mately invade this area since the substantive act itself does not do so.

Thus, in answer to your last question, such abstracts may not be obtained by this Department pursuant to Burns Statutes, § 47-2326.

OFFICIAL OPINION NO. 49

December 30, 1966

INDIANA JUDICIAL STUDY COMMISSION—Amendment to State Constitution—New Judicial Article Proposing Abolition of Office of Justice of the Peace.

Opinion Requested by Hon. F. Wesley Bowers, Chairman, Indiana Judicial Study Commission.

This is in response to your inquiry concerning the Indiana Judicial Study Commission's proposal of a new judicial article for the Constitution of the State of Indiana. Your letter indicates that one resolution has been prepared for submission to the 95th General Assembly, which resolution, if passed, would propose the repeal of Sections 1 through 20 of the present judicial article and the substitution therefor of twenty-one new sections. Your letter also advises that the proposed article is intended to eliminate the office of justice of the peace in Indiana, although it nowhere refers specifically to that office.

Your inquiry raises the following questions:

1. Whether a resolution for the repeal of an article of the Constitution and its replacement with another article is invalid if it contains more than one subject.

2. Whether the proposed article, if adopted, would eliminate the office of justice of the peace without specific abolition

of that office in the proposed article, and without amendment of Art. 4, § 22 of the Constitution, which specifically refers to the office of justice of the peace.

I.

MORE THAN ONE SUBJECT IN RESOLUTION

In accordance with the separation of powers doctrine enunciated in Art. 3, § 1 of the Constitution of Indiana, the legislative power is vested in the General Assembly under Art. 4, § 1. One of the limitations placed upon that legislative power is Art. 4, § 19, requiring that statutory enactments embrace but one subject matter. The question under consideration here, however, is not an act or the enactment of statutory law, but a resolution by means of which one General Assembly expresses the agreement of a majority of the members of each house thereof to an amendment or amendments proposed to the Indiana Constitution. The power of the Legislature must therefore be viewed in light of Article 16 of the Constitution. Section 1 of that Article reads as follows:

> "Any amendment or amendments to this Constitution, may be proposed in either branch of the General Assembly; and, if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election; and if, in the General Assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such amendment or amendments to the electors of the State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this Constitution."

The Supreme Court, speaking through Chief Judge Cox, in *Ellingham v. Dye,* 178 Ind. 336, 99 N.E. 1 (1912), said:

> " 'The General Assembly, in amending the constitution, does not act in the exercise of its ordinary legislative authority of its general powers; but it possesses and acts in the character and capacity of a convention, and is, *quoad hoc,* a convention expressing the supreme will of the sovereign people.' " 178 Ind. at 348, 99 N.E. at 5. "Where authority is specifically granted to the legislature by the constitution to prepare and submit amendments, that establishes its competency, and, to the extent of the specific authorization and within its limitations, it is always to be considered as chosen for limitations, it is always to be considered as chosen for the purpose." 178 Ind. at 353, 99 N.E. at 7.

Since the Legislature's power in amending the Constitution is not derived from Article 4, but from Article 16, the limitation on number of subjects imposed by Art. 4, § 19, would be wholly inapplicable to legislative approval of a constitutional amendment. Other limitations on statutes do not apply to constitutional provisions. The Court in *Hall v. Essner,* 208 Ind. 99, 114, 193 N.E. 86, 93 (1934), said:

> "We have previously stated that the subject matter of an article of our Constitution need not be limited to the subject expressed in the title of the article, still we think that the provisions should be presumed to relate to the subject matter as expressed in the title unless the context indicates the contrary."

The only constitutional limitation upon the methods of presentation of proposed constitutional amendments to a body which must act upon them is that contained in Art. 16, § 2, which requires that

> "If two or more amendments shall be submitted at the same time, they shall be submitted in such manner, that the electors shall vote for or against each of such amendments separately; . . ."

This limitation, by its terms, does not apply to presentation of proposed amendments to the two successive General Assem-

blies which must approve proposed amendments before they are submitted to the electorate.

