of 157 Ind. (60 N.E. 709):

"The fees of a juror are not allowed by the court; they are merely certified to be due. The statute conclusively fixes the per diem and mileage, and the court has no power either to increase or to diminish them. The court settles only the number of days and miles. The statute does the rest. If a court, after settling the number of days served by the juror, and the distance traveled by him, makes an allowance to the juror in excess of the fees and mileage to which he is lawfully entitled, it acts without authority, and its proceedings are void. In settling the account of a juror, the power of the court is strictly circumscribed and limited, and it is without authority to make any appropriation of the public funds for that purpose, except such as is expressly conferred by statute.

"It is held in this State that even allowances, properly so called, made by courts for services to be paid for by the county, are not judgments and are only prima facie evidence of the validity and amount of the claims allowed. In the case before us, the county was not a party to any action or proceeding in which these fees were stated. It had no notice of the time and place when and where the statement would be asked for. The action of the court was entirely ex parte, and bound no one. The court possessed neither inherent nor statutory power to settle the amount of the compensation of the
juror at a sum in excess of the fees fixed by law; nor could it exercise such authority as the agent of the county. *State, ex rel. v. Snodgrass*, 98 Ind. 546; *Board etc. v. Summerfield*, 36 Ind. 543; *State, ex rel. v. Jamison*, 142 Ind. 679. [42 N.E. 350]

"The bill of court expenses certified by the judge showed upon its face that the fees credited to the relator were double the amount lawfully due him. Under these circumstances, it was the duty of the auditor to refuse to draw his warrant for the excessive and unauthorized allowance." (Emphasis added to this paragraph only.)

Notwithstanding the decision above there are supporters of the proposition that the regular judge of a court has the inherent power to fix the compensation of special judges who serve in his court and who rely on the case of *Noble County Council v. State ex rel. Fifer*, 234 Ind. 172, 125 N.E.2d 709 (1955). In that case the court, pursuant to statute (Burns § 9-2212), had appointed a probation officer and set his salary within the statutory limits. The probation officer, who was serving without pay because the county council refused to appropriate the salary fixed by the judge, brought suit to mandate the council to make the appropriation. A judgment of mandate was issued and the council appealed to the Supreme Court, which Court sustained the judgment. In a separate opinion, Judge Bobbitt concurred in the result for this stated reason: "It seems to me that the question presented in this appeal might have been fully decided simply by determining the authority of the circuit court under the provision of Acts 1927, ch. 210, § 4, p. 594, being § 2-2212 Burns 1942 Replacement." As the concurring opinion implies, the majority opinion did not rely solely upon the statute, but chose rather to elaborate thereon, stating, *inter alia* (234 Ind. 180, 125 N.E.2d 713):

"However, the authority of the court to appoint a probation officer, fix his salary and require payment thereof, does not rest upon mere legislative fiat. The court has inherent and constitutional authority to employ necessary personnel with which to perform its in-
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herent and constitutional functions and to fix the salary of such personnel, within reasonable standards, and to require appropriation and payment therefor."

The language above could be construed as overruling, sub silentio, the holding in Monroe v. State that a trial court cannot award jurors' fees in excess of the amount provided by statute, and as authorizing excess but reasonable payments to necessary personnel, including both jurors and special judges. That argument, however cogent, is irrelevant in the present instance.

I assume that it was in virtue of this inherent power of the judiciary to provide for the performance of its inherent and constitutional functions free of any limitations imposed by the legislative branch that the Indiana Supreme Court acted in raising the compensation of special judges from "the sum of ten dollars per day, for each day or part thereof actually served" (Burns § 2-1416) to "the sum of Twenty-five dollars ($25.00) per day or part thereof actually served" (Rule 1-12 [14]). And it would seem to me to be beyond the power of any other Indiana court to alter, amend or supersede the Supreme Court's Rule 1-12(14) by which that exercise of inherent judicial power has been accomplished.

In State ex rel. Gmil v. Markey, 230 Ind. 68, 71, 101 N.E. 2d 707, 708 (1951), the court said:

"It is well settled that any rules of trial courts which are in conflict with the rules of this court are superseded by the rules of the Supreme Court. . . .

"The last-quoted portion of Rule 1-12 is therefore controlling in the matter now before us."

Thus, although the amount of payment is established by Supreme Court Rule rather than by statute, the description of the respective authority of the regular judge and the county auditor contained in Monroe v. State, supra, would be applicable to the payment of special judges.

