OPINION 12

OFFICIAL OPINION NO. 12

June 30, 1966

STATE BOARD OF ACCOUNTS—Entitlement of Certifying Officer to Certification Fee for Convictions under Motor Vehicle Code.

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

This is in response to your letter in which you requested an Official Opinion answering the following questions:

> "1. What effect will Section 18, Chapter 350, Acts 1965 have upon Burns' Indiana Statutes, Section 47-1052(d) and the proviso in Section 47-1048(e)?
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> "2. If the two (2) sections, supra, are affected by the 1965 amendment, will the person certifying the abstract under both sections be entitled to retain the 25¢ fee?"

Acts 1965, ch. 350 (hereinafter referred to as the "1965 Fee Act"), is an omnibus statute changing specified fees, penalties, charges and rates of eighteen [18] different boards and agencies of the state government without specific reference to or repeal of the statutes theretofore governing such fees. Section 18 of that Act, the same being Burns IND. STAT. ANN., § 47-1052(b), reads as follows:

> "Department of Motor Vehicles—Operator's Record Fee. The following fees shall be collected by the clerk of a court or the judge of a court which has no clerk on behalf of the Commissioner of Motor Vehicles:
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> "Upon the conviction of any person for any offense which authorizes or requires the clerk of a court or

the judge of a court which has no clerk, to certify an abstract of the record of such conviction to the commissioner or the department, a certification fee of twenty-five cents (25¢) shall be taxed by the court as a part of the costs against the defendant and in favor of the party authorized or required to make such certification and a permanent operator's record fee of two dollars ($2.00) shall be so taxed by the court as a part of the costs against the defendant and in favor of the commissioner, and the suspension of either of these fees by the judge shall mean the suspension of both. *The certification fee of twenty-five cents (25¢) shall become the property of the officer making the certification* and the permanent operator's record fee of two dollars ($2.00) taxed in favor of the commissioner shall be paid over to the commissioner upon due demand and receipt therefor. When the commissioner shall have collected any such permanent operator's record fee, he shall forthwith pay the same into the general fund." (Emphasis added.)

Your first question concerns the effect, if any, of this statute on two sections of Acts 1947, ch. 159, as amended (hereinafter referred to as the "Motor Vehicle Act"). Section 18 of the 1965 Fee Act, as quoted above, is identical to § 9(d) of the Motor Vehicle Act as last previously amended by Acts 1963, ch. 283, § 1, except that the amount of the commissioner's fee is increased by the 1965 Fee Act, and an introductory paragraph has been added.

The 1965 Fee Act is an original act. An original act which is in irreconcilable conflict with a prior statute amends or modifies the prior statute to the extent of the conflict. *Wright-Bachman, Inc. v. Hodnett,* 235 Ind. 307, 320, 133 N.E. 2d 713, 719 (1956); *Watson v. Strohl,* 220 Ind. 672, 681, 46 N.E. 2d 204, 207 (1943); see also *State v. Larue's, Inc.,* 239 Ind. 56, 154 N.E. 2d 708 (1958). Since § 18 of the 1965 Fee Act is in irreconcilable conflict with § 9(d) of the Motor Vehicle Law as last previously amended only to the extent that it prescribes the amount of the commissioner's fee, § 9(d) of the latter act is amended by § 18 of the 1965 Fee Act as to the amount of

the commissioner's fee, and is re-enacted in other respects by the 1965 Act.

The other section of the Motor Vehicle Act to which your first question refers is § 5(e), as last amended by Acts 1951, ch. 74, § 3, as found in Burns IND. STAT. ANN., § 47-1048 (e). It reads as follows:

> "(e) For the purpose of this act the term 'conviction' shall mean, conviction upon a plea of guilty or the determination of guilt by a jury or by a court though no sentence has been imposed or if imposed has been suspended and it includes a forfeiture of bail or collateral deposited to secure appearance in court of the defendant unless the forfeiture has been vacated. Provided, however, That the payment of money by any person as a penalty or as costs in accordance with any agreement between a moving traffic violator and a traffic violations bureau, commonly termed 'Cafeteria Court,' shall also be construed as being a conviction for the purposes of this act and *duties prescribed in the act to be performed by the clerk of a court shall be performed by the official or board charged with the administration of such traffic violations bureau.* The fee of twenty-five cents [25¢] shall be paid into the general fund of the municipality in which such traffic violation bureau is located." (Emphasis added.)

This section of the Motor Vehicle Act applies only to fees collected by the administrator of a traffic violations bureau who is to perform duties "prescribed in the act to be performed by the clerk of a court." As explained in 1962 O.A.G. 213, No. 42, at 218-220, such a bureau is not a court, but an agency of the city government created to compromise civil claims. The first paragraph of § 18, of the 1965 Fee Act limits its application to fees collected by "the clerk of a court or the judge of a court which has no clerk." Since no judge or clerk of a court may collect fees for the traffic violations bureau, the two sections are mutually exclusive as to disposition of the certification fees collected, and fees collected by said administrator pursuant to the section quoted above shall continue to be paid into the general fund of the municipality in

which such traffic violations bureau is located, and shall not become the property of the administrator.

Therefore, the answer to your first question is that § 18 of the 1965 Fee Act amends one portion of and re-enacts the remainder of § 9(d), as amended, of the Motor Vehicle Act, but does not affect § 5(e) of the Motor Vehicle Act, Burns IND. STAT. ANN., § 47-1048(e). Since the latter section is not affected by § 18 of the 1965 Fee Act, it need not be considered in answering your second question.

Section 18 of the 1965 Fee Act does re-enact that portion of the prior statute which provides that the twenty-five cent [25¢] certification fee shall become the property of the clerk of a court or the judge of a court without a clerk who makes a certification. However, the trend of legislation in recent years concerning fees and salaries of public officers has been to provide salaries in lieu of fees to cover all duties of a public officer. As early as 1891, the fee system of paying county officers became "intolerable" to the citizens. *Harter v. Board of Comm'rs,* 186 Ind. 301, 116 N.E. 304 (1917). The effect of legislation eliminating fees upon § 18 of the 1965 Fee Act must be considered.

The language contained in § 18 of the 1965 Fee Act concerning the disposition of certification fees is an identical re-enactment of the language contained in the 1949 amendment to § 9 of the 1947 Motor Vehicles Statute, Acts 1949, ch. 274, § 4:

> ". . . The certification fee of twenty-five cents shall become the property of the officer making the certification. . . ."

Such language was re-enacted by Acts 1951, ch. 74, § 4; Acts 1953, ch. 65, § 1; Acts 1953, ch. 196, § 1; Acts 1963, ch. 283, § 1. Each of these amendatory acts, including the 1965 original act, made a change or changes in other portions of the amended section.

Article 4, § 19, of the Constitution of the State of Indiana as amended, requires that no section or subsection of an act shall be revised or amended unless it is set forth and published at full length. Therefore, any amendatory statute must repeat

any language from the amended section or subsection which the Legislature desires to retain, as well as recite the changed portion. The Supreme Court has decided that any particular portion of an amended statute is effective as of the date it first became a part of the statute.

> "The recital in this manner, in an amendatory act, of language contained in the act amended, does not show a legislative intent to make any change in the law as expressed by the language so re-enacted; but the unchanged portions of the statute are continued in force, with the same meaning and same effect after the amendment that they had before. *Worth v. Wheatley* (1915), 183 Ind. 598, 604, 108 N.E. 958; *State v. Kates* (1897), 149 Ind. 46, 48, 48 N.E. 365; *Holle v. Drudge* (1920), 190 Ind. 520, 129 N.E. 229, 230.
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> " 'So far as the section is changed (by amendment) it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the mere nominal re-enactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since the first enactment. . . . The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along.' Sutherland, Statutory Construction (2d ed.) § 133. 'By observing the constitutional form of amending a section of a statute the legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated. Any other rule of construction would surely introduce unexpected results and work great inconvenience.' *McLaughlin v. Newark* (1894), 57 N.J. Law 298, 301, 30 Atl. 543, 544."
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> *Thompson v. Mossburg,* 193 Ind. 566, 574, 139 N.E. 307, 310 (1923). See also 1953 O.A.G. 228, No. 48.

Following that rule, the provision specifying the disposition of the certification fee in the Motor Vehicle statute, first enacted in the 1949 amendment and re-enacted through 1965,

remains effective as of 1949. The Supreme Court has decided that any intervening statute which modifies a provision of a prior statute continues to modify that provision of the statute as re-enacted subsequent to the modifying statute.

> "It is a fundamental rule of statutory construction that where a later statute re-enacts the provisions of an earlier statute, it does not repeal or change the effect of an intermediate act which has qualified or limited the earlier enactment. Rather, the intermediate act will be deemed to remain in force and to qualify or modify the new act, in the same manner as it did previously. This court considered the present question in the case of *Public Serv. Comm'n v. City of Indianapolis* (1922), 193 Ind. 37, 49, 137 N.E. 705. In that case this court stated:
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> > " '. . . And where a later statute merely re-enacts the provisions of an earlier one, it does not repeal an intermediate act which has qualified or limited the earlier one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first. 1 Sutherland, Statutory Construction (2d Ed.) § 273; Endlich, Interpretation Statutes, § 194.' "
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> *State ex rel. Palmer v. Hendricks Cir. Ct.*, 244 Ind. 297, 301, 302, 192 N.E. 2d 625, 627, 2 Ind. Dec. 63, 66 (1963).

Therefore, it must be considered whether salary statutes eliminating fees for various officers have modified the pertinent provision of § 9(d) of the Motor Vehicle Act effective in 1949 and as last re-enacted in the 1965 Fee Act.

Chapter 319, Acts 1957 (hereinafter referred to as the "County Officers' Salary Act"), fixes salaries of county and circuit officers. The salary of the clerk of the circuit court is established in § 6, as found in Burns IND. STAT. ANN., § 49-1058 and in § 3 of that act, as amended by Acts 1965, ch. 400, § 1, Burns § 49-1055. The latter section reads in part as follows:

> "The annual salaries fixed by this act shall be in full for all services and in lieu of all fees, per diems, penalties, fines, interest, costs, forfeitures, commissions, percentages, allowances, mileage, and any and all other remuneration whatsoever for official services or involving official authority except as herein otherwise provided. . . ."

The 1965 amendment did not change this language. Section 16 of the act, as amended by Burns IND. STAT. ANN., § 49-1068, Acts 1959, ch. 270, § 1, expresses the legislative intent to abolish the "fee system" with respect to the officers covered by the statute:

> "It is the intent of this act that all fees, per diems, penalties, costs, interests, forfeitures, percentages, commissions, allowances, mileage, and any and all other remuneration of whatever kind or character now received by all officers included in this act for official services, or involving official authority, except as herein otherwise provided, shall be collected, accounted for and paid into the county general fund: . . ."

When the County Officers' Salary Act became effective on January 1, 1958, it clearly conflicted with the Fee Section of the Motor Vehicles Act, Burns IND. STAT. ANN., § 47-1052 (d), as last previously amended by Acts 1953, ch. 196, § 1.

It is obvious that a particular fee could not at the same time become the property of the circuit clerk making the certification pursuant to the Fee Section of the Motor Vehicles Act and also be collected, accounted for and paid into the county general fund pursuant to § 16 of the County Officers' Salary Act. The Legislature clearly intended that all provisions for fees in force at that time and in conflict with the County Officers' Salary Act should be repealed by the latter act. Therefore, the County Officers' Salary Act repealed the provision in the Fee Section of the Motor Vehicles Act which provided that the certification fee become the property of a county clerk who certified the abstract. As previously shown, the re-enactment of the language concerning the disposition of certification fees in § 9(d) of the Motor Vehicle Act after

1957 and through the 1965 Fee Act did not modify the County Officers' Salary Act, and certification fees collected by circuit clerks pursuant to the Fee Section of the Motor Vehicle Act are not the property of the clerk as stated therein.

In cities of the first class, city courts have been abolished, Acts 1925, ch. 194, § 27, Burns IND. STAT. ANN., § 4-2527, and a municipal court has been established. Pursuant to § 8 of that statute, Burns § 4-2508, the clerk of the circuit court acts as clerk of the municipal court, and the County Officers' Salary Act would prohibit a circuit clerk serving as clerk of a municipal court from retaining the certification fee.

However, others besides circuit clerks serve as clerks of courts, and there are, of course, judges of courts without clerks who are not limited in their compensation by the County Officers' Salary Act. Statutes establishing salaries for them must also be considered.

In cities of the second class, the clerk of the city serves as clerk of the city court, Acts 1905, ch. 129, § 221, as amended by Acts 1927, ch. 133, § 1, Burns IND. STAT. ANN., § 4-2406. In both third and fourth class cities, since 1961 the judge of the city court may serve as clerk of the court. Acts 1905, ch. 129, § 215, as amended by Acts 1961, ch. 60, § 1; Acts 1965, ch. 265, § 1, Burns IND. STAT. ANN., § 4-2401. No provision for a clerk for the judge of fifth class cities has been found. In all cities of the second through the fifth class, the city clerk or clerk treasurer and the city judge, if any, must be elected by the voters. See Acts 1933, ch. 233, § 5, as last amended by Acts 1959, ch. 107, § 1, Burns IND. STAT. ANN., § 48-1215 (second class); Acts 1959, ch. 107, § 2, Burns IND. STAT. ANN., § 48-1216 (third class); Acts 1933, ch. 233, § 7, as last amended by Acts 1961, ch. 172, § 1, Burns IND. STAT. ANN., § 48-1217 (fourth class); Acts 1933, ch. 233, § 8, as last amended by Acts 1959, ch. 107, § 4, Burns IND. STAT. ANN., § 48-1219 (fifth class).

Since all city clerks and judges must be elected, their compensation must be determined pursuant to Acts 1933, ch. 233, § 20a, as added by Acts 1959, ch. 107, § 6, and as amended by Acts 1965, ch. 437, § 1, Burns IND. STAT. ANN., § 48-1233. Section 20b of the 1933 Act, as added by § 7 of the 1959

Act, Burns IND. STAT. ANN., § 48-1233a, reads in part as follows:

> "The salaries of the elected city officials as fixed by ordinance of the common council pursuant to the provisions of section 20a of this act shall be in full for all governmental services and lieu of all fees, penalties, fines, interests, costs, forfeiture, commissions and percentages."

Since the 1959 statute repealed the Fee Section of the Motor Vehicle Code then in effect to the extent that the latter statute provided that certification fees became the property of city clerks or clerk-treasurers serving as clerks of a court, or judges of courts without a clerk, pursuant to the rule previously explained, the 1965 Fee Act does not entitle a city clerk or clerk-treasurer or judge to retain abstract certification fees as his own property. Since the judge himself, when serving as clerk of the court in third, fourth and fifth class cities, is prohibited from retaining any fees collected, any clerk whom he might appoint would be subject to the same rule, and could not retain a certification fee.

The judge of any town court created by ordinance also acts as clerk and bailiff, and

> ". . . docket fees and other costs in both criminal and civil cases shall be collected and distributed in the same amounts and in the same manner as required by law and as collected and distributed by city courts." Acts 1905, ch. 129, § 215a, as added by Acts 1961, ch. 76, § 1, Burns IND. STAT. ANN., § 4-2423.

Since, as previously stated, the certification fees in city courts are not distributed to the clerk or judge of the court, but must be paid as otherwise provided by law, the fees collected by the town judge may not be distributed to him.

You have informed me that according to your records, a magistrate's court exists only in Marion County. The magistrate's court created pursuant to Acts 1939, ch. 164, § 1, in counties with a population of over six hundred and fifty thousand (650,000) was abolished and a new court created by

Acts 1965, ch. 433. Since that statute does provide for a clerk for the court, the judge may not retain the certification fee. Because the clerk of the circuit court is required to serve as clerk of the magistrate's court, see Acts 1965, ch. 433, § 3, Burns IND. STAT. ANN., § 4-3823, the clerk of the court may not retain the certification fee.

The 1965 Fee Act also, on its face, would authorize justices of the peace, or their clerks, if any, to retain the certification fees as their own property. However, the 1957 Legislature specifically required as to each criminal case before any justice of the peace:

> ". . . There shall be no other costs taxed in any criminal case except . . . a fee of twenty-five cents for certifying the abstract of the record of conviction relating to moving traffic violations as required by chapter 159, Acts 1947 as amended: Provided, that the abstract fee of twenty-five cents shall be collected for the benefit of the township; . . ." Acts 1957, ch. 322, § 14, Burns IND. STAT. ANN., § 5-1721.

This 1957 enactment repealed that part of the Fee Section of the Motor Vehicle Act, as last previously amended in 1953, which authorized justices of the peace to retain certification fees, and as previously explained, the 1965 Fee Act is subject to the same limitations as the 1953 amended section. Therefore, certification fees collected by justices of the peace or their clerks are collected for the benefit of the township and do not become the property of the justice of the peace or his clerk, if any.

In conclusion, it is my opinion that that portion of § 18 of Acts 1965, ch. 350, which provides that the certification fee of twenty-five cents (25¢) shall become the property of the officer making the certification has been repealed as to all officers making such certifications, and that no such officer may retain the certification fee as his own property.