REGULAR MEETING

Monday, May 17, 1926, 7:30 p. m.

The Common Council of the City of Indianapolis met in the Council Chamber, Monday, May 17, 1926, at 7:30 p. m., in regular session, President Boynton J. Moore in the chair.

The Clerk called the roll.

Present: Hon. Boynton J. Moore and seven members, viz.: Walter R. Dorsett, Claude E. Negly, Austin H. Todd, Otis E. Bartholomew, Robert E. Springsteen, O. Ray Albertson and Millard W. Ferguson.

Absent: Edward B. Raub.

The reading of the journal was dispensed with on motion of Dr. Tood, seconded by Mr. Bartholomew.

COMMUNICATIONS FROM THE MAYOR

May 12, 1926.

To the Honorable President and Members of the Common Council of the City of Indianapolis, Indiana:

Gentlemen—I have today vetoed General Ordinance No. 26. An Ordinance to repeal sections 381 and 382 of General Oridnance Number 121, being an Ordinance entitled "An Ordinance concerning the Government of the City of Indianapolis, providing penalties for its violation and, with stated exceptions, repealing all former Ordinances," being known as "Municipal Code of Indianapolis 1925."

J. L. DUVALL,
Mayor.

May 12, 1926.

To the Honorable President and Members of the Common Council of the City of Indianapolis, Indiana:

Gentlemen—I have today approved with my signature and delivered to Wm. A. Boyce, Jr., City Clerk, Resolution No. 4. Whereas the General Assembly of the State of Indiana Acts 1925 p. 367, enacted a general law, amending sections 1 and 6 of the Act of 1923 providing for a tax on gasoline.

J. L. DUVALL,
Mayor.

May 12, 1926.

To the Honorable President and Members of the Common Council of the City of Indianapolis, Indiana:

Gentlemen—I have today approved with my signature and delivered to Wm. A. Boyce, Jr., City Clerk, General Ordinance No.

23, 1926, an Ordinance transferring the sum of Five Thousand ($5,000.00) Dollars in the Department of the City Civil Engineer from the fund known as Item No. 21, Team Hire, and reappropriating the same to the fund known as Item No. 72, Equipment, in the Department of the City Civil Engineer, and declaring a time when the same shall take effect.

J. L. DUVALL,
Mayor.

May 12, 1926.

To the Honorable President and Members of the Common Council of the City of Indianapolis, Indiana:

Gentlemen—I have today approved with my signature and delivered to Wm. A. Boyce, Jr., City Clerk, General Ordinance No. 24, 1926. An Ordinance transferirng the sum of Seventy-five ($75.00) Dollars in the Department of Law from the fund known as Item No. 53, therein, "Refunds, Awards and Indeminities," and reappropriating the same to the fund known as Item No. 21, "Communication and Transportation," in the Department of Law, and declaring a time when the same shall take effect.

J. L. DUVALL,
Mayor.

May 12, 1926.

To the Honorable President and Members of the Common Council of the City of Indianapolis, Indiana:

Gentlemen—I have today approved with my signature and delivered to Wm. A. Boyce, Jr., City Clerk, General Ordinance No. No. 25. An Ordinance to regulate the retail sale and distribution of coal and coke, in the City of Indianapolis; To provide for the licensing of dealers in such fuel products; To provide for delivery tickets giving the weight and description thereon; To provide for truthfully describing such products in advertising and selling; Prescribing a penalty for violation thereof; declaring an emergency, and designating a time when the same shall take effect.

J. L. DUVALL,
Mayor.

REPORT OF CITY OFFICERS

May 17, 1926.

To the Honorable President and Members of the Common Council of the City of Indianapolis, Indiana:

Gentlemen—I am handing you herewith a General Ordinance abolishing the position of one of the two regular foremen employed at the rate of Fifteen Hundred ($1500.00) Dollars per year, each, in the Asphalt Repair Department under the Board of Public Works, and increasing the salary of the Assistant Superintendent of such Asphalt Plant Department from Sixteen Hundred and Twenty ($1620.00) Dollars to Two Thousand Four Hundred ($2400.00) Dollars per annum. This will make a saving of Seven Hundred and Twenty ($720.00) Dollars per year in the Asphalt Plant Department under the Board of Public Works.

I respectfully recommend the passage of this Ordinance.

Yours,
WM. C. BUSER,
City Controller.

May 17, 1926.

To the Honorable President and Members of the Common Council of the City of Indianapolis, Indiana:

Gentlemen—I am handing you herewith a General Ordinance providing for the immediate investment by the City Controller in bonds of all prepayments and moneys prepaid by persons assessed for public improvements and who have taken theretofore the privilege of payment by installments under the Barrett law: providing a method for the immediate payments of such bonds by the City Treasurer upon warrant of the City Controller; providing for the immediate deposit in a bank or trust company, to be selected by the Mayor, of all special funds in the hands of the City Treasurer undeposited in public depositories, in the name of the City of Indianapolis, as trustee, and incapable at the time of being used in the purchase of such bonds; providing that such deposits shall draw interest at the rate of 5% per annum, or more, and that such interest shall be the property of the City as such trustee for the payment of interest due on bonds issued originally for the payment of such public improvements.

I respectfully recommend the passage of this Ordinance.

Yours,

WM. C. BUSER,
City Controller.

May 12, 1926.

To Hon. Boynton J. Moore, President of the Common Council of the City of Indianapolis, Indiana:—

On March 15th last, the Common Council by Resolution No. 2, made specific demand upon me as head of the Legal Department of the City to advise it and to institute such proceedings and take such steps as may be deemed necessary and proper by the Corporation Counsel to enforce the provisions of the laws of this State applicable to Barrett Law moneys coming into the hands of the City Treasurer.

Under Acts of 1905, Page 236, Burns' 1926, Sec. 10335, it is the duty of the Corporation Counsel to have the management, charge and control of the law business of the city and for each branch of its government, and to be the legal adviser of all of its departments and officers, which, of course, includes the Common Council; he shall also promptly commence all proceedings necessary or advisable for the protection or enforcement of the rights of such city or of the public. Under the oath of this office and under such express law, the Corporation Counsel has no option in the matter, even were he disposed to do otherwise, than to advise you truthfully and as expeditiously as he can of the law inquired about and to institute such proceedings as are necessary to vindicate the law.

For proper understanding of the Barrett law situation, it is necessary that I review somewhat the history and nature of the same. Although it antedates 1905 when our city laws were codified, yet I will only begin at that date and briefly summarize. This is necessary, although the only question here is whether or not the interest on the prepayments of persons specially benefitted by public improvements and who have taken the Barret law, belongs to the City or to the County Treasurer who is ex-officio the City Treasurer.

At the outset, let me say that it is my opinion that under the law of the State any interest of any nature or description arising from prepayments on the Barrett law belongs not to the City Treasurer or to an individual but to the City and its creditors.

It has been stated that under the law as it now exists, if the interest were paid to the City instead of to the City Treasurer, that the same would end all deficiency in the Barrett law payments. My answer to this is that it is a mistaken notion. It cannot be done under the present law; it can only be approximated. Under the Acts of 1905, the law permitted prepayments of assessments against individuals benefitted by the public improvement but also provided for calling in the bonds issued by the City for paying for the improvement originally and making partial payment thereon to stop the interest. This was satisfactory to property owners but the bonds were not so good as the maturity was uncertain and interest was lost to the City to some extent by the delays of calling in the bonds and making the proper credits thereon. But because this plan had a tendency to increase the rate of interest required by bond holders and because it made such bonds undesirable on the ground that they were not a certain fixed investment by the bond holder, this plan was considered as impracticable, and indeed a considerable deficit accumulated thereunder. It was to make up this shortage that the Legislature passed a law providing for a one-cent tax levy on the general public to make up the deficiency between the original bonds and the payments and prepayments of the persons assessed.

In Acts 1913, Page 349, in order to obviate deficiences in the future, the Legislature adopted the only feasible plan to make the money paid in on Barrett law absolutely and unerringly equal to the amount for which the City was liable on bonds and their interest issued by the City to secure the deferred payments under the Barrett law. This Act declared that although persons may take the Barrett law (which means that persons liable for the assessments of benefits may pay the same in 10 annual installments) yet if such persons desire to make prepayments and get rid of the lien upon their property, they must in such prepayment pay in not only the full amount of the principal which is due, but also all of the interest which would accumulate for the full unelasped period of 10 years. Obviously then under this plan there could be no deficiency. But again this plan was highly unsatisfactory to the public who desired more leniency and the 1915 Act, Acts of 1915, Page 548, Burns' 1926 Sec. 10450, was substituted for the 1913 Act.

This 1915 Act in my opinion is now the law as to prepayments and has been the law since it went into force in about the month of February, 1915. This Act declares that a Barrett law taker might make his prepayments at any time after the expiration of the first year, pay up his entire assessment and stop the interest thereon, and be relieved of the lien of the same, only upon the condition that he at the same time pay up all accrued interest, and also interest up to the time when the next installment of interest would be payable, provided that he give six months notice to the Treasurer of such prepayment. This leniency to the Barrett law taker necessarily placed large sums of money in the hands of the City Treasurer amounting, as I am reliably informed, to about $1,000,000.00 a year. Of course, the original Barrett law bonds continued without intermission to pile up interest against the City but unless this pre-

payment sum of $1,000,000.00 a year were invested as quickly as possible, the City would have no offset against the original bond interest, from the large sum of the prepayments. Devising against this difficulty, the 1915 Act provided as follows:—

"Said prepaid assessments shall constitute a 'special fund' to be held in trust by the Treasurer in the form hereinafter prescribed, for the owner or owners of the different issue, of bonds upon which such prepayments had been made; it shall be the duty of the City, through its Comptroller, to invest such trust funds in bonds of similar kind and character, at par, for the benefit of said City as Trustee for the holders of the bonds and interest coupons upon which such prepayments were made, and the City shall become liable to such holders to the amount of the prepayment thereon made, with the interest on the principal thereof. The said bonds in which said trust funds are invested, shall be held and collected by the Treasurer as other bonds are collected, and the money applied in payment of the installmen\ of interest and principal of the bonds upon which said prepayments were originally made, or to said City; provided, that it has paid the same."

Under this law it was the intent of the Legislature to show leniency to the Barrett law taker but also it was the purpose to take his prepayment and to apply it immediately to the purchase of new bonds in order to attain unto a higher rate of interest than could be obtained by a deposit in a bank or perhaps in a public depository and thereby do the best that could be done under the circumstances to cause the new interest on the prepayments to equalize or opproximately equalize the interest accruing on the original bonds. Before proceeding further let me discuss briefly some of the defects, perhaps, in the operation but not of the validity of this law. At least some time must intervene before the controller can invest this large sum of prepayment money into bonds which would be desirable. During this time the Treasurer under present practice would have this sum for his own use and upon which under present practice he would draw interest at the rate of $5,000.00 or $10,000.00 per year. It has been questioned as to whether or not at times the controller could get good bonds in the market quickly and expeditiously. It has been urged that in such cases bonds purchased by the Controller might not be paid; that foreclosures would result and perhaps the City be loaded down with real estate and various kinds of frozen securities. It is also urged that by reason of the vast number of prepayments and numbers of investments which the Controller must make under the bond purchasing provision, a gigantic and perhaps impossible requirement as to bookkeeping in the offices of the Controller and Treasurer might result. Be this as it may, this is now the law and should be followed at least until the next General Assembly, when after trial if the law be found wanting, it could be rectified.

But at no time since 1915 has this law ever been put into effect. The reasons for this inoperation seem to me to be artificial and not based upon common sense or duty to the public. The main difficulty as raised, is the public depository law of 1907 and the Federal injunction thereunder in 1908 by the U. S. Circuit Court in the case of Barber Asphalt Paving Company vs. Edward J. Robison, as Treasuser of the City of Indianapolis and the City of Indianapolis, No. 10815. This case seems to have been a friendly litigation but on

December 30, 1908, A. B. Anderson as the Judge therein rendered the following final decree in the case:

"That the temporary injunction heretofore granted against the defendants herein be, and the same hereby is made perpetual."

"And the said Edward J. Robison, as Treasurer of the City of Indianapolis, and his successor or successors in office be, and they hereby are, perpetually restrained and enjoined from depositing in any bank, trust company, or other public depository, any of the moneys or funds received by the said Robison as such Treasurer, or by his successor or successors, on account of any special assessments made by the City of Indianapolis, for the improvement of streets or other public improvements therein."

The Public Depository Law, Acts 1907, page 391, Burns' 1926, Sec. 12611, et seq. went into effect December 1, 1907, which has since been amended in various particulars. The purpose of the depository Act was to remedy the old grievance of the public that Treasurers, State and Municipal, were allowed under the law, as we shall hereafter show, to deposit public funds to their own benefit and retain the interest thereon. Many fortunes were made in this way it is said. It was desired by the General Assembly that the interest on public funds should go to the Public, and pursuant to such view insofar as cities were concerned certain banks were established as compulsory depositories of all public funds, which depositories, under Section 15 of the law, as amended in Acts of 1909, page 437, were to pay to the City interest on daily balance, at the rate of 2% per annum, and upon semi-annual time deposits 2½% per annum and upon annual time deposits 3% per annum. In passing let me say that this rate of interest has become antiquated; the City like any other depositor ought to receive a much higher rate on its deposits of public funds, such as is received by an ordinary depositor in these days; that the next General Assembly should order a raise in the per cent. of interest coming to the City. The title to the Depository Act shows that the same has no reference to any funds except public funds and the Act itself, the Federal Court decision, the hereinafter mentioned decision of the Marion Superior Court in the Von Hake case, and other sections of the Statute show the same.

In the case in the Federal Court the theory of the plaintiff was that it had bonds, probably executed before the depository law went into effect and that any change in the method of their payment or of the depositing of the trust funds for their payment, would impair the obligation of the contract for such bonds; that Robison as Treasurer of the City was about to deposit Barrett law funds in the public depositories and that no money deposited by said Robison in said depositories could thereafter be withdrawn from the same except in payment of a warrant drawn by proper officers as authorized by the depository law; that if such Barrett law moneys were so deposited there would be no proper officer of the City with right or authority to draw any warrant in favor of the plaintiff or of any other bond holder, upon which such money could be withdrawn from said depositories; that the ten Controllet, George T. Bruenig, had given out and asserted that if such moneys were so deposited, he would draw no warrant in favor of any bond holder which would enable such bond holder to obtain the money so deposited; that if such moneys

were so deposited, it would hinder and delay plaintiff and all other bond holders in the collection of their bonds and would necessitate a multiplicity of suits by said bond holders to obtain the money to which they were entitled, and would result in the condition that the bonds held by the plaintiff and others would depreciate in value to a large extent and the marketable quality of such bonds would be greatly and needlessly impaired.

Agreeably with our view that this was a friendly suit, we maintain without any hint of bad faith in reference to any of the parties to the same, that the matter patently was not fully presented to the Court at that time and that had the Court fully understood the import of the matter and the deplorable implications resulting therefrom, it would never have rendered the injunction, at least in its present manner and form. Although technically the Barrett law funds were held not to be public funds, yet it would not have hurt anyone had they at that time been deposited in the public depository and thereafter; the bondholders would have known that their trust funds were kept safely; the City would have drawn interest thereon for all these years for the payment of the bond holders. Had the money been deposited then and thereafter in the depository Mr. Bruenig and his successors would not have had the least trouble in withdrawing the same on their warrants. This is especially true since the trust fund whether it went into a public depository or not, could be followed by the cestui que trustents wherever it might go in or out of the City's hands. The trust funds are far safer in the public depository than in the pockets of the individual who happens to be City Treasurer. The specific answer of the defendants in the case, admitting all the allegations of the complaint, add to the impression that it was merely an agreed case and not fully argued; it also asks the Court to decide once for all a question which would undoubtedly be altered by enactment of statutes. The final injunction, so broad in its scope, binding all the successors of Robison, without qualification or condition, shows that the Court was not fully informed of all the implications of his decision as he would have been, had the matter been a genuine adversary proceeding. It does not appear to us that in a matter pertaining to the mere rights of the Barber Asphalt Paving Company as to bonds held in 1908, against an individual who temporarily held the office of City Treasurer, that an injunction should have been granted purporting to bind the City and its officers for all future time. We feel that if the matter had been fully presented to the Court no such blanket injunction would have been granted, and in saying this we mean not the slightest disrespect either to the Court or to the counsel or parties individually.

It has been urged by lawyers of ability that the Federal injunction has only force insofar as the pleadings in the cause and the issues involved permit; that this case was only the individual case of the Barber Asphalt Paving Company and Robison and the City when Robison was Treasurer; that the same is no longer binding. However, the decree being so broad and all inclusive, one could not blame the City or its officers from refusing to violate in any way even its purported meaning. The City years ago should have moved to modify or to set aside the same and this office is preparing now to do so. However, as I shall show, the Federal injunction did not and does not interfere with the right of the City to the interest on pre-

payments on the Barrett Law funds, if any such interest has been earned.

Reverting to the 1915 Act again, it is alleged that by reason of the Federal injunction, such Act is inoperative. We do not agree with this contention. This proposition was stated by Mr. Lawrence Orr, the capable and excellent head of the State Board of Accounts, in the following language in a recent public statement on the 22nd day of April last:

"Reinvestments have not been made of such prepayments with the view that the money cannot be withdrawn from the treasury for such purpose, as to so withdraw it the Controller would need to issue a warrant upon the depository, and the funds are not carried in the depository since the Federal injunction forbids."

But why such delicacy on the part of the Controller? We ask, without in the least attempting to pick a quarrel with Mr. Orr. If not given a fork at the table, some of us can get along very well with only a knife. Indeed, the City Controllers ever since the Federal decree have had no trouble in issuing their warrants for millions of dollars throughout all these years up to the present time, in favor of contractors and bond holders, on these same Barrett law funds, although they were not in the public depository. Why has not the same favor been shown the City? Besides, how did the money get out of the Treasurer's hands on Barrett law funds before the passage of the depository law in 1907? They got out, because they are not here now. If the depository Act does not apply to Barrett law funds, then the general law as it was before 1907 and as it is now, governs. There has always been sufficient power in the Controller to make order against these trust funds in the hands of the City Treasurer:

"He (the Controller) shall sign and issue all orders for money upon the City Treasurer, and no money shall be paid out by the Treasurer except upon such order."

BURNS' 1926, SEC. 10311 (3d)

"He shall notify the Mayor in case of any neglect or failure on the part of any officer or officers authorized to collect any moneys for or on account of the City, in the performance of such duty or in depositing their collections in the Treasury; and thereupon, the Mayor shall suspend such officer or officers, and proceed against them for an action upon their official bond, or otherwise, as he may deem best."

BURNS' 1926, SEC. 10311 (11th)

"The Treasurer of every county, in the Sate (the ex-officio city Treasurer) shall keep an account of all moneys received by him for each city in such county for taxes, current or delinquent, assessments, license fees, and from all other sources whatever; and on the first day of each month he shall receipt to the Controller of such city, in cities in which such office of Controller has been created, and to the City Clerk of other cities, for the amount collected by him as aforesaid, for the preceding month, itemizing the moneys by him so collected, which amounts so receipted for shall at once be available for such city's use. . . . and in cities of the first . . .

classes which are county seats (such as Indianapolis) he shall pay such amounts on the warrants drawn on the City Treasurer by the City Controller of each of such cities respectively, and as otherwise provided in this Act. Whenever any County Treasurer . . . shall fail to discharge faithfully, fully and promptly any duty imposed upon him by this Act, or by any other law relating to his duties in connection with cities or towns, he shall be liable to impeachment and removal from office, and to damages from such failure, for which damages his bondsmen also shall be liable—the bondsmen of any such officers may be made co-defendants of the action in case such city or town seeks to recover damages."

BURNS' 1926, SEC. 10971

"The City Treasurer shall receive all moneys, notes, bonds and orders belonging to the City, and keep an accurate account of such moneys, notes, bonds and orders, and of the amounts received and paid out by him; and no money shall be paid out of the city treasury by him except upon a warrant duly drawn thereon."

BURNS' 1926, SEC. 10972

"All moneys due to or to be collected for any city, on any account whatever, shall be paid to the City Treasurer, who shall, for every sum received by him, issue a receipt to the person paying the same; which receipt, except for taxes charged on the duplicate, such person shall file with the city controller, save in cities of the fifth class, in which case, such receipt shall be filed with the city clerk, and thereupon such controller or clerk shall issue a quietus to such person, and charge the Treasurer with the amount therein specified, and upon what account. The Treasurer shall receive city orders that are due in payment of any debt, tax or assessment due such city; and when an order is received by him for any debt, tax or assessment due such city, or otherwise paid or redeemed, he shall cancel the word 'redeemed' and the date of redemption; and such order shall not again be put in circulation. The treasurer shall also, in like manner, cancel all bonds or other evidence of indebtedness redeemed or liquidated by him. He shall register all orders by him so redeemed in a book to be furnished him for that purpose, in the same manner as the city clerk or controller is required to register such orders. He shall also register all receipts given by him as required in this Act, except receipts for taxes charged on the tax duplicate."

BURNS' 1926, SEC. 10973

"The City Treasurer shall pay all orders issued by the City of which he is such Treasurer, when presented properly endorsed, if there be money in the Treasury appropriated for that purpose sufficient to pay the same."

"The City Treasurer of every city shall, on the first day of each month, furnish the city controller, in cities of the first, second, third and fourth classes, and the City Clerk, in cities of the fifth class, a statement of all the receipts and disbursements made by him during the previous month, and the balance in the treasury belonging to each fund, general and special, and also deliver to him all the orders

redeemed and cancelled by him during the same period; taking the Controller's or Clerk's receipt therefor; which statement, with the orders redeemed, the controller or clerk, as the case may be, shall lay before the Common Council at its next meeting, to be disposed of as the Council may direct. The City Treasurer shall also, at least fifteen days before the general city election, and at all other times when so required by the Common Council, render a full account of the receipts and expenditures for the current year, and the general condition of the treasury. He shall also, at his own peril, keep safe the moneys of the city."

BURNS' 1926, SEC. 10975

These sections of the statute above quoted were all in force in 1905, before the enactment of the depository law and have been at all times since in force. All of the various provisions for the payment or handling of Barrett law funds under these statutes have been operative at all times except where the city's rights seem to intervene. There is no reason why the Barrett law prepayments have not been turned over for re-investment by the Controller. The mere fact that the depository law, which has no application to the Barrett law funds except as the hereinafter discussed 1921 Fees and Salaries Act may govern and except as the City Treasurer might voluntarily use the depository, states that for public funds in the depository, there must be a warrant by the Controller therefor stamped with the name of the depository thereon, does not prevent the honoring by the City Treasurer of a warrant upon Barrett Law funds, which are not public funds and are not deposited in the public depository. The Section of the depository law, Burns' 1926, Sec. 12634, has no bearing upon the matter at all as to how these particular funds shall be withdrawn. The withdrawal of these funds is clearly governed by the law of 1905 and general law relating to funds not contemplated by the depository Act.

This seems so obvious to me that apparently further leglislation is unnecessary to get the Barrett law funds from the hands of the City Treasurer for the payment of the new bonds purchased by the Controller under the Act of 1915. Has the law come to such a pass that the city as trustee, cannot have its own money? To argue would make a laughing-stock of the law. But in order to obviate any excuse or further delay in the matter we suggest to you the immediate passage of the ordinance which I have drawn and append hereto, under suspension of rules. The City Council has more power in these matters than is generally thought. Under Burns' 1926, Sec. 10949, it is made the duty of the City Treasurer to "perform all the duties which by law or the ordinances of such city are required to be performed by the Treasurer thereof, except as herein otherwise provided," and there is no provision in the law opposing what I am now to suggest. The following is the state law which I now ask you for these purposes to invoke:

"And wherever there is a grant of authority or power conferred by this Act, and no method is provided by this Act or by any other general law, as herein referred to, for the exercise of such authority or power, the common council of any city or the Board of Trustees of any town, may, by ordinance, provide such method."

Burns' 1926, Sec. 11184, Acts 1905, page 383.

Presuming therefore, for the sake of argument only, that there is no method provided by the 1915 Act by which the Barrett law prepayment funds may be ordered by the Controller from the City Treasurer to pay for the new bonds contemplated in such Act, yet the General Assembly has put it in the power of the City Council to provide such method. Undoubtedly there is a grant of authority or power conferred by the law upon the Controller to invest these funds in new bonds. You therefore may by passage of this ordinance provide immediate relief by specifically stating therein the method by which the Controller may realize his authority and power.

It will be noted that in the above set out Section 10971 of Burns' 1926, that the Treasurer shall each month receipt to the Controller for Barrett law funds and the same shall then at once be available for such City's use. Construing this literally, the Treasurer under his present practice would be able to get the interest on Barrett law funds for such time as might intervene between his obtaining of the same and his receipt of the same to the Controller; a considerable sum. We think, however, that the Act of 1915 supersedes this section in this respect; that it contemplates the immediate investment of Barrett law prepayments in bonds because the very purpose of the bond investment is to cause the interest on the new bonds to approximate or equal the interest on the old bonds. The Controller has the right to know immediately of any prepayments and as to all the accounts of the Treasurer; he should therefore under the law not wait for 30 days to elapse but should invest prepayments at once in bonds:

The case of City of Indianapolis vs. Bruce Robison, 186 Ind. 660, can be dismissed without much consideration. It did not hold the 1915 law invalid; it merely decided that the application of it to bonds executed before the 1915 law went into effect could not be maintained, on the ground of impairment of contract. That would be true as to any law. Such case did, however, state that the Barrett law funds invested as provided in the 1915 Act are a trust fund in the hands of the city.

The case of State of Indiana, ex rel City of Indianapolis vs. Carl Von Hake and his bondsmen, No. A-7668, Room 3 of the Marion Superior Court, also has little significance here. On the ground of res judicata however, the city or state cannot proceed further against Von Hake and his bondsmen. In that case the plaintiff tried to maintain that the Barrett law funds should have been placed in the public depository and that Von Hake earned large sums of money in the way of interest thereon by private investment. The contention of the defendants according to their briefs, which I have read, was that these sums were not public funds and had no place in the public depository; that under the law the relation of debtor and creditor applied and that Von Hake was entitled to the interest. This theory was adopted in some particulars by the learned Court and judgment was rendered for the defendants. It would seem that irrespective of the question as to whether or not these funds were public funds, the matter was still open as to whether or not Von Hake was entitled to the interest. The plaintiff to my view should have appealed this case for a decision of the higher court but instead it waived the right to appeal and also dismissed a similar case against the former City Treasurer Sourbier. This decision declared the law wholly in refer-

ence to Von Hake and his bondsmen but as to no one else. In the same, from the pleadings and the briefs I can find no contention made by the plaintiffs of treasurer's liability on the theory of the trust fund doctrine upon which the views expressed herein are largely based. In fact when I mentioned this theory to one of the able attorneys at law of the defendants in that case, he informed me that this trust fund doctrine was never raised and believed that if it had been, the decision of the Court might have been altogether different. I do not wish to be put in the attitude however, of criticising the plaintiff's attorneys nor anyone in that case; the matters are extremely complicated and often leading theories may be overlooked.

There is no merit in the contention that the Treasurer is liable to the city for the interest merely because there was no investment in new bonds under the 1915 Act. The Treasurer had no duty to perform here except as follows: the duty was on the Controller to buy the new bonds and to send his order to the Treasurer for their payment. Until the Controller invested in the new bonds and sent such warrant or order there was no duty on the part of the Treasurer. He could not be held as a constructive trustee, a trustee exmalefacio or as any other kind of trustee until the Controller had bought the bonds and the Treasurer had refused payment thereon. This to my information was never done. The special fund of the Act of 1915 was merely making a special fund of a special fund, with the sole change from the latter of the manner of its investment. The second special fund contemplated, never became a fund "to be held in trust by the Treasurer in the form hereinafter prescribed," until the bonds were bought, paid for and placed in the hands of the Treasurer for holding, collection and satisfaction of the other bonds. None of this to my information was ever done. Unless it could be proven that the Controllers and Treasurers were in a conspiracy to prevent the investment under this Act, I do not see how the Treasurer could be held for the interest solely because of a special fund never created, through the fault of the Controller. To hold the Treasurer responsible in any way, it must be shown that the trust fund in his hands first earned interest and then that the old relation of debtor and creditor between the City and the Treasurer does not apply to the Barrett law trust funds.

Although, your inquiry was only as to interest on prepayments, let me further suggest that there is probably other interest which the City Treasurer has taken for years which is not ordinarly considered. I refer to the interest on sums ranging from $500,000.00 to $1,000,000.00 a year which are paid in by persons assessed for public improvements, in cash and in advance and in full, without the taking of the Barrett law. These sums are use to partially pay for the improvement and generally are in the hands of the Treasurer for at least 30 days without interest given to the public. If the Treasurer according to rumor, invests these sums privately as it is alleged that he does in regard to the said prepayments, he would obtain on these funds interest in a sum ranging from $4,000.00 to $10,000.00 per year.

Contrary to popular impression the law in this state up until 1907 when the depository Act was passed, declared that the interest on all public funds both state and municipal, belonged to the Treasurer. Although contrary to the great weight of authority throughou-

the Union, our Supreme Court decisions took this rather peculiar shoot, holding that public funds were held by the Treasurer not as a Trustee or bailee for the City or State but were held in the debtor and creditor relation only, the City or State being the creditor and the Treasurer being the debtor. As a plain inference from this relation, the Indiana Courts held that this relation gave the Treasurer legal title to such funds. They reason in this wise, because under the law the Treasurer is an insurer of public funds with no relief from act of God, death, fire, earthquake, theft, or any casualty; he must hold the funds at his peril. The Court argued that this insurance precluded the Treasurer from being a Trustee or a Bailee because a Trustee or Bailee under the law is not an insurer or responsible for act of God, or any such casualties; that the relation of debtor to the City or State was the only one which would fit the situation for the reason that only as a debtor could the Treasurer be held responsible in spite of any such casualties. A debtor must pay and his obligation, which never ceases no matter what disasters might confront him. A debtor concededly under general law holds legal title to the amount loaned him; if the Treasurer held legal title, the Supreme Court argued the funds were his and he was credited to the interest. Concededly under general law a Trustee or Bailee if they put the funds to interest must account to the Cestui Que Trust or to the bailor for such interest, it being only the natural increment and belonging to the funds. For all these years, therefore, our Supreme Court has held that the relation of City and Treasurer was that of debtor and creditor and that the Treasurer was therefore entitled to any interest or emolument that he might obtain thereby.

In the leading case of Shelton vs. The State ex rel, 53 Ind. 331, the Treasurer of Morgan County was asked to account for the interest on public funds which he had invested privately to his own profit. The Court discussed the Indiana rule as we have above outlined and held the County Treasurer not liable to the county for the interest and stated as the correct rule:

"That when the officer has complied with the terms of his official bond, by keeping the money safely during the term of his office, by paying it out when legally required during his term, or accounting for and paying the same over to the proper person or authority at the expiration of his term, he has done all that the law and the terms of his bond require of him. He is not, like a Trustee or an agent the mere bailee or custodian of the money in his hands. The money which he receives becomes his own money and when he has accounted as required by law and by the terms of his bond, nothing further can be required of him. If the Legislature has provided, or shall provide, that money, in such case, shall remain specifically the money of the county, a different rule would prevail. No such regulation is found applicable to the money from which the profits were derived, that are in question in this case."

This case has never been overruled but is supported by a great number of other authorities, excerpts of which we here now insert:

"The facts found by the court show that Thomas became a defaulter in his prior term of office—not because he invested money received from public sources in his private business, for that he had a right to do, so long as he kept himself ready to pay out according to all sums required for public uses."

Goodwine et al vs. The State ex rel., Fleming, 81 Ind., 109.

"He was bound, as a public officer, to keep the funds in his hands safely. He was an insurer of the safety of the funds, and he was bound to account for the money lost by him, although lost without his faut. The amount of money he received measured his liability. Rock v. Stinger, 36 Ind., 346; Inglis v. State, ex rel., 61, Ind., 212; Linville vs. Leininger, Tr., 72 Ind. 491; Bocard v. State, ex rel., 79 Ind. 270, *** 'He was not a mere bailee of the money; but he became bound by his bond to the township for it, whatever casualty might have happened to him, whereby he lost it."

McClelland, Trustee, v. The State, ex rel. Speer, 138 Ind. 321.

" And if the Trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the cestui que trust has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. And where a part of the funds of the cestui que trust have been mixed up with other funds exclusively belonging to the trustee in the new purchase or investment, 'there may be ground to hold the trust funds in charge pro tanto therein.

"But the doctrine so announced as applicable to ordinary trustees, including agents, bailees and the like, is not applicable to public officers who give bond to secure a just and full accounting for the moneys which come into their management and control. ***

"It is well established that a public officer who is required to give bond for the proper payment of moneys that may come into his hands as such officer, is not a mere bailee of the money, exornerated by the exercise of ordinary care and diligence; but that his liability is fixed by his bond, and that the fact that the money was stolen from him, without his fault, does not release him from his obligation to make such payment."

"In Morbach v. The State, ex rel., 28 Ind. 86, this case was approved and the doctrine applied to the case of a township trustee; and in Rock v. Stinger, 36 Ind. 346, the same judge, speaking for the court, after reaffirming the doctrine and its applicability to a township trustee, says: "Under these circumstances, as the trustee is not a mere bailee, it would seem that the legal technical title to the money in his hands is in himself. Suppose a township trustee should die with moneys received by him as such, in his hands; can it be claimed that the money, even if the specific bills or coin received by him officially could be identified, would go to his successor and not his administrator? We think it quite clear, in the case supposed, that the money would go to the administrator, because simply the title was in the trustee. This view is fully sustained by authority. In the case of Inhabitants of Colerain v. Bell, 9 Met. 499, it was held that 'the specific money received by a collector, in the collection of taxes, is his money, and not that of the town.' "

"But, say counsel for the appellee, in substance, this officer was a trustee, so named in the law, and the duties of a trustee are imposed on him, and, consequently, the law of trusteeship must apply to his transactions. There is no question that in the general management of his office, and in the discharge of its duties, he is

responsible as such, and may well be called a trustee; but, in reference to the public money which comes into his hands, it is not so. That at the moment of receipt, becomes his own. The amount he receives measures the amount for which he is liable on his bond, and the amount which he can officially expend; and he must manage his trust with reference thereto, holding himself ready to apply that sum, if necessary, to the public uses under his supervision, according to law, but with reference to any particular or specific money, no matter whence received, he owes the public no duty, and the public can make no demand therefor.

"This conclusion necessarily results from the doctrine enunciated in the cases referred to supra, and the extraordinary liability imposed on public officials and their bondsmen, beyond any which is enforced against an ordinary trustee, or private agent, can be maintained consistently on no other theory."

"It being conceded that the public officer, under bonds to account therefore, is not a bailee or trustee, but the owner of the moneys which come into his hands by virtue of his office, there is no room for an application of the equitable principle which the appellee endeavored to invoke, for that principle applies only in case of trusts and to the subject matter of the trust. Repeating the expression used in Halbert v. The State, supra, the "liability" of an officer who is required to give bond "is fixed by his bond," and in case of default resort must be had to that bond, if the individual responsibility of the officer is not adequate. There is no principle of equity or rule of law or statute by which the preference asked for can be allowed.

Linville vs. Leininger, 72 Ind. 491.

Such was the law before the enactment in 1907 of the depository Act but none of these decisions insofar as we have been able to discover, held that as to a special fund held in trust for the city as for bond holders or others, the rule of debtor and creditor applied. The remarks of the court in the last above cited decision as to specific money, if at all applicable to the Barrett law situation, would be mere obiter dicta and not authorized by the facts of the case. The concluding sentence of the above excerpt in the Shelton case which we again quote, seems to point the way here:—

"If the Legislature has provided, or shall provide, that money, in such case, shall remain specifically the money of the county (or city) a different rule would prevail."

As to Barrett law money the Legislature has provided that such money shall remain specifically the money of the city and consequently a different rule in our opinion does prevail. Under law money in the hands of a trustee remains his money; he holds legal title to it. Here, the city is such manner of trustee. Since 1905 and at all times for that matter, the Barrett law funds are specific and special funds, in fact they are trust funds with the city as the trustee thereof for the bond holders.

"The funds thus raised shall be a specific fund, to be held and used for the special purpose herein described, and for no other purpose whatever."

Acts 1905, Page 236, Sec. 108 p. Burns' 1926, Sec. 10442.

"It shall be the duty of the Treasurer to promptly and properly apply all money paid in on such installments to the holders of the bonds and coupons and he shall not use the money received by him in payment of such installments for any other purpose whatever than that of paying the bonds and coupons, and he shall promptly ascertain the amount paid in on such installments and, without delay, pay the same to the bond and coupon holders entitled thereto."

Acts 1905, Page 236, Sec. 115; Burns' 1926, Sec. 10454.

In the case of City of Indianapolis vs. Robinson, 186 Ind. 660, 117 N. E. 861, it was held that the special fund under the 1915 Act of the Barrett law prepayments was a trust fund wherein the city was the trustee for the bond holders. There is no distinction between the 1915 Act and former Barrett law Acts in respect to the funds except the manner in which it is to be invested.

This being such a trust fund, would the interest, if any earned, be the property of the city or the property of its Treasurer? Does the Treasurer in keeping trust funds, for the city, maintain as to it the old relationship of debtor and creditor? As to this fund does the Treasurer hold the legal title and may he invest it in his private business or put it privately out at interest for himself as was his privilege in regard to public funds before the enactment of the depository law? In my opinion the law of trustee prevails and compels the answers to each of the last two questions to be in the negative. It is a matter of surprise to me that this theory has not entered into the discussions of the subject heretofore.

One of the cardinal rules of trusts is that the trust fund, the res, the corpus, or the body of the trust, must be kept intact. It ceases to be a trust when not kept intact; it never becomes a trust except in the contemplation that the fund will remain intact. If the Treasurer were permitted as between him and the City to hold this trust fund in the old debtor and creditor relation, then he would be permitted as a matter of law to use the same in his own private business, to put it in the bank of his own private choosing, to buy merchandise with it or to do anything else he chose, provided at the end of his term he would produce its equivalent to his successor, but this would be in violation of the very definition of a trust; it would not be keeping the trust fund intact. The city and its agent the Treasurer must keep this fund intact because it is dedicated to that very purpose.

"The law has long been regarded as settled that it is the duty of trustees to collect and preserve intact the trust property, and that they have no power to change the characer of the trust property, unless it is of a perishable or transitory nature, and then only to convert it into a a substantian, enduring, and revenue producing investment, and if a change be deemed necessary, or for the interest of the beneficiary, the permission or sanction of the court should be obtained. The rule is necessary for the preservation of the fund. The temptations to tamper with the fund by a trustee are so powerful and so numerous, the hopes of bettering the estate so often prove delusive, that the power of changing the character of the fund is most safely reposed in the discretion of judicial tribunals. This is

the invariable rule in reference to converting money into real estate or real estate into money. A trustee ordinarily holds the property intrusted to his charge to collect the rents, issues, dividends, or profit thereof, and to apply them to some specific use, and the legal presumption is that he has no power to sell or transfer the subject of his trust. The power to sell must be found in the instrument vesting the estate in the trustee, or in some other instrument executed or assented to by the donor and declaring the purposes of the trust. And in absence of any authority given expressly or by implication property which has passed into the hands of a trustee to be held by him for a limited time must be kept by him and delivered in kind to the beneficiaries at the termination of the trust, and a sale of the property without authority is void as against the beneficiaries."

26 Ruling Case Law, 1283, and cases.

Under the doctrine of the Treasurer as a debtor, the interest he earns on public funds is his but where he cannot be the debtor of a City as in case of a special trust fund, he as trustee or as a joint trustee or a representative or agent of the trustee or as a bailee, in each of which relations he is not entitled to the interest he may have earned from the fund privately, would not own the interest. That interest is the natural increment to and belonging to the principal sum and goes to the one to whom the principal belongs either actually or by legal fiction.

State vs. Chamber, L. R. A. 1918 B. 803, 811, Note.