It has been held in other jurisdictions with constitutional provisions similar to Art. 16 that joinder of amendments in one resolution or their separation into several resolutions for approval of a legislative body is a matter of form and not of substance, even to the extent that the second legislative body to which the amendments are submitted may separate different amendments presented in one resolution by the proposing legislative body and pass some, while defeating others. *Trustees of Univ. of N.C. v. McIver,* 72 N.C. 76 (1875). See also *Collier v. Frierson,* 24 Ala. 100 (1854). The language of the resolution which is not the substance of the section of the Constitution, as proposed to be amended, is not part of the proposed amendment, *Funk v. Fielder,* 243 S.W. 2d 474, 478 (Ky., 1951); *Browne v. City of New York,* 241 N.Y. 96, 149 N.E. 211, 213 (1925), and the fact that such language in the resolution passed by the second Legislature differs from that in the resolution passed by the first approving Legislature does not change the identity of the amendment itself, *State ex rel. Thompson v. Peoples State Bank,* 272 Wis. 614, 76 N.W. 2d 370, 376 (1956). The words or figures in a resolution indicating sections are not substantive, *In Re Opinion of Supreme Court,* 29 R.I. 611, 71 Atl. 798 (1909).

As previously indicated, a second approving General Assembly may separate, for purposes of separate passage or defeat, distinctive amendments proposed by a previous General Assembly in one resolution.

Therefore, if the 95th General Assembly voices its approval of your commissioner's proposal by passage of a single resolution, the 96th General Assembly would not be bound to the two choices of approving all or approving none of the amendments proposed, if in fact the resolution contains more than one proposed amendment.

Should both the 95th General Assembly and its successor approve the proposed amendment or amendments, set out in one resolution, the second approving General Assembly would then have the duty to decide whether the resolution contained more than one amendment, so that such amendment or amend-

ments could be properly submitted to the electors pursuant to the directions in Art. 16, § 2.

Although nineteen (19) of the amendments to the Indiana Constitution of 1851 have been approved by separate resolution for each section of the Constitution amended, history also supports the presentation of changes to more than one section by one resolution and one amendment. Acts 1877 (Spec. Sess.), S. J. R. No. 9, p. 85 and Acts 1879, S. J. R. No. 9, p. 54, proposed the repeal of all four sections of the original Article 13 of the Constitution which pertained to the settlement of negroes and mulattos in the state, and replaced them with one section limiting municipal indebtedness, an entirely different subject, ratified March 14, 1881, by the electorate. The word "white" as a description of the male inhabitants who must be enumerated for apportionment of the General Assembly was deleted from both §§ 4 and 5 of Art. 4 by Acts 1877, S. J. R. No. 4, p. 161 and Acts 1879, S. J. R. No. 4, p. 53, ratified March 14, 1881. An amendment ratified November 8, 1960, was agreed to by Acts 1957, ch. 384 and Acts 1959, ch. 406. It repealed § 21 of Art. 4 and combined part of that former section, as amended, with § 19, as amended, of the same article.

While one Legislature may not pass and present to the people a complete new Constitution without complying with Art. 16, *Ellingham v. Dye,* supra, at 382 of 178 Ind., at 17 of 99 N.E., there is no prohibition against presentation of a series of amendments when the required procedures are followed.

A new judicial article may, therefore, be agreed to in the form of a single resolution passed by the 1967 General Assembly.

II.

ELIMINATION OF JUSTICES OF THE PEACE

Your letter indicates that the proposed judicial article is intended to eliminate the office of justice of the peace as a constitutional judicial office and attempts to accomplish that purpose by omitting it from the article. It is true that that office is not mentioned in the proposed judicial article. How-

ever, § 1 of the proposed judicial article, which is § 3 of the proposed resolution, reads as follows:

> "*Judicial Power.* The judicial power of the State shall be vested exclusively in one Court of Justice which shall be divided into one Supreme Court, one Court of Appeals and one Circuit Court."