The county auditor in drawing his warrant for the compensation of a special judge is disbursing county funds, just as
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he does in any other instance in which he draws a warrant in satisfaction of a claim against the county, notwithstanding the fact that both Rule 1-12(14) and Burns § 2-1416 provide for ultimate reimbursement by the State. As a consequence, the county auditor’s rights, powers and duties with respect to the payment of this claim should be the same as with the payment of other claims against the county.

Basically those powers and duties are stated in 1 R.S. 1852, ch. 8, § 4, the same being burns § 49-3005, which provides:

“He shall examine and settle all accounts and demands chargeable against his county, which are not directed to be settled and allowed by some other tribunal or person; and for all such sums of money settled and allowed by himself, such other tribunal or person, or where the same is fixed by law, he shall issue his orders on the treasurer of the county, payable to the person entitled thereto, which orders shall be numbered progressively, and the number, date, and amount of each, and to whom payable, and the purpose for what drawn, shall, at the time of issuing the same, be entered in a book kept for that purpose.”

It would appear from a strict construction of the above that the auditor does not have any duty to “examine and settle” when the “accounts and demands” are “directed to be settled and allowed by some other tribunal or person.” Furthermore, that “for all such sums of money, settled and allowed by . . . such other tribunal or person . . . he shall issue his orders on the treasurer of the county, payable to the person entitled thereto. . . .” (Emphasis added.) However, as was held in Monroe v. State, supra, “allowances . . . made by courts for services to be paid for by the county . . . are only prima facie evidence of the validity that amount of the claims allowed” and when they show upon their face that the allowance is illegal it is the duty of the auditor to refuse to issue his warrant on the county treasurer. Similar statements have been made in relation to claims allowed by the Board of County Commissioners. See State v. Perry, 159 Ind. 508, 65 N.E. 528 (1902); Sudburry v. Board of Comm’rs, 157 Ind. 446, 62 N.E. 45 (1901).
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Legislation enacted subsequent to the decisions in *Monroe v. State, State v. Perry*, and *Sudbury v. Board* has not altered the conclusion that the auditor is not relieved of his duty to examine a demand chargeable against his county merely because it has been “settled and allowed by some other tribunal or person.”

Acts 1911, ch. 115, § 1, the same being Burns § 49-3006, provides:

“When heretofore or hereafter, in good faith, any auditor of any county in the State of Indiana, pursuant to the order or authority of the board of commissioners of any such county, or pursuant to the judgment or order of any court of common law jurisdiction in any such county, in any case wherein said county was a party and was duly served with process, shall have issued his warrant upon the treasurer of said county, that then and in such event, no civil suit shall be maintained against said county auditor or his bondsmen for the issuance of said warrant although such warrant shall have been drawn pursuant to some order of the board of commissioners or judgment of the court which is either void or voidable, but the validation of such sums of money from any person receiving the same that might have been recovered if this act [section] had not been passed.”

Under the statute above the only court order which will excuse even a “good faith” issuance of a warrant by a county auditor to pay an illegal claim is an order made in a “case wherein said county was a party and was duly served with process.”

Acts 1909, ch. 55, § 13, the same being Burns § 60-215, (a part of an act entitled “An Act concerning public accounting and reporting and supervision thereof. . . .” which is the Act establishing the State Board of Accounts and prescribing its powers and duties) provides:

“It shall be the duty of every officer having authority to draw the warrant of the state or of any municipality referred to in this act in disbursing its funds, or who has authority to execute the receipt and quietus of the
state or of such municipality in settlement with public officers or with debtors, before presenting the same for allowance to the board or other authority required to pass upon the same, to make an examination of all claims as to their form, the authentication thereof as required by law, whether they are based upon contract or statutory authority, and as to their apparent correctness, and upon presenting the same to file there-with his certificate in writing as to such matters in respect to each and all of such claims; and where the authority to pass upon and allow such claim is lodged in such officer, he shall, before drawing a warrant therefor, certify to the correctness thereof over his official signature, and it shall be his duty before issuing the receipt or quietus of the state or municipality to any debtor or any officer making settlement with the state or municipality to examine the report, account or settlement sheet upon which settlement is made, and to require of such debtor or officer, or to otherwise secure all such information, accounts, vouchers or exhibits as shall be necessary to satisfy such officer issuing such receipt or quietus of the correctness of such report, account or settlement sheet, and to certify thereon that he has made such examination and is satisfied as to its correctness, and no such warrant or quietus shall be issued by any such officer until such certificate shall have been executed and filed with such claim, report, account or settlement sheet."

The above statutes were considered in *State ex rel. Steers v. Acree*, — Ind.App. —, 8 Ind. Dec. 456, 217 N.E.2d 167 (1966). In that case the defendant auditor, who had paid claims after approval by the Board of County Commissioners, and the auditor’s surety were sued to recover, for the county, expenditures made for road materials when no contract and no requisition were on file as required by Acts 1935, ch. 145, § 1, Burns § 36-1114. In affirming a judgment in favor of the auditor the court said, at 217 N.E.2d 176:

“We think the auditor acted within the scope of his authority, when relying upon verified statements of
claimants, when relying upon certified statements of the highway supervisor, and departmental heads, when guided by advice of the county attorney, and when following the determination of the Board of Commissioners. We also think that this instruction as given, would have invaded the province of the jury in the consideration as to whether or not the auditor acted with reasonable diligence and good faith. Section 49-3006, supra, provides that good faith relieves the auditor from responsibility; Section 60-215, supra, demands only that the auditor determine the apparent correctness of the claim; and, that the cases of Miller, supra, and State ex rel. Hitchcock v. Farris (1925) 197 Ind. 128, 150 N.E. 18, provided that good faith and due diligence on the part of the auditor provides a defense."

Nothing in the opinion or in either statute indicates that it was not within the authority of the auditor to have refused payment of the claims in question. As the opinion says, "Section 49-3006, supra, provides that good faith relieves the auditor from responsibility," and that "Section 60-215, supra, demands only that the auditor determine the apparent correctness of the claim." It does no more.

In contrast to the claim involved in State v. Acree, supra, which was not incorrect on its face, a claim or order for a special judge's compensation must show "the time of service," and must also be "supported by the affidavit of the special judge that he actually served such time." Any such claim which does not meet this dual requirement for specificity and certification of the time served lacks "apparent correctness." Likewise, any order which does specify the time actually served and then purports to "allow" the claimant, for his services as special judge, compensation of more than "Twenty-five Dollars ($25.00) per day or part thereof actually served" also lacks "apparent correctness." In fact, it is incorrect on its face, which is to say, its incorrectness or illegality is apparent.

A county auditor who is cognizant of this opinion or any of the prior Attorney General's opinions holding that only one per diem can be earned in any one day or of the holding
to that effect in *City of Columbus v. Rynerson*, *supra* [195 Ind. 620, 148 N.E. 602] would seem to be in no position to claim "good faith" reliance on such a court order.

It has been reported that in some counties judges have threatened to mandate county auditors to issue warrants in payment of "allowances" made by them to special judges on the basis of $25.00 per case per day rather than $25.00 per day. Some county auditors so threatened seem to feel that they have no recourse and must yield. But in my opinion it is their duty to defend the county's funds against dissipation by such illegal expenditures and the county attorneys have the primary responsibility to represent the county auditors in resisting payment of such allowances. (See 1960 O.A.G. p. 222, at pp. 224-226, for the duty of county attorneys.) Inasmuch, however, as it is not yet settled what effect a mandate against the auditor would have on the treasurer's settlement with the Auditor of State, the Attorney General, if duly notified of the commencement of a mandate action against the auditor or any other legal proceedings by whatever name, to force the auditor to issue a warrant, could exercise his discretion to consider the action a threat against the state treasury thus "involving the rights and interests of the state" and in which he should "represent the state of Indiana" in defending the action of the county auditor in refusing to issue a warrant. Acts 1941, ch. 109, § 6, p. 292, being also Burns § 49-1924. Or, if an attorney general should deem "it necessary or desirable for the purposes of the uniform and orderly enforcement and effectiveness of the acts of the general assembly of state-wide public interest and concern" so to do, he could remove such an action to the Appellate Court of Indiana. Acts 1965 (2nd Spec. Sess.) ch. 7, § 3, p. 28, being also Burns § 3-2122.

While not meaning to concede, or even to suggest, that due notice to the Attorney General, giving him an opportunity to defend the principles stated in this opinion, would alter the legal position of the county officials on settlement with the state, I do suggest that giving of notice to the Attorney General and the Auditor of State, when presented with claims of special judges for compensation in excess of $25.00 per day, depending on the circumstances of the particular case, may
be the means by which county auditors can avoid being caught in the cross-fire of conflicting demands of state officials and local judges.

Fourth. County treasurers' settlements with the state treasurer (which is the "settlement with the treasurer of state" on which "the county shall have credit" for compensation to special judges which has been "paid out of the county treasury for the time being," as provided in Rule 1-12 (14) and Burns § 2-1416) are now provided for Article IX of the "Property Tax Collection Act of 1963," being Acts 1963, ch. 280, §§ 901-905, being also Burns §§ 64-2334 to 2338. Section 901, being Burns § 64-2334, reads as follows:

"SECTION 901. On or before June 20 and December 20 each year, after the auditor of each county has audited the records of the county treasurer, such county auditor and county treasurer shall meet at the office of the county auditor, and the county treasurer shall make a settlement with the county auditor for the amount of taxes and special assessments which the county treasurer has collected, as follows:

"The county treasurer, under oath to be administered by the county auditor, shall certify, on a form to be prescribed by the State Board of Accounts, to the correctness of credits for cash collected in each taxing unit appearing on the tax duplicate, and such other collections as he is required by law to collect. Such county treasurer shall further certify to the correctness of the number of polls on which taxes have been collected. Immediately following each settlement, the county auditor shall send to the Auditor of State a copy of the certificate of settlement so made by the county treasurer, together with a statement of distribution of taxes collected. Each county treasurer shall, on or before June 30 and December 31 each year, pay to the State Treasurer, all money due for state purposes, as shown on the certificate of settlement."

The following sections of the Act authorize the prosecuting attorney to institute the appropriate action if the treasurer
Refuses or neglects to settle with the county auditor, or fails to pay the amount due the state into the state treasury, and provide the procedure to correct errors in settlement which resulted in overpayments to the county for the state. The only express provision in the 1963 Act for the Auditor of State to take any such action with regard to the settlement is found in Section 904, Burns § 64-2337, concerning errors resulting in overpayments. That statute provides that upon such an overpayment "the board of county commissioners shall direct the county auditor to certify a statement of the improper or erroneous payments to the Auditor of State who shall audit and allow the same as a claim against the Treasurer of State, and the Treasurer of State shall refund the same out of money not otherwise appropriated." The Act contains no language pertinent to the authority of the Auditor of State to disapprove the semi-annual settlement when the treasurer's accounts, although correct on their face, include the honoring of warrants improperly issued by the county auditor.

I can find no reported Indiana court decision involving a situation in which a county treasurer's settlement with the Treasurer of State was less than it should have been because the county treasurer had paid a county auditor's warrant which either should not have been drawn at all or should not have been drawn in an amount so large. There is, however, such a case involving county funds only, in which it was held that a county treasurer who had paid warrants drawn by the county auditor without authority was entitled to credit for such amounts on his settlement with the board of county commissioners. In that case, *Graham v. State*, 66 Ind. 386, 392 (1879), the court said:

"It may be conceded that the treasurer was bound to know the law, and to know, therefore, that an order drawn by the auditor without any allowance therefor, or authority of law, was illegal and ought not to be paid. But he was not bound to know the fact that no allowance had been made by the board of commissioners on which to base the orders in question. The auditor, and not the treasurer, as has been seen, is the keeper of the records of the proceedings of the
board of commissioners. And, as has also been seen, it was the duty of the treasurer to pay all orders of the auditor when presented, etc. The treasurer is not bound to search the auditor's office to see if there is an allowance by the board of commissioners, or an amount certified to be due by a court of record, on which to base an order drawn by the auditor and presented to the treasurer for payment. That is no part of his official duty. He is justified in paying all orders drawn upon him by the auditor, if there is an appropriate fund in the treasury sufficient for that purpose, for the statute makes it his duty to do so.

"The treasurer might, to be sure, if he had knowledge that an order was drawn without any allowance, certificate, or authority of law, refuse payment; and payment could not be coerced, because the order would have no validity.

"The treasurer, in this case, was not required to ascertain whether allowances had been made which authorized the issuing of the orders, and had a right to presume that such allowance has been made, and was justified in paying the orders. He was, therefore, entitled to credit, for the amount thus paid, in his settlement with the board. It follows that the county was injured by the wrongful acts of Gale, and that the board is the proper relator. It also follows that the relator is not estopped or in any way prejudiced by having, in the settlement with the treasurer, allowed him the amount by him paid in redemption of the orders in question." [The relator was the board of commissioners of the county, Gale the auditor.]

No reason appears why the rule should be any different with respect to the hypothetical warrants in question here. It seems certain that the treasurer himself has done nothing wrong when he pays the warrant without notice that it is an illegal payment, in whole or in part. He is entitled to credit someplace and Burns § 2-1416, which is the only statute which mentions it, says the credit should be taken on his report to the state. The 1881 statute said:
"... the same shall be paid out of the county treasury for the time being, for which the county shall have credit on settlement of the Treasurer with the State."

(It seems beyond question that "the Treasurer" as there used means "the [county] Treasurer.") This 1932 amendment (Acts 1932 [Spec. Sess.] ch. 25, § 1, p. 39) changed the wording to that which is its present form in both Burns § 2-1416 and Rule 1-12 (14) which is:

"... the same shall be paid out of the county treasury for the time being, for which the county shall have credit on settlement with the treasurer of [the] state."

(The bracketed word "the" was dropped out by the 1941 amendment.)

The 1881 provision, it will be noted, speaks of a settlement of "the Treasurer with the State" while the present version seems to be speaking of a settlement of the county with the Treasurer of State. Literally speaking, of course, there is no settlement provided for by law which fits either description. And as I have pointed out supra, the "settlement" upon which "the county shall have credit" is the settlement provided for in Burns § 64-2334 (a part of the "Property Tax Collection Act of 1963") quoted supra, which statute merely provides for semi-annual payment by the county treasurer to the State Treasurer the amount "as shown on the certificate of settlement," which certificate is the account of the county treasurer’s settlement with the county auditor.

Most of the state revenues today are probably collected at the state level, but it seems a safe assumption that in earlier days the opposite was true. The officer charged with the duty to collect all property tax for every unit of government is, and always has been, the county treasurer. Other state revenues collected on the local level, such as docket fees collected by court clerks, are required to be paid to the county treasurer and by him paid over to the state treasurer on these semi-annual settlements. Acts 1949, ch. 128, § 1, p. 337, being also Burns § 49-1305a.

At this point it becomes desirable to understand in what capacity the county treasurer acts in collecting, accounting
for and paying over state revenues, as well as in what capacity the county auditor acts in drawing warrants on the county treasurer, particularly in drawing warrants to pay special judges.

Considerable light is thrown on the matter by the court's opinion in *Vigo Township v. Board of Commrs of Knox County*, 111 Ind. 170, 12 N.E. 305 (1887), in which the court held that a county was not liable to a township for township funds embezzled by a county treasurer. Speaking of the treasurer in 111 Ind. at 174, the court said:

"His duties are prescribed by law, and in the exercise of his office he is in no way subject to the control of the county board [of commissioners]. He performs official duties for the State as well as for the county, and for every township and municipality within the territorial boundaries of the county. His duties are, therefore, not for the special or peculiar benefit of the county, nor for its interest, in any different sense than are they for the benefit or interest of the State, or the other municipalities in whose behalf the law requires the county treasurer to perform official service. He is a person selected in the manner prescribed by law, and has certain public functions to perform, which are all prescribed by statute and primarily laid upon him, and for the performance of which he is held civilly and criminally responsible. He is not, therefore, the agent of the county in respect to funds collected by him for townships; nor can the county be held answerable for his delinquency in the absence of an express statute making it liable." (Emphasis added.)

Similar decisions have been reached in other states. In *Territory v. Bachford*, 2 Ariz. 246, 12 P. 271 (1887), it was decided that a shortage of a county treasurer who held both territorial and county funds should be absorbed proportionately by the territory and by the county rather than the full loss being borne by the county. In *State v. Milwaukee*, 145 Wis. 131, 129 N. W. 1101, Ann. Cas. 1912 A 1212 (1911), the court held that a complaint filed by the State of Wisconsin
against the City of Milwaukee and the County of Milwaukee alleging only that the treasurers of those governmental units had collected fines but had not paid those fines over to the state was subject to demurrer. In subsequent proceedings (reported in 138 N. W. at 1006 and 149 N. W. at 578) it was pleaded and proved that the moneys involved were received and actually used for legitimate municipal purposes by the city and the county, and the state recovered judgment.

Thus, the county treasurer is not truly an agent of the county nor of any other governmental unit. He is, instead, a public officer who is statutorily given certain duties in relation to the collection and disbursement of funds. It therefore follows that the treasurer’s semi-annual settlement, whether with the county auditor or the Treasurer of State, is his personal settlement rather than the settlement of any governmental unit or other public official. It is the county treasurer’s report of his performance of the governmental duties imposed upon him by state law. If he has fully performed those duties, he is entitled to his quietus.

Among those duties is his duty to pay warrants drawn by the county auditor. He has discharged his duty when, in good faith, he pays a warrant valid on its face that is either wrongfully issued or issued in an amount greater than the amount in which it should have been issued. Whenever he in good faith pays a warrant valid on its face he is entitled to credit therefor at the proper semi-annual settlement. Thus it seems inescapable that the State Auditor should issue his quietus to a county treasurer who presents the State Treasurer’s receipt for “all money due for state purposes, as shown by the certificate of settlement [between a county auditor and a county treasurer].”

Fifth. There can be no question that the Auditor of State should take whatever action is proper to recover for the State Treasury all over-payments to special judges from all persons and entities that might be liable for such over-payments. The question, of course, is what constitutes proper action.

Your question suggests as a possible action the withholding from the county those sums due to be distributed to the
county by the Auditor of State until such time as the county tenders to the state the overpayments made to special judges in that county.

That question is one that has never been answered by Indiana courts, either specifically or by implication in a decision of any analogous question. However, consideration of somewhat related decisions in the courts of other states may indicate the probable answer if the question were to be litigated in Indiana.

In *State v. Ferguson*, 133 Ohio State 325, 13 N.E.2d 723 (1938), an Ohio statute authorizing the Auditor of State to withhold sales tax distribution to counties indebted to the state was held constitutional. This decision is not pertinent the instant problem inasmuch as Indiana has no statute specifically authorizing the Auditor of State to withhold distributions, but it does indicate that the problem might be resolved by proper legislative action.

In a number of jurisdictions it has been held that the Auditor of State does not have the authority to withhold various distributions. See *San Benito County v. Riley, State Controller*, 88 Cal.App. 131, 263 P. 349 (1927); *Posados v. City of Manila*, 274 U.S. 410, 47 S.Ct. 704 (1927); *State v. Hastings*, 11 Wis. 471 (1860). These cited decisions are based on the reasoning that the distributions are to be made under certain stated conditions and that they are therefore legislative appropriations and cannot be withheld without proper legislative authority.

In one jurisdiction, Michigan, the decided cases have had the practical result of permitting the Auditor of State to withhold distribution moneys. *Ottawa County v. Alpin, Auditor General*, 69 Mich. 1, 36 N.W. 702 (1888); *People v. Van Tassel*, 73 Mich. 28, 40 N.W. 847 (1888); *Sumeracki v. Stack*, 269 Mich. 169, 256 N.W. 843 (1934). The cited Michigan cases hold that a suit by the county to mandate the distribution is a suit against the state without the consent of the state and thus not subject to adjudication. However, the court in the *Ottawa County* case did state “We think the state had the right to withhold the money due the county so long as the county is shown to have been indebted to the state”
for the reason "This is but just between the county and the state."

Thus, in the majority of instances, other jurisdictions have maintained that the Auditor of State is not empowered to withhold distributions from local governmental units. In the one instance where withholding was deemed proper (Ottawa County), it was so deemed because the county had been shown to be indebted to the state and it would be inequitable or unfair to require the state to fulfill its fiscal obligation to a county when the county refuses to discharge its fiscal obligation to the state. The justification, then, is that the state has the right to exercise a set-off against the county.

When a set-off and some limitations on its applications to transactions between a commercial bank and its depositors, as set forth in the following quotation from *Teeters v. City Nat'l Bank*, 214 Ind. 498, 501, 14 N.E.2d 1004, 1005, 118 A.L.R. 383 (1938), would appear to be helpful to a determination of whether a set-off involved is the question at hand. There the court said:

"That a bank may ordinarily charge a borrower's deposit with a due note is not to be questioned. The right existed at common law and is now clearly recognized by statute in the Negotiable Instruments Act. Section 19-618 Burns' Ann. St. 1933, § 12904 Baldwin's 1934. The basis of the right, whether viewed from the standpoint of the common law or of the statute, is the same. It finds its justification in the doctrine of set-off, that is, the right which exists between two persons, each of whom, under an independent contract, express or implied, owes an ascertained amount to the other, to set off their mutual debts by way of deduction, so that in an action brought for the larger debt, the residue only, after such deduction, may be recovered. State v. Beach (1897), 147 Ind. 74, 90 46 N.E. 145; 9 C.J.S., p. 616, note 64. It is familiar law, however, that mutuality is essential to the validity of a set-off, and that, in order that one demand may be set off against another, both must mutually exist between the same parties. *Proctor v. Cole* (1886), 104 Ind. 373, 3 N.E.
106, 4 N.E. 303. Accordingly, it is settled that a bank can claim no lien upon the deposit of one partner, made on his separate account, in order to apply it on a debt due from the firm, nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal and the other sureties, or unless it becomes necessary in order to do complete equity or avoid irremedial injustice. *Lamp, Receiver v. Morris* (1889), 118 Ind. 179, 20 N.E. 746. 'When a note payable at a bank is signed by three persons one of whom has an account at the bank, it may well be said that the bank has no power to transfer money deposited by one of the makers to the payment of the note without the depositor's consent.' *Bedford Bank v. Acoam* (1890), 125 Ind. 584, 588, 25 N.E. 713." (Emphasis added.)

Unless, therefore, the county is indebted to the state for the overpayment to the special judge (which is to say, under a legal obligation to reimburse the state for the overpayment) there would seem to be no basis for applying the doctrine of set-off in justification of withholding by the Auditor of State. In other words, unless the state could sue the county and recover judgment against the county, the State Auditor would have no justification for not distributing to the county all state revenue to which the county is otherwise entitled. Conversely, unless the existence of the overpayment as a credit against state revenue on the county treasurer's report would constitute a defense to a mandate action against the Auditor of State to draw his warrant for distribution of said aid funds to the county, such overpayment would not legally justify the Auditor of State in withholding the distribution, wholly or partially.

In my preceding discussion of the capacity in which the county treasurer acts in paying the warrant compensating the special judge out of county funds for the time being and in making his settlement with the Treasurer of State, I have pointed out that the county treasurer is performing a duty which he owes the state and not a duty the county owes the state. I have also pointed out that the county treasurer is en-
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titled to credit for the full amount he has paid on the warrant, even though the auditor erred in drawing it for the full amount "ordered" by the regular judge, and that the only place he can get that credit is on his semi-annual settlement with the Treasurer of State. This credit to the county treasurer against state revenue which he would otherwise be required to pay over to the Treasurer of State results in (or is the result of) the county's having credit for the full amount advanced by it to pay the draft in the first instance. And if there is any liability, obligation, or debt owed by the county to the state, it arises out of this credit to the county or out of the county auditor's error in drawing the warrant for the excessive sum.

It was seen in the preceding review of State v. Milwaukee, supra, [145 Wis. 131, 129 N.W. 1101, Ann. Cas. 1912 A 1212 (1911)]; Territory v. Bachford, supra, [2 Ariz. 246, 12 P. 671 (1887)]; and Vigo Township v. Board of Comm'rs., supra, [111 Ind. 170, 12 N.E. 305] that a county is not liable to another unit of government for the malfeasance or non-malfeasance of a duty to that other unit of government which the law has imposed on a county officer. The Vigo Township case, supra, having never been overruled or its rationale questioned in Indiana, there is no basis for finding that the county owes any obligation to the state because the county auditor erred in drawing the warrant.

It, therefore, appears that the Auditor of State has no authority to withhold distributions to a county for the sole reason that special judges appointed in that county have been paid in excess of the statutory amount.

This does not mean that such money is necessarily lost by the state. The Auditor of State can demand repayment from the overpaid special judge, and if payment is refused the matter may be referred to the Attorney General for his consideration as to whether he should proceed under the powers and duties conferred upon him by Acts 1941, ch. 109, § 6, the same being Burns §-49-1024, against the recipient of the overpayment. This is the procedure that was followed in City of Columbus v. Rynerson, supra, discussed in response to your first question.
Furthermore, if the overpaid special judge happens also to be a regular judge on the state payroll, the Auditor of State can withhold issuance of one or more monthly salary warrants until the overpayment is refunded to the state. This procedure has been held proper in other situations.

