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“Any state officer . . . or their appointees or agents . . . or any person holding a lucrative office under the constitution or laws of this state, who shall, during the time he may occupy such office or hold such appointing power and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any . . . public building or work of any kind, erected or built for the use of the state . . . or who shall bargain for or receive any percentage, drawback, premium, or profit or money whatever, on any contract, or for the letting of any contract . . . wherein the state . . . is concerned. . . .”

A member of the State Fair Board is a “state officer” within the meaning of this statute, in my opinion.

OFFICIAL OPINION NO. 26

November 29, 1966

**SECRETARY OF STATE—Licensing Collection Agencies
—Subjection of Foreign Corporations to Indiana
Statutes—Statute as Designed for Social,
Rather than Economic, Welfare
of State.**

Opinion Requested by Hon. John D. Bottorff, Secretary of State.

This is in response to your inquiries concerning the application of the Collection Agencies statute, Burns IND. STAT. ANN., § 42-1801, *et seq.*¹ to persons or corporations, foreign and domestic, offering a letter or written demand service on

¹ Acts 1937, ch. 92; Acts 1955, ch. 304; Acts 1965, ch. 350, § 8.

behalf of their customers demanding payment of delinquent accounts.

The facts submitted by you pertain primarily to the business operations in Indiana of Power's Service, Inc., a Delaware corporation with its principal office located in Chicago, Illinois.

Power's provides, for a stated sum or flat fee, a letter demand service to businesses for the collection of unpaid or delinquent accounts.

Solicitation of the service is by salesmen who directly contact the business. Orders are subject to acceptance by Power's at its Chicago office. The business then provides Power's with the names of the delinquent debtors. Power's in turn sends a series of six to eight letters from its Chicago office to the debtor demanding payment of the account. Payments by the debtor are made directly to the creditor. There is no assignment of the account to Power's. The solicitors are paid by Power's on a commission basis.

Power's has solicitors actively engaged on a continual basis in the solicitation of orders in Indiana from Indiana business concerns which has been the subject of complaints filed with your office.

Your inquiries raise the following three questions:

1. Whether persons offering a letter or written demand service on behalf of businesses for a stated sum demanding payment of delinquent accounts, without assignment of the account, are collection agencies under Burns IND. STAT. ANN., § 42-1801, and, therefore, subject to the licensing requirements of that statute.

2. Whether subjection of a foreign corporation who offers a letter demand collection service to the requirements of Burns IND. STAT. ANN., § 42-1801, *et seq.* constitutes a burden on interstate commerce under Art. 1, § 8, cl. 2 of the Constitution of the United States.

3. Whether the Federal Trade Commission under 15 U.S.C. § 45(a) has pre-empted state regulation of foreign corporations acting as collection agencies under the supremacy clause of Art. 6 of the Constitution of the United States.

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I.

PERSONS OFFERING LETTER DEMAND ARE COLLECTION AGENCIES

The first question raised by your inquiry is whether the offering by a person of a letter demand service for a stated sum constitutes acting as a collection agency under Indiana law.

This question must be answered in the affirmative. Burns IND. STAT. ANN., § 42-1801 (b) provides:

“The term ‘collection agency’ means and includes all persons engaging directly or indirectly and as a primary or secondary object, business or pursuit, in soliciting claims for collection, or in the collection of claims owed or due or asserted to be owed or due to another; the term ‘collection agency’ also means and includes, but shall not be limited to, any person who sells, furnishes or maintains a letter or written demand service, including stickers or coupon books, designed for the purpose of making demand on any debtor on behalf of any creditor for the payment of any claim wherein the person furnishing or maintaining such letter or written demand service, including stickers or coupon books, shall sell such services for a stated amount or for a percentage of money collected whether paid to the creditor or to the collection agency, or where such services may be rendered as a part of a membership in such collection agency regardless of whether or not a separate fee or percentage is charged. The term ‘collection agency’ shall also include, but not be limited to, any individual, firm, partnership or corporation who uses a fictitious name, or any name other than his or its name, in the collection of accounts receivable with the intention of conveying to the debtor that a third person has been employed.”

Section 42-1801 (b) is unequivocal in its terms and clear in its application. It is neither vague nor ambiguous. The licensing requirements apply to any person operating a letter demand service for creditors for a stated sum or to any person

using a fictitious name other than its own to demand payment by conveying the impression to the debtor that a third party had been employed for collection.

II.

COMMERCE CLAUSE

The next question raised by your inquiries is whether subjection of Power's to the licensing requirements of the Collection Agencies statute, Burns IND. STAT. ANN., §§ 42-1803, 42-1803a, and 42-1804, would constitute a burden on interstate commerce in violation of Art. 1, § 8, cl. 2 of the Constitution of the United States.

This question requires a negative answer.

The issue necessitates an analysis of the constitutional relationship of the police power of the State and the free flow of commerce among the United States. The relationship is predicated upon a finely delineated balance. Such an analysis was just recently required in 1965 O.A.G. 390, No. 75 in considering the power of states to regulate certain aspects of community antenna television systems (CATV) in light of the Commerce Clause. It was there determined that State regulation of CATV would only have an indirect and incidental effect on interstate commerce so as to have no repugnancy to the Commerce Clause.

Repugnancy has been most patent in state statutes or municipal ordinances imposing taxes, direct or indirect, on interstate commerce. In these so-called "drummer" cases, the Supreme Court has generally held the statute unconstitutional. *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887); *Nippert v. City of Richmond*, 327 U.S. 416, 90 L. Ed. 760 (1946); *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 96 L. Ed. 436, 72 S. Ct. 424 (1952).

This matter, however, does not involve the imposition of a tax. The statute here under consideration involves the police power with its purpose—the general welfare of the citizens through protection against invidious collection devices. Those engaged in debt collection in Indiana are required to be

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licensed and closely regulated, 1965 O.A.G. 25, No. 6, for protection of the citizen and not for the purpose of raising revenue. Similar regulatory legislation has been consistently upheld by the Supreme Court.

In *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 61 L. Ed. 480, 37 S. Ct. 217 (1917), the court upheld an Ohio statute requiring securities dealers to obtain a license under a procedure similar to that for obtaining a collection agency license in this matter. The court held that the licensing requirement had only an incidental effect on interstate commerce, saying the "prevention of deception is within the competency of government." 242 U.S. at 551.

The court in *Breard v. Alexandria*, 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 920 (1951) distinguished the tax cases from those involving a more purified application of the police power. The court said:

"When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana." 341 U.S. at 640.

The court in *Breard* upheld a municipal ordinance making door-to-door solicitation a criminal nuisance in the absence of permission by the property owner.

The Supreme Court has likewise upheld state statutes aimed at protection of the citizens' health though an incidental burden was placed on interstate commerce. *Hartford Acc. & Indem. Co. v. Illinois*, 298 U.S. 155, 80 L. Ed. 1099, 56 S. Ct. 685 (1936); *Savage v. Jones*, 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715 (1912).

Justice Hughes, speaking for the court in *Savage*, said:

"The state cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce . . . But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may inci-

dentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority." 225 U.S. at 524, 525.

This principle was reiterated by the court in *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963) and *Eli Lilly & Co. v. Sav-On-Drugs*, 366 U.S. 276, 6 L. Ed. 2d 288, 81 S. Ct. 1316 (1961).

Burns §§ 42-1803, 42-1803a, 42-1804 and 42-1805 were obviously enacted for the purpose of protecting the citizens of Indiana against devious and fraudulent collection practices. That purpose is a valid subject of the police power. The subjection of foreign corporations engaged in a *modus operandi* similar to that of Power's does not impose an undue burden on interstate commerce. A burden, yes, but one having only an indirect and incidental effect on interstate commerce.

III.

FEDERAL PRE-EMPTION

The question arises from your inquiries as to whether Congress has pre-empted State regulation of collection agencies in several states through 15 U.S.C. § 45(a). The question essentially becomes one of whether Federal Trade Commission regulation of certain collection agency practices under § 45(a) conflicts with Indiana regulation by the Secretary of State under Burns § 42-1801, *et seq.*, *supra*.²

The F.T.C. has made a limited regulatory application of § 45(a) to collection agencies operating in interstate commerce using misrepresentation or deceptive advertising. *Bernstein v. F. T. C.*, 200 F. 2d 404 (9th Cir. 1952); *Rothschild v. F. T. C.*, 200 F. 2d 39 (7th Cir. 1952). Neither the federal statute nor its F.T.C. application indicates conflicts with the Indiana statute such as that which existed in *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026 (1947). Nor has Congress through

² 15 U.S.C. § 45, and Burns IND. STAT. ANN., § 42-1801, *et seq.* are fully set forth in the Appendix hereto.

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§ 45, evidenced an intent to reach intrastate activities having an effect on interstate activities. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937).

The test under the Supremacy Clause on federal pre-emption has, since *Gibbons v. Ogden*, 9 Wheat 1 (1824), been whether the state and federal legislation are irreconcilable. As Chief Justice Marshall said in *Gibbons*, the question is whether a collision of the two laws exists. The state law's conflict must be direct and positive before it will be declared invalid under the Supremacy Clause. *Savage v. Jones*, 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715 (1912); *Hartford Acc. & Indem. Co. v. Illinois*, *supra*; *Asbell v. Kansas*, 209 U.S. 251, 52 L. Ed. 778, 28 S. Ct. 485 (1908).

The court in *Florida Avocado Growers v. Paul*, 373 U.S. 132, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963), said:

“ . . . The test of whether both federal and state regulations may operate, or the state regulations must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

“The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusions, or that the Congress has unmistakably so ordained.” 373 U.S. at 142.

Partial occupancy of a field of commerce by Congress does not oust the states of regulatory power. *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190 (1947).

Section 45 is, viewed in the most liberal light, only a partial occupancy of the area of collection agencies by Congress. The federal statute makes no specific mention of collection agencies. It is a general statute aimed at fraudulent and deceptive practices in commerce and has received application by the F.T.C. to collection agencies primarily where there has been

deceptive advertising or misrepresentation. By contrast the Indiana statute is particular in its application to collection agencies and broader in scope as to subject matter. It is not limited to fraudulent or deceptive practices or to misrepresentation. It does not, however, attempt regulation of activities beyond the borders of Indiana as existed in *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 4 L. Ed. 724, 80 S. Ct. 717 (1960). See also *Travelers Health Ass'n v. FTC*, 298 F. 2d 820 (8th Cir. 1962) and *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 94 L. Ed. 1154, 70 S. Ct. 927 (1950).

There is nothing to indicate an intent by Congress to exclusively occupy this field. There is only a partial occupancy by Congress at best. Neither is the Indiana statute inconsistent or repugnant to the federal statute nor its FTC application.

The subjection of Power's Service, Inc. to the requirements of Burns § 42-1801, *et seq.*, *supra*, would not violate the Supremacy Clause of Art. 6 of the Constitution, since 15 U.S.C. § 45 (a) does not preempt state regulation of collection agencies doing business in Indiana as well as interstate.

CONCLUSION

It is, therefore, my opinion that Power's Service, Inc., doing business in Indiana, *Travelers Health Ass'n v. Virginia*, *supra*, is subject to the requirement of Burns § 42-1801, *et seq.*, *supra*, and to regulation by the Secretary of State.