In the comments by the Commission on this section, the following statements are made, at p. 2 of the proposal approved October 20, 1966:

> "This creates a single unified judicial system by vesting all judicial power in one Court of Justice. . . .
>
> "This makes three changes from the present judicial article. It provides for a unified system rather than autonomous courts, provides for one Circuit Court rather than many and *removes the power of the General Assembly to create additional courts* (though additional judges and districts may be provided to meet expanding needs)." (Emphasis added.)

Your proposed article would also repeal the present section of the judicial article creating the office of justice of the peace, Art. 7, § 14, and would also repeal § 1 of that article, which specifically empowers the General Assembly to create courts in addition to those specified in the present Constitution.

The only specific reference to the office of justice of the peace which I have found in the Constitution of the State of Indiana, other than those provisions now in Art. 7 which you propose to repeal at the same time the proposed judicial article would be adopted, is contained in § 22 of Art. 4, which reads in part as follows:

> "The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say:
>
> "Regulating the jurisdiction and duties of Justices of the Peace and of Constables; . . ."

Section 23 of the same article reads as follows:

> "In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

These sections appear to be a limitation of the legislative power of the General Assembly, and not a specific grant of power to legislate in the cases enumerated. Even should these provisions be considered a grant of legislative power to pass general laws concerning justices of the peace, however, the Supreme Court in *Griebel v. State ex rel. Niezer,* 111 Ind. 369, 376, 12 N.E. 700, 703 (1887), said:

> "The adoption of a new Constitution repeals and supersedes all the provisions of the older Constitution not continued in force by the new instrument. The same rule applies to amendments of an existing Constitution which are inconsistent with the original text of the instrument amended; also to statutory enactments which are inconsistent with later constitutional provisions embracing the same subject-matter."

The present office of justice of the peace has been held to be a judicial office, *McClanahan v. State,* 232 Ind. 567, 112 N.E. 2d 575 (1953); *In re Petition of Justice of the Peace Ass'n,* 237 Ind. 436, 147 N.E. 2d 16 (1958). Since the present office of justice of the peace is a judicial office, and the proposed judicial article would provide for the "exclusive" vesting of "all" of the state's judicial power in the courts created therein, it is my opinion that the proposed judicial article would, if properly agreed to and ratified, eliminate the office of justice of the peace as a *judicial* office and prohibit the creation of such an office in the future by the General Assembly. To the extent, if any, to which §§ 22 and 23 of Art. 4 authorize the General Assembly to enact a general law relating to the jurisdiction and duties of justices of the peace as *judicial officers,* those sections would be amended by implication, pursuant to the rule announced in the *Griebel* case.

However, it is true that leaving the present constitutional reference to that office in Art. 4 without change may open the

area to a future judicial determination which could be contrary to the intentions of your Commission. Therefore, as a matter of policy, you may desire to propose the deletion of such reference at the same time at which you propose the new article.

For your information, the following is a list of other provisions of the present Constitution which you may wish to examine before presenting your proposed resolution, although they do not necessarily conflict with the proposed article:

Art. 2, § 14 (General Assembly may provide by law for election of all judges at election for such officers only);

Art. 4, § 22 (prohibits special laws providing for changing venue in civil and criminal cases, summoning and empaneling grand and petit juries and providing for their compensation);

Art. 4, § 23 (requires general laws in cases enumerated in § 22 of Art. 4);

Art. 5, § 16 (Governor to fill vacancy in office of judge of any court by appointment to expire when a successor shall be elected and qualified);

Art. 6, § 7 (manner of removal from office of all "state officers").

OFFICIAL OPINION NO. 50

December 30, 1966

PUBLIC WELFARE—Day Nurseries—Bona Fide Educational Institutions—Licensing by Department of Day Nurseries.

Opinion Requested by Mr. Albert Kelly, Administrator, Department of Public Welfare.

Your recent letter requesting an Official Opinion reads as follows: