exercises powers and duties formerly conferred upon boards of trustees of the various state penal and correctional institutions, according to the provisions of the Acts of 1953, Ch. 266, Sec. 23, as found in Burns' (1956 Repl.), Section 13-1523.

Nevertheless, in consideration of your third question, it is my opinion that, if one committed to the Indiana Boys' School should not be twenty-one [21] years of age or legally discharged by the board of control of such school when sentenced as an adult criminal, or when such sentence is discharged either by completion of the sentence or otherwise, the Indiana Boys' School would still be entitled to exercise its right to care and guardianship of such infant and would have a legal right to return him to such school.

Although the case of a juvenile may be waived to criminal court when such juvenile is between the ages of fifteen [15] and eighteen [18] years of age, jurisdiction waived is of the case rather than of the child and, in the absence of statutory provisions to the contrary, it is my opinion that a juvenile court is not bound by such waiver in any other case involving the same child, but trial of a child over the age of fifteen [15] years by a juvenile court is a matter of discretion rather than of right.

It is therefore my opinion that a juvenile court may exercise jurisdiction in the case of a child even though a juvenile court may previously have waived jurisdiction of another case involving such child, and such is my answer to your fourth question.

OFFICIAL OPINION NO. 65

November 14, 1962

Dr. James B. Kessler, Resident Director
Commission on State Tax and Financing Policy
1008 State Office Building
Indianapolis 4, Indiana

Dear Dr. Kessler:

This is in response to your request for my Official Opinion concerning the question of whether the Acts of 1905, Ch. 129, Sec. 53, as found in Burns' (1950 Repl.), Section 48-1407,

authorizes cities and towns to impose taxes for revenue-raising purposes. A careful consideration of your problem requires the conclusion that such act does not authorize cities and towns to levy taxes for such purposes, for the reasons hereinafter appearing.

The particular language of the statute which gives rise to the question and as specified in your letter is that part of the Acts of 1905, Ch. 129, Sec. 53, designated as the Thirty-second, Thirty-third, Thirty-eighth, Thirty-ninth, Forty-sixth and Forty-seventh clauses, which read as follows:

> "The common council of every city shall have power to enact ordinances for the following purposes:
>
> * * *
>
> "Thirty-second. To regulate, tax and license coaches, hacks, drays, automobiles and all other vehicles.
>
> "Thirty-third. To regulate, license, tax, restrain or prohibit theatrical and all other exhibitions, shows or entertainments.
>
> * * *
>
> "Thirty-eighth. To license, tax and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, bill-posters and all other persons pursuing like occupations for pay or hire, and to prescribe their compensation, and revoke any license for violation of such ordinance.
>
> "Thirty-ninth. To license, tax and regulate or prohibit all inns, taverns, hotels, restaurants or other places used or kept for public entertainment.
>
> * * *
>
> "Forty-sixth. To license, tax and regulate branch stores or establishments, and all other concerns established in such city for temporary business only; and to license, tax and regulate itinerant physicians and venders of medicine and other articles.
>
> "Forty-seventh. To preserve peace and good order, prevent vice and immorality, quell riots and disperse disorderly assemblages. To prevent cruelty to children or other persons and to animals. To suppress gaming

> and gaming-houses, and places or houses of ill fame and assignation, or houses kept for any immoral purpose. To prohibit gaming and to destroy any instruments or devices of gaming and to restrain fraudulent practices. To license, tax, regulate, restrain or prohibit all tables, alleys, machines, devices or places of any kind for sports or games. To regulate the time and place of and restrain or prohibit bathing in the rivers or public waters of the city. To direct the location and management of public bath-houses, to license the same or require the same to be closed if deemed expedient. To restrain and punish vagrants, mendicants, street beggars, common prostitutes and their associates, thieves, criminals, and persons known or reputed to be such. For the purposes of this clause any such city is given jurisdiction for four miles from the limits thereof."

As in all questions of statutory construction, the answer must be found by the application of the standard as to what the Legislature intended, and further by reference to applicable constitutional provisions. As an aid in determining legislative intent, reference to the bound volume containing the Acts of 1905 is deemed helpful. Chapter 129 thereof is entitled simply: "AN ACT concerning municipal corporations." From the foregoing, it is obvious that the title contains nothing which would even intimate that the act was for the purpose of raising revenue. Chapter 129, as originally enacted, was extremely comprehensive, resulting in considerable length—that chapter extending from page 219 to page 410 of the volume containing the official 1905 Acts. The act was divided by the Legislature into three basic divisions as follows:

The first basic division of the Acts of 1905, Ch. 129 is entitled: "I. Towns." This part contains the first thirty-seven sections of the act which concern a wide variety of subjects relating to towns—from the incorporation thereof to their dissolution—and contains sections concerning the duties of town officers and town boards. Section 31 concerns the powers of boards of town trustees and commences by stating that: "The board of town trustees shall have the following powers:" Then follow twenty-one paragraphs of specific powers, including the power to make the levy provided by the eighteenth paragraph, (subject to the limitations therein) which may be

found, as last amended by the Acts of 1957, Ch. 258, Sec. 1, in Burns' (1962 Supp.), Section 48-301. However, with respect to such towns, a special section—Section 37, as found in Burns' (1950 Repl.), Section 48-6801—provides for the levy of a town tax for the current year for all town purposes, to be effectuated by means of the general laws of the state for the uniform assessment and collection of taxes upon property assessed by the township and county assessors as modified by the county board of review and the State Board of Tax Commissioners.

The second basic division of the Acts of 1905, Ch. 129, is entitled: "II. Cities." This part extends from Section 38 to Section 228 of the act, and contains such a myriad and variety of subsubjects, not relevant to your question, so that to discuss the same would unduly lengthen this opinion. However, it is within this Part II of the act that Section 53, with which your question deals, is found, which section is a part of a subdivision entitled by the Legislature "GENERAL POWERS OF THE COMMON COUNCIL," from which it would seem that such refer only to the powers of cities. There are comparable sections in this part dealing with powers granted to the mayor (Section 80, as amended, as found in Burns' [1962 Supp.], Section 48-1502), powers granted to the city clerk (Section 81, as amended, as found in Burns' [1950 Repl.], Section 48-1503), powers granted to the various departments comprising the executive department (Section 82, as amended, as found in Burns' [1950 Repl.], Section 48-1504), powers granted to the city controller (Section 88, as amended, as found in Burns' [1950 Repl.], Section 48-1602), powers granted to the board of public works (Section 93, as amended, as found in Burns' [1950 Repl.], Section 48-1902), and various other sections relating to powers and duties of city government and departments and officers thereof. Section 200, as amended, as found in Burns' (1950 Repl.), Section 48-6708, provides for the common council of cities to levy a tax upon the property within the city, not to exceed the limits therein provided, which, as in the case of towns, is to be upon the basis of assessment of property as made by taxing officials and as reviewed by the county board of review and the State Board of Tax Commissioners for state and county taxes, and to be collected as provided by such provisions of other statutes.

The third basic division of the Acts of 1905, Ch. 129 is entitled: "III. Cities and Towns." This part comprises Sections 229 to the end of the chapter, in which there does not appear to be any section for the levy of a tax, except Section 257, as amended, as found in Burns' (1950 Repl.), Section 48-7209, providing for the levy of an annual tax, not to exceed the limitation therein provided, in connection with the furnishing of utilities.

The nature of the title of Ch. 129 of the Acts of 1905, and the broad scope of the subjects included in that chapter, tend to indicate that the Legislature did not intend for that act to be the authority for the levying of special excise taxes for revenue-raising purposes, with the exception of the levy of a property tax (an *ad valorem* tax) as a component element of the total rate levied in the county for both state and local government, the mechanics for the assessment of the taxpayers' property and the collection of the tax being as provided by other statutes.

Instead of being included in the sections of Chapter 129 dealing with finances and revenue, Section 53, *supra,* is the general powers' section, applicable to the common council of every city, and corresponds to Section 31 of that Act concerning the general powers of boards of town trustees. It is noteworthy that in Section 53, the term "tax," as used in the Thirty-second, Thirty-third, Thirty-eighth, Thirty-ninth, Forty-sixth and Forty-seventh clauses, is always used in connection with the terms "regulate" and "license." Rather than imposing a tax upon either the class of property, activities or persons designated in said clauses solely for revenue-raising purposes, the element of tax in such was obviously meant to be in connection with, and as an incident of, regulating and licensing such property, activities or persons. The effect of the combination of the terms "regulate," "tax," and "license" is the same as if the Legislature were to have stated that the common council shall have the power to regulate, license and impose a license fee upon the class of property, activities and persons specified in said clauses. It is not uncommon for a statute, enacted in the exercise of the police power of the state for regulatory purposes, to require the payment of a fee which, although raising revenue in the loose sense of the term, is actually for the primary purpose of

defraying the costs of administration of the regulation and licensing of the property, activities or persons involved, rather than for the primary purpose of raising revenue. Such was the case in Stith Petroleum Company v. Department of Audit and Control (1937), 211 Ind. 400, 5 N. E. (2d) 517, concerning the imposition of an oil inspection fee imposed by the Acts of 1919, Ch. 83, a former statute providing for the inspection and branding of products of petroleum prior to sale.

Further, it should be noted that whatever power to regulate, tax and license motor vehicles, as may have been granted by the Thirty-second clause, *supra,* is now subject to the restriction in the Acts of 1945, Ch. 304, Secs. 36 and 37, as found in Burns' (1952 Repl.), Sections 47-2613 and 47-2614, which provide as follows:

47–2613 "A license, issued by any city or town, for any motor vehicle operated for hire, shall be valid in every city and town of the state, for the year for which such license is issued, and only one such city or town license shall be required for any such motor vehicle operated for hire for any one year: Provided, That no motor vehicle, operated as a common carrier for hire and registered under the provisions of this act, shall be so operated upon any public highways unless the owner of such motor vehicle has complied with all the general or special laws of this state, governing the operation of such motor vehicle upon the public highways."

47–2614 "No owner of any motor vehicle except the owner of trucks or other motor vehicle or vehicles used in transporting passengers or property for hire, who shall have obtained a certificate of registration under the provisions of this act, as hereinbefore provided, shall be required to pay another license fee whatsoever, or to obtain any other license or permit to use or operate any such motor vehicle on the public highways nor shall any such owner be required to display upon such motor vehicle any other number than that issued by the department."

As stated in the beginning of this opinion, other factors for consideration in determining legislative intent are applicable

constitutional provisions, a consideration of which, in this instance, refutes the idea that the Legislature was intending Sec. 53 of Ch. 129 of the Acts of 1905 to grant authority to cities and towns to levy independent excise taxes solely for revenue purposes. When speaking of bills for the raising of revenue, the Indiana Constitution, Art. 4, Sec. 17, provides as follows:

> "Bills may originate in either House, but may be amended or rejected in the other; *except that bills for raising revenue shall originate in the House of Representatives.*" (Our emphasis)

Reference to the Acts of 1905, Ch. 129 discloses that the bill, which was introduced into the General Assembly, and upon enactment and approval on March 6, 1905, became Ch. 129, *supra,* was introduced into the Senate, being Senate Bill No. 75. As stated in Stith Petroleum Company v. Department of Audit and Control, *supra,* this constitutional provision does not apply with respect to the levy of fees for the purpose of the administration and enforcement of regulatory statutes which do not have, as their primary purpose, the raising of revenue. In the Stith case, one of the bases for alleging that the Acts of 1919, Ch. 83 was unconstitutional was that the act was a revenue, and not a regulatory, measure, and that it had originated in the Senate instead of the House of Representatives as required by the Indiana Constitution, Art. 4, Sec. 17, *supra,* relating to bills for the raising of revenue. In the Stith case, the Indiana Supreme Court conclusively demonstrated that the particular act was a regulatory measure, not subject to the requirement of the Indiana Constitution, Art. 4, Sec. 17, and stated, on page 408 of 211 Ind., the following:

> "It will be noted readily that the title designates the Act as regulatory and places its enforcement under the jurisdiction of the State Food and Drug Commission. The question as to whether the Act is a regulatory or a revenue measure, for the purpose of applying the constitutional provision as to which house of the Legislature should originate the Act, is a matter to be determined from the Act itself and the facts as they then existed and were known to the Legislature. In the very nature of this constitutional provision it cannot be

> determined on facts existing seventeen years later. Clearly Section [Chapter] 83 was a regulatory measure when enacted. Conceding this point it must be said that subsequent events cannot change its character and convert it into a revenue measure in violation of Section 17, Article 4, of the State Constitution."

However, if we were to assume that Sec. 53 of Ch. 129 of the Acts of 1905 was intended to authorize the levy of independent excise taxes for the sole purpose of raising revenue for cities and towns, then that part of the act would clearly be in violation of Art. 4, Sec. 17 of the Indiana Constitution, *supra.*

That the Legislature was not intending Section 53 to authorize the levy of independent excise taxes, is further demonstrated by reference to conditions relating to taxation at the time of the enactment of said 1905 statute. The basic means for the raising of revenue during those years was the imposition of the property tax collected by the county for state, county and local government, which is the tax to which reference is made in Section 37, *supra,* concerning towns, and the corresponding Section 200, *supra,* concerning cities. These sections clearly refer to the mechanics for the assessment of property and collection of such tax by means of the services of county officials pursuant to other statutes. Section 37, *supra,* relating to towns, is under the title "ASSESSMENT AND COLLECTION OF TAXES," and Section 200, *supra,* relating to cities, is under the title "DEPARTMENT OF ASSESSMENT AND COLLECTION," so that, even though there were no constitutional impediments, the fact that the power to impose other forms of taxation as independent revenue-raising measures was not included within such division of Chapter 129 is further indicative of the fact that the term "tax," as used in Section 53, was the equivalent of "license fee." Also, not only was the property tax the basic, if not the only, revenue-raising measure at that time, but various forms of independent excise taxes, as we know them today, were enacted on a state-wide basis subsequent thereto—the Inheritance Tax Law having been enacted first in 1913 by the Acts of 1913, Ch. 47, the Store License Tax Law (although a regulatory measure) having been enacted in 1929, by the Acts of 1929, Ch. 207, the Intangibles Tax Law having been enacted in 1933 by the Acts of 1933, Chs. 81, 82 and 83, the Indiana Gross

Income Tax Statute having been enacted in 1933 by the Acts of 1933, Ch. 50, and the Oil Petroleum Severance Tax Law having been enacted in 1947 by the Acts of 1947, Ch. 278. Also, the constitutional amendment now providing for the imposition of an income tax, as found in the Indiana Constitution, Art. 10, Sec. 8, was not adopted and ratified until November 8, 1932, which provides as follows:

> "The general assembly may levy and collect a tax upon income, from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law."

Further indicative of the meaning of the sections to which your letter requesting the Official Opinion relates, is the general tenor of the entire Section 53, *supra,* which is extremely comprehensive in detailing the powers of the common council of a city, consisting of fifty-three separately designated clauses, said section commencing on page 246 and concluding on page 257 of the bound volume of the 1905 Acts. Reference to the entire section discloses that of the powers therein granted, practically all are based upon the exercise of the police power by the governing body of a city for the protection of individuals in their property rights, and for the purpose of protecting the persons and property subject to the jurisdiction of the city authorities by regulating persons and their use of property and occupations in the interest of promoting suitable conditions for safety, good health and good morals, and for the general welfare of the inhabitants of the city. There are so many references to "regulating," "prohibiting" and "preventing," as applied to individuals, property and occupations, as to make it clear that Section 53, *supra,* was enacted in furtherance of the police power of the city to regulate persons, property and occupations subject to its jurisdiction for the interest of its citizens. For instance, the Forty-seventh clause, which is one to which your letter makes reference, while authorizing the licensing, taxing, regulating, restraining and prohibiting of tables, alleys, machines, devices or places of any kind for sports or games, commences by granting the express power to preserve peace and good order, to prevent vice and immorality, to quell riots and disperse disorderly assemblages, to prevent cruelty to children or other persons and animals, to suppress gaming and gaming houses

and places or houses of ill fame and assignation, or houses kept for any immoral purpose, and to prohibit gaming and to destroy any instruments or devices of gaming and to restrain fraudulent practices. The same clause, following the sentence containing the word "tax," concerns the regulation of rivers or public waters of the city, the regulation of public bathhouses, the restraining and punishment of vagrants, mendicants, street beggars, common prostitutes and their associates, thieves, criminals and persons known or reputed to be such, and for such purpose gives the city jurisdiction for four miles beyond its city limits. This is one of many clauses, in fact true of most of the clauses, the obvious purpose of which is regulation rather than the raising of public revenue.

An examination of Section 53, as found in Burns' 48-1407, *supra,* discloses that there are twelve pages of annotation following the section containing a great many citations to court decisions involving one or more of the clauses contained within said Section 53. Because of the multitude of such citations, it is deemed unnecessary to cite such, since all confirm the conclusion herein that the section has, for its purpose, the authorization of ordinances enacted by the common councils of cities for regulatory purposes and as a delegation of the police power of the state. One such case is that of Goldblatt Brothers Corporation v. City of East Chicago *et al.* (1937), 211 Ind. 621, 6 N. E. (2d) 331, wherein is stressed the broad coverage of Section 53 and the proposition that the clauses therein authorize the enactment of ordinances for regulatory purposes, and that the powers therein enumerated include implied powers possessed by municipal corporations to enact and enforce reasonable ordinances for the protection of health, life and property. Speaking of this section, the court stated, on page 627 of 211 Ind.:

> "* * * The statute conferring powers upon cities in this state is clearly designed to empower cities to do the things essential to the enjoyment of life, and desirable for the protection of the public, and it must be construed with this purpose in mind * * *"

See also: Sprout v. City of South Bend (1926), 198 Ind. 563, 571, 153 N. E. 504, reversed (1928), 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833.

The above case involves a license fee imposed upon persons operating commercial vehicles pursuant to clause Thirty-eighth, *supra.*

Therefore, it is my opinion that the provisions of the Acts of 1905, Ch. 129, Sec. 53, to which your request for my Official Opinion relates, were not intended to be, and cannot operate as, authority for cities and towns to levy independent excise taxes for revenue-raising purposes. Further, inasmuch as the power to tax rests solely with the General Assembly, cities and towns may have the power to levy such taxes only to the extent to which the General Assembly may levy taxes and to the extent to which that body may constitutionally delegate such power to tax.

OFFICIAL OPINION NO. 66

November 15, 1962

Hon. Kenneth J. Brown, Jr.
State Senator
8 Hampshire Lane
Muncie, Indiana

Dear Senator Brown:

This is in response to your recent request for an Official Opinion from me. Your question pertains to the City of Muncie, a second class city, and involves possible changes in the areas of councilmanic districts in said city. In your letter you state:

> "Since these districts were established in Muncie there have been significant changes in the city lines, plus population shifts within the established districts, which now range in population from 3,000 to 10,500 people."

Your specific question is stated as follows:

> "The question now has developed in our community as to whether the City Council has authority at this time under this statute to re-establish by ordinance the councilmanic districts in a manner which reflects more equal population."