APPENDIX

Burns IND. STAT. ANN., § 42-1801:

(a) The term "person" means any individual, firm, partnership or corporation;

(b) The term "collection agency" means and includes all persons engaged directly or indirectly and as a primary or secondary object, business or pursuit, in soliciting claims for collection, or in the collection of claims owed or due or asserted to be owed or due to another; the term "collection agency" also means and includes, but shall not be limited to, any person who sells, furnishes or maintains a letter or written demand service, including stickers or coupon books, designed for the purpose of making demand on any debtor on behalf of any creditor for the payment of any claim wherein the person furnishing or

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maintaining such letter or written demand service, including stickers or coupon books, shall sell such services for a stated amount or for a percentage of money collected whether paid to the creditor or to the collection agency, or where such services may be rendered as a part of a membership in such collection agency regardless of whether or not a separate fee or percentage is charged. The term "collection agency" shall also include, but not be limited to, any individual, firm, partnership or corporation who uses a fictitious name, or any name other than his or its name, in the collection of accounts receivable with the intention of conveying to the debtor that a third person has been employed.

(c) The term "claim" means any obligation for the payment of money or its equivalent and any sum or sums owed or due or asserted to be owed or due to another, for which any person may be employed to demand payment and to collect or enforce payment thereof; and the term "claim" also includes obligations for the payment of money in the form of conditional sales agreements, notwithstanding that the personal property sold thereunder, for which payment is claimed, may be or is repossessed in lieu of payment.

(d) The term "office" shall mean any room or rooms of a building which is located on a plat of ground that is zoned for business purposes: Provided, however, That in the event the office is located in a town or city that has not enacted a zoning ordinance, the term "office" shall mean any room or rooms of a building that is primarily used for business or commercial purposes. [Acts 1937, ch. 92, § 1, p. 460; 1955, ch. 304, § 1, p. 915.]

Burns Ind. Stat. Ann., § 42-1802:

The term "collection agency" does not include the following:

- (a) Attorney at law;
- (b) Persons regularly employed on a regular wage or salary in the capacity of credit men or in a similar capacity except as an independent contractor;
- (c) Banks, including trust departments thereof, fiduciaries and financial institutions including licensees under the Indiana Small Loan Act [§§ 18-3001—3005], licensees under the Indiana Industrial Loan and Investment Act [§§ 18-3101—3125], and licensees under the Indiana Retail Instalment Sales Act [§§ 58-901—934].
- (d) Licensed real estate brokers;
- (e) Employees of licensees under this act;
- (f) Any person, firm, partnership or corporation engaged in any business enterprise in the state of Indiana whose primary object, business or pursuit is not the collection of claims, as said term is defined by the provisions of this act;
- (g) Any electric, gas, water and telephone public utilities, their respective employees, agents, representative agents, representatives and individual contractors; and

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(h) Any express company subject to the regulations of the public service commission of the state of Indiana. [Acts 1937, ch. 92, § 2, p. 460; 1955, ch. 304, § 2, p. 915.]

Burns IND. STAT. ANN., § 42-1803:

(a) Any person desiring to conduct a collection agency shall make an application to the secretary of state upon such forms as may be prescribed by the secretary of state. Such application shall give the full name or the applicant, if a person, his correct residence and business address, age, sex, the business or businesses he has been engaged in and the duration thereof during the preceding five [5] years, and his experience in the collection business. If a partnership, the application shall give the full name, address, both residence and business, age, sex, and business experience of each of the partners during the preceding five [5] years, particularly as to the collection experience of such partners. If a corporation, the application shall give the date and place of incorporation, the name, age and correct address, both residence and business, of each of the officers of the corporation, together with the business experience during the preceding five [5] years of each of said officers, particularly their experience in the collection business. The application shall be duly sworn to before an officer qualified to administer oaths. The application shall set forth therein any other verified information which will assist the secretary of state in determining the qualifications of the applicant to meet the requirements of a collection agency as hereinunder set forth.

(b) Every original application filed after January 1, 1956, and at all times thereafter, shall be accompanied by a fee of one hundred dollars [\$100], plus an additional fee of fifteen dollars [\$15.00] for each branch office operated by the applicant whether as sole owner, partnership or corporation.

(c) Any person desiring to secure a renewal of a collection agency license shall make a renewal application to the secretary of state not later than January 1 of each year upon such forms as the secretary of state may prescribe. Such application shall contain therein verified information that will assist the secretary of state in determining whether or not the applicant is in default, or is in violation of any of the provisions of this act, and whether or not the applicant has at all times complied with the requirements of this act in the operation of his collection agency.

(d) Each renewal application shall be accompanied by a fee of fifteen dollars [\$15.00], and an additional fee of fifteen dollars [\$15.00] for each branch office maintained and operated by the applicant.

(e) Every original and renewal application shall be accompanied by the following:

1. A financial statement of the applicant showing the assets and liabilities of the applicant, which statement shall accurately reflect the net worth of the applicant in cash or its equivalent and is available for the

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use of the applicant in his business. The financial statement shall be attested to by the applicant if the applicant is an individual, or by a partner, director, manager or treasurer if the applicant is a partnership or a corporation. The information contained in the financial statement shall be confidential and shall not be a public record.

2. The names of at least three [3] individuals who can be used as references and who are well acquainted with the reputation of the applicant for honesty and moral integrity, and the manner in which the applicant conducts his business.

3. A corporate surety bond in the sum of five thousand dollars [\$5,000] for each office the applicant operates in the State of Indiana. All bonds shall run to the people of the State of Indiana and shall be furnished by a surety company authorized to do business in this state. All bonds, shall be conditioned upon the faithful accounting of all moneys collected upon accounts entrusted to such person and shall be continuous in form and shall remain in full force and effect and run continuously with the license period and any renewal thereof. All bonds shall further be conditioned upon the provision that the applicant shall, within sixty [60] days from the date of the collection of any claim, render an account of and pay to the client, for whom collection has been made, the proceeds of such collection less the charges for collection agreed upon by and between the applicant and the client. All bonds shall be filed in the office of the secretary of state and shall be approved by the secretary of state before being filed. All bonds filed and approved shall be for the use and benefit of all persons damaged by the wrongful conversion of any moneys by such person, and any individual so injured or aggrieved may bring an action upon such bond. The surety company may notify the secretary of state and principal of its desire to terminate its liability under any bond furnished. Thirty [30] days after receipt of such notice by the secretary of state, the secretary of state shall thereupon require the principal to file a new bond or discontinue all operations. If a new bond is filed by the principal all liability under any previous bond shall thereupon cease and terminate. If a new bond shall not be filed within the thirty [30] day period above specified the secretary of state shall, after expiration of the period, revoke the principal's license.

4. Any applicant who is a nonresident of the State of Indiana shall also submit a statement appointing an agent or attorney resident herein, upon whom all legal process against the applicant may be served. The statement shall contain a stipulation that the applicant agrees that service of legal process upon such agent or attorney shall be valid service upon the applicant. [Acts 1937, ch. 92, § 3, p. 460; 1955, ch. 304, § 3, p. 915.]

Burns IND. STAT. ANN., § 42-1803a:

The secretary of state shall charge and collect the following collection agency fees:

Every original and renewal application of any person desiring to conduct a collection agency shall be accompanied by a fee of fifty dollars

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[\$50.00] per annum, plus an additional fee of five dollars [\$5.00] per annum for each unlicensed employee who assists the licensee in his business as a collection agency. [Acts 1965, ch. 350, § 8, p. 1041.]

Burns IND. STAT. ANN., § 42-1804:

The following qualifications shall be required of all individual applicants and of any individual who is an officer of any corporation or a member of any partnership or firm and actively manages the collection of or solicits accounts for collection for any firm, partnership, or corporation which makes an application for a collection agency license:

(1) The applicant shall be a citizen of the United States, of good moral character and not less than twenty-one [21] years of age;

(2) He shall not have been convicted of any crime involving moral turpitude;

(3) He shall not have had a record as a defaulter in the payment of money collected or received for another; and

(4) He shall not be a former licensee under the provisions of this act whose license has been suspended or revoked and was not subsequently reinstated under the provisions of this act.

The applicant to whom the license applied for is to be issued shall meet the financial responsibility and bonding requirements hereof and shall agree to maintain at least one office in this state for the conduct of his business. [Acts 1937, ch. 92, § 4, p. 460; 1955, ch. 304, § 4, p. 915.]

Burns IND. STAT. ANN., § 42-1805:

The secretary of state shall investigate the qualifications of the applicant and if the applicant meets the qualifications of this act the secretary of state shall approve the application. If the application is approved the license shall be issued forthwith to the applicant. All licenses shall expire on the thirty-first day of December of the year in which they are issued. If the application for a license is denied, the fees submitted therewith shall be retained by the secretary of state.

The secretary of state shall issue a license to any person who holds and presents with such application a valid and subsisting license to operate a collection agency issued by another state or agency thereof: Provided, That (1) the requirements for the securing of such license were, at the time of issuance, substantially the same or equal to the requirements imposed by this act; (2) the state concerned extends reciprocity under similar circumstances to licensed collection agencies of this state; (3) the application is accompanied by the fees and financial bonding requirements as provided in this act; and (4) the applicant shall maintain an office in this state for the conduct of his business.

Upon application, accompanied by the fifteen dollar [\$15.00] yearly fee and financial bonding requirements as hereinbefore set forth, the secretary of state shall issue an original license to each person now operating a collection agency, with an office in this state, on the effective date of this act: Provided, however, That such person shall meet the

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requirements of section 3 [§ 42-1803] of this act upon the making of an application for a renewal license.

In the event of the death of an individual licensee, or the dissolution of a licensee partnership by death or operation of law, or the termination of employment of the active manager if the licensee is a firm, partnership or corporation, upon a showing that the financial and bonding requirements provided for in this act are complied with, the secretary of state shall issue, without a fee, a provisional license to the personal representative of the deceased or his appointee, or to the surviving partner, or the firm or corporation, as the case may be, which shall be for the following purposes only shall expire at the following times:

(1) A provisional license issued to a personal representative or his appointee, shall expire one [1] year from the date of the issuance and shall not be subject to renewal. The authority of the provisional license so issued shall be limited to such activities as may be necessary to terminate the business of the former licensee.

(2) All other provisional licenses shall expire three [3] months from the date of issuance unless the provisional licensee, within this period can meet the requirements for a full license as provided in this act. [Acts 1937, ch. 92, § 5, p. 460; 1955, ch. 304, § 5, p. 915.]

Burns IND. STAT. ANN., § 42-1806:

The secretary of state shall keep in his office a record of all applications for licenses and all bonds required to be filed, including a statement as to whether a license, renewal license or provisional license has been issued under each application and bond, and if revoked or suspended, the date of the filing of the order of revocation or suspension. He shall maintain a list of all individuals, firms, partnerships or corporations who have had their license revoked or suspended, and he shall keep a written record of all complaints filed against any licensee. Each license issued shall contain the name and address of the licensee and a serial number. The record, with the exception of the financial statement of an licensee, shall be open to inspection as public records. [Acts 1937, ch. 92, § 6, p. 460; 1955, ch. 304, § 6, p. 915.]

Burns IND. STAT. ANN., § 42-1807:

(1) It is unlawful for any person to conduct, within this state, a collection agency without first having applied for and obtained a license under the provisions of this act.

(2) It is unlawful for any person conducting a collection agency within this state to fail to render an account of and pay to the client, for whom collection has been made, the proceeds of such collection, less the charges for collection in accordance with the terms of agreement between the applicant and client. This account shall be made within sixty [60] days from the date of the collection of any claim.

(3) It is unlawful for any person conducting a collection agency, within this state, to fail to deposit with a local depository not less than

