islature intended the deposits in such banks to be invested in government bonds, mortgages, and properly secured commercial paper. Realizing that the opportunity for such investments does not always exist, the Legislature provided that savings banks may make short-term loans rather than let the money deposited remain idle. However, no more than twenty percent of the deposits can be used for making loans, any individual loan must be repayable within twelve months, and all loans must be properly secured by bonds, stocks or other securities, life insurance policies, or farm produce or equipment. Since no provision is made for the charging of interest on, or the schedule of repayment of, such loans (other than the twelve-month restriction), savings banks may follow the provisions of the Installment Loan Act relating to those subjects. The restrictions placed on the power of savings banks to engage in the business of making installment loans can only be changed by legislation.

OFFICIAL OPINION NO. 56

December 28, 1967

OFFICERS, COUNTY—Obligation to Furnish Legal Defense in Civil Actions Where Officers Are Performing Official Duties.

Opinion Requested by Hon. Richard C. Bodine, House Minority Leader, General Assembly.

This is in response to your request for my Official Opinion regarding the responsibility of counties to provide a defense in civil suits against county sheriffs and their deputies under the "Civil Rights" statutes, 42 U.S.C., §§ 1981 through 1995. More specifically you ask the following questions:

"1. Is there any obligation on a County to furnish a legal defense to members of its police department who are sued in civil actions for damages arising out of activities performed while acting within the scope of their official duties?

"2. If so, what is the nature and extent of such obligation?

"3. From what source does the expense of such obligation come and, should the County Prosecutor or County Attorney or neither, represent the County and/or defendants in such cases?"

Before answering these questions I will discuss the somewhat preliminary and subsidiary question of whether the county itself is subject to suit.

Regarding the liability of counties under the "Civil Rights" statutes, 42 U.S.C., § 1983, reads as follows:

> "Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979." (Emphasis added.)

It has been held that counties may not be sued under the "Civil Rights" Act for the actions of its officers or agents. The basis of these decisions is that a county or other political subdivision of a state is not a "person" under 42 U.S.C., § 1893, *supra. Monroe v. Pape,* 365 U.S. 167 (1961); *Egan v. City of Aurora, Illinois,* 365 U.S. 514 (1961).

Aside from the "Civil Rights" Act, it has been held that a county, which is a political subdivision of the state, exercises the powers delegated by the state and is not liable for the tortuous acts of omissions of its officers or agents even when engaged in the performance of their duties, unless a

right of action is given by statute. *State v. Board of Comm'rs,* 170 Ind. 595, 85 N.E. 513 (1908); *Board of Comm'rs v. Allman,* 142 Ind. 573, 42 N.E. 206 (1895). In the case of *McDermott v. Board of Comm'rs,* 60 Ind. App. 209, 212, 110 N.E. 237 (1915), the court stated:

> "The law seems to be well settled as a general proposition that a county is not liable any more than a state would be liable for the negligence of its agents or officers, in the absence of a statute creating liability. (citing authority)"

In the recent case of *Brinkman v. City of Indianapolis,* — Ind. App. —, 231 N.E. 2d 169, 12 Ind. Dec. 96 (1967), the Appellate Court abrogated the application of the doctrine of sovereign immunity to municipal corporations. However, because of the language employed in that decision and because of the differences inherent in the relationships of cities to policemen and counties to sheriffs, I do not believe this case extends to counties and county sheriffs.

Further, it appears that the sheriff may not be sued in tort in his official capacity as sheriff, i.e., as an agent of the county. This was explained in the case of *State ex rel. Penrod v. French,* 222 Ind. 145, 150, 51 N.E. 2d 858, 149 A.L.R. 1084 (1944), when the Court said:

> "Fleming French, in his capacity as sheriff of Wells County, could not be liable on the sheriff's bond. He as an individual executed this bond as principal to guarantee that he would faithfully discharge his duties as sheriff.
>
> "The bond constituted a contract between him as an individual and the State for the benefit of any one who might suffer damage by reason of his failure to faithfully discharge his duties as sheriff. *His breach of the conditions of the bond could only result in liability against him in his individual capacity, not against him in his official capacity as sheriff. A judgment for damages against him in his capacity as sheriff would amount to a judgment against the office and the funds of the office. He might be sued as sheriff,*

> *that is in his official capacity, to recover property which he held as sheriff, but for any official nonfeasance, misfeasance or malfeasance he could only be sued as an individual. This is true whether the action be a tort action or an action on his bond. . . .*" (Emphasis added.)

Under the authority above the answer to your first and second questions must be that there is no obligation on the part of the county to defend such actions. In answer to your third question, since there is no obligation, neither the county prosecutor nor county attorney is obligated to defend such actions.

Your questions impliedly raise one additional question: "May" a county provide such a defense?

It may be stated as a general proposition that a county may not dispense county funds without an appropriation, and an appropriation may not be made without authorization therefor.

The County Reform Act of 1899, Burns § 26-515, states in part:

> ". . . the power of making appropriations of money to be paid out of the county treasury shall be vested exclusively in such council, and, except as in this act otherwise expressly provided, *no money shall be drawn from such treasury but in pursuance of appropriations so made.*" Acts 1899, ch. 154, § 15, p. 343. (Emphasis added.)

Regarding the making of payments from such appropriations, Burns § 25-529, states:

> "Except as to payment of the salary of councilmen herein specifically provided for, this act shall not be construed as authorizing the appropriation of any money to be paid out of the county treasury, or the *drawing* of any warrant therefor, or payment of any money out of such treasury, for any purpose

> whatever for which such payment out of the county treasury is not authorized by law other than this act. The intent of this act is to place limits and checks upon payments out of such treasury, and not to extend or increase them." Acts 1899, ch. 154, § 29, p. 343. (Emphasis added.)

In construing this section, the court in *Applegate v. State ex rel. Pettijohn,* 205 Ind. 122, 126, 185 N.E. 911 (1933) said:

> "Section 29 of the County Council Act . . . provides that the Act shall not be construed as authorizing the appropriation of any money to be paid out of the county treasury for any purpose whatever unless authorized by law, and that the purpose of the Act is to place limits and checks upon payments out of the treasury, and not to extend or increase them. . . .
>
> "To construe the quoted provisions as a grant of power to the county council to provide salaries for any and all deputies which the county officers might see fit to appoint, would be to do violence to the language of the statute and to the policy of the Legislature as manifested in all of its enactments."

For further in regard to a county's power to appropriate money, see *Harney v. The Indianapolis, C. & D.R.R.,* 32 Ind. 244 (1869).

There is no express statutory authority for a county to appropriate or pay money to defend a county police officer in a civil action for damages. Since a county is not liable for the torts of its agents *(McDermott v. Board of Comm'rs, supra)* and since a sheriff must be sued as an individual *(State ex rel. Penrod v. French, supra)* it would seem to follow that there is no implied authority for such an appropriation or payment.

The prosecuting attorney of a county is a constitutional officer. Indiana Constitution Art. 7, Sec. 11. His powers and duties are derived from the Constitution and statutes.

> ". . . the prosecuting attorney's duties are concerned with representing the State of Indiana as an attorney at law, primarily in criminal matters, although there are many statutes requiring him to perform duties with reference to the practice of law in various fields, both civil and criminal. . . ." *State ex rel. Indiana State Bar Ass'n. v. Moritz,* 244 Ind. 156, 159, 191 N.E. 2d 21, 1 Ind. Dec. 455 (1963).

Under authority already cited, there would be no authority for paying a prosecuting attorney out of county funds for such a defense, or for allocating part of his time and salary for such purposes. Further, the basis of the civil suit for damages may be the basis for a criminal action. There would be a clear conflict in these circumstances.

Regarding county attorneys:

> ". . . The position of county attorney involves a contract of employment between such an attorney and the board of county commissioners. The terms of such employment and the duties to be performed thereunder are governed by contract. . . ." 1964 O.A.G. p. 51.

As stated above, there is no authority for a county to pay for such a defense, therefore, the contract of employment with the county attorney could not expressly or impliedly permit paying the county attorney for such a defense, absent authorizing legislation. There would be nothing to prevent a county attorney from defending such actions in his *private capacity as a lawyer*; however, he would not be functioning in his capacity as county attorney in such a situation.

By way of summary and conclusion, a county has no obligation to defend sheriffs or their deputies, or both, in civil law suits for their negligent acts; a county has no power to appropriate or pay money for such a defense; a prosecuting attorney is without authority to make such a defense, and there is no authority for paying a county attorney for making such a defense. Because of the expanded area of

liability of police officers enunciated in *Monroe v. Pape, supra,* in relation to the Federal Civil Rights Act, 42 U.S.C. § 1981, and the recent Indiana case of *Brinkman v. City of Indianapolis, supra,* which is a complete departure from previous Indiana precedents, it becomes rather obvious that legislation to provide counsel for police officers in tort or related actions must be considered by the General Assembly.

OFFICIAL OPINION NO. 57

December 28, 1967

TAXATION—Special Benefits Tax Levied by Conservancy District—As Required to be Imposed Upon All Real Estate in District.

Opinion Requested by Mr. Richard L. Worley, Chief Examiner, State Board of Accounts.

This is in response to your request for my Official Opinion in answer to two questions concerning Acts 1957, ch. 308, (Burns (1960) §§ 27-1501 through 27-1599) as last amended by Acts 1967, ch. 231, which provides for the creation of conservancy districts and for the levy (only upon real estate) of both a "special benefits tax," imposed at a uniform rate, and the assessment of "exceptional benefits" which may be levied in addition to the said "special benefits tax." The two questions which are presented by your letter are as follows:

> "1. Is the 'special benefit tax' provided for in the act relating to conservancy districts, Burns 27-1501 et seq., required to be imposed upon the 'gross' assessed valuation of real estate or upon the 'net' as-