In *State ex rel. Black v. Burch*, on rehearing, 226 Ind. 489, 81 N.E.2d 850 (1948), a State Representative resigned shortly after the 1947 regular session of the Indiana General Assembly, and accepted employment in an administrative department of the state government. The statutes regulating the payment of legislators at that time scheduled salary payments in such a manner that in those years wherein a regular session was held the legislators would receive their entire annual salary prior to the end of the session. Thus, although he resigned in March, the legislator had received his entire salary for the year. The Auditor refused to pay the resigned legislator for his service in the administrative branch. The court said:

“Section 49-1809 Burns’ 1933, dealing with the powers and duties of the Auditor of State among other things provides: ‘. . . the auditor shall examine, with care, every demand and claim presented for payment, and shall be satisfied that every claim is just, legal, and unpaid, before he shall allow, audit, or countersign it.’ This provision is broad enough to justify the auditor in refusing to issue a warrant for money owing to one who in turn is indebted to the state, as was the case here. To compel the auditor so to do would deprive the state of its right to set off.”

The same conclusion was reached in *State ex rel. Slenker v. Burch*, 226 Ind. 579, 82 N.E.2d 258 (1948).

It is my opinion that it is your duty to withhold payment of salary from any regular judge who has been overpaid as a special judge and who, after demand, has failed to refund all overpayments. I see no reason to withhold all future payments, but only so many monthly warrants as may be necessary to equal or exceed the amount of the judge’s indebtedness to the state.
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To summarize, it is my opinion that:

1. A special judge who presides in more than one case in the same court on the same day is entitled to compensation of only $25.00, but if the special judge is also the regular judge of another court situate in the same county or city he is entitled to no compensation.

2. A special judge who presides in two or more courts on the same day is entitled to compensation of $25.00 for each such court (with the exception noted above as to regular judges serving in another court in the same city and county).

3. County auditors have the right and duty to refuse to issue warrants to pay compensation allowed to special judges by court order in excess of the lawful amount. When an order allowing excessive compensation to a special judge is presented to a county auditor, he should refuse payment and notify the Auditor of State, Attorney General, county attorney, and county commissioners.

4. County treasurers who pay warrants drawn by the county auditors to pay special judges are entitled to credit therefor on their semi-annual settlements with the Treasurer of State regardless of whether the county auditor was justified in drawing the warrant. As to the county auditor, however, the settlement cannot be approved if the amount of any such warrant exceeds the sum to which the special judge is lawfully entitled.

5. It is the duty of the Auditor of State not only to disapprove, as to the county auditor, settlements which include credits for excessive payments to special judges, but also to make a reasonable effort, by any lawful means available to him, to attempt to bring about repayment to the state treasury of the excess paid to any special judge. The withholding of distribution to the county of state collected revenue is not a lawful means of coercing such repayment. The following means, however, are available to him:

   a. He may demand repayment from the overpaid special judge and if that fails, refer the matter to the Attorney General to consider the advisability of legal action against such special judge or against the county auditor, or both, such actions.
b. He may withhold state salary payments from regular judges who fail, after demand, to refund to the state over-payments made to them for acting as special judges in other courts.

OFFICIAL OPINION NO. 39

November 18, 1968

PUBLIC WELFARE—Implementation of the Work Incentive Program—Recipients of Aid to Families with children benefits as eligible.

Opinion Requested by Mr. William R. Sterrett, Acting Administrator, Department of Public Welfare.

You have asked me whether the State Department of Public Welfare may, without specific Indiana enabling legislation, implement the Work Incentive Program (hereinafter referred to as “WIN”) created by the 1967 Amendments to the United States Social Security Act.\(^1\) The WIN program would be performed in cooperation with the Indiana Employment Security Division and the federal government, and financed primarily by federal funds, with state contributions also required.

Although WIN itself is a new program, § 204(b) of the 1967 Amendments adds subparagraph (19) to § 402(a) of the Act.\(^2\) That subparagraph requires states to refer qualified recipients of Aid to Families with Dependent Children (hereinafter referred to as “AFDC”) to the WIN program. Subparagraph (19) became effective July 1, 1968, in any state in which a state statute does not prevent the state from com-

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\(^1\) § 204(a) of Pub. L. 90-248, 81 Stat. 884 to 889, adding Part C to Title IV of the Act, §§ 430 to 444, 42 U.S.C. §§ 630 to 644.

\(^2\) 42 U.S.C. § 602(a).