It does not lie in the mouth of the Treasurer to say to the City as Trustee, which insofar as the Treasurer is concerned is the owner of the funds and holds legal title thereto, that the bond holder only can complain as to the interest. The trustee in every way and for every purpose represents the bond holder, the cestui que trustent. The Trustee may bring suit for and in behalf of every right of its certui and it is its duty to do so. It is not the affair of the Treasurer as to whom the money eventually belongs, when he deals with the Trustee. Besides the city as a trustee personally has been damaged by the acts of the Treasurer in retaining the interest; it has been compelled to levy a one cent tax in its attempt to equalize deficiencies and now there are as in the past, great deficiencies. The city has as Trustee a personal interest in seeing that the trust fund and its increment interest is kept intact. This is also following the law of trusts.

In our view the Treasurer upon the receipt by him of the Barrett trust funds became a trustee or agent thereof for the city to the extent of its interest and for the bondholders although the city was the trustee named in the law. In the case of Lewis vs. Hershey, 45 Ind. App. 104, 90 N. E. 332, a grandfather obtained from the mother a sum procured by court decision in a bastardy proceeding, which sum made a trust fund for the illegitimate child. The court says:—

"Unlike many cases, where the question as to whether or not a trust exists, the money over which this dispute arose was trust money, created so by statute, regardless of whether the mother or grandfather held it. This is certainly true, when he took it, as he did, with full knowledge of the facts as to the source from whence

it came. He was merely the custodian of the money. Kane v. Bloodgood, 7 Johns, Ch. (N. Y.) 90 11 Am. Dec. 417; Brown v. Maplewood Cemetery Ass'n. 85 Minn. 498, 89 N. W. 872; Taylor v. Benham,46 U. S. 233, 12 L. Ed. 130. In the case of Kane v. Bloodgood, supra, Chancellor Kent said; 'Every person who receives money to be paid to another or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity as a trustee for a breach of trust.' "

"A grantor of property in trust for a specific purpose retains such an interest therein as entitled him in equity to insist on specific execution of the trust."

39 Cyc. 246, and cases.

"While an agent or solicitor of a trustee is personally liable for any loss resulting from his own positive act or default, and will under some circumstances be charged as trustee, where he has not participated in any breach of trust he will not be held personally liable, or held to be a constructive trustee, his liability to account being to the trustee and not to cestui que trust."

39 Cyc. 306 and authorities.

"A mere agent of a trustee is generally accountable only to the trustee, and not to the cestui que trust, unless the facts established his relation as that of trustee."

39 Cyc. 468 and authorities.

The directors of a corporation, while not technically trustees, were liable in equity to account the same as ordinary trustees for their conduct in the management of the corporation, and for the monies they had received as a consideration for turning over the control of the corporation to third parties.

Bosworth vs. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751.

In England it seems to be the law that notwithstanding the general rule that a trustee's agent is accountable to the trustees only, an inquiry should be had of the circumstances attending the agent's appointment and his knowledge of the trusts affecting the property.

Archer vs. Lavender, Ir. R. Eq. 220.

Conceding the sake of argument only that the last proceding reasoning is defective, yet on other grounds the Treasurer would be liable for any interest which he has privately earned on the trust fund. This is the trust of the city in favor of the bond holders. Without question the bond holders could have held the Treasurer for the increment interest on the funds. However, the city under the deficiency statute and under the 1915 law was made responsible to the bond holder for the principal and also the interest on the bonds. It has been paying such principal and interest for many years going into its own pocket to supply the deficiency created more or less from the pocketing of the interest by the Treasurer. It has paid what it was legally bound to pay and what the Treasurer was

partly bound to pay in the way of interest, to the bond holder. Even though in the first instance had the city as trustee no cause of action against the Treasurer for his retention of interest which should have been paid as increment money, yet when the city does pay the bond holder in full, under the doctrine of law known as subrogation, it steps into the shoes of the bond holder and is permitted to assert any rights which the bond holder had or might have had. The latter, as we have said, had the right before his payment in full by the city, to hold the Treasurer for the increment interest on his personal sum. The city, therefore, being subrogated to the rights of the bond holder may sue the Treasurer for the increment interest with the same right formerly possessed by the bond holder. The following excerpt from one of the leading legal publications given the general doctrine regarding the right of subrogation.

"Subrogation is the substitution of another person in the place of a creditor so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. (Johnson vs. Barrett, 117 Ind. 551, 19 N. E. 190) The doctrine is one of equity and benevolence, and like contribution and other similar equity rights was adopted from the civil law, (Spray vs. Rodman, 43 Ind. 225) and its basis is the doing of complete, essential and perfect justice between all the parties without regard to form, and its object is the prevention of injustice. The right does not necessarily rest on contract or privity, but upon principles of natural equity, (citing numerous Indiana authorities, Foot Note 6) and does not depend upon the act of the creditor, but may be independent of him and also of the debtor." - - -

37 Cyc. 363 Et. Seq.

"A general agent upon being compelled to pay a debt which should be satisfied by a sub-agent is subrogated to the creditor's right against the latter."

37 Cyc. 349.

Hough vs. Aetna L. Ins. Co., 57 Ill., 318.

Young vs. Morgan, 89 Ill., 199.

"A court of equity will not allow an agent to use trust funds in any manner by which he himself acquires a special benefit to the detriment of his principal and it will not allow him to invest the funds in securities which he himself held and in such case equity will allow the principal to be subrogated to the rights which the agent had at the time of the transaction, even though the original securities are cancelled of record."

37 Cyc. 440.

It is our view that the Treasurer insofar as this trust is concerned holds the same as an agent or a sub-agent of the principal, the city as the trustee.

Our search has not led us to any case identical in every respect to this one as relates to subrogation. But the facts and the principle of law are enunciated with remarkable similarities in the case of the U. S. Mortgage Co., vs. Henderson et al, 111 Ind. 24. In that case Henderson was the agent of the Mortgage Company under

contract that would advance payment on mortgage interest due from clients of the company when such clients failed to pay the same. In the case of the City against its Treasurer the City agreed to advance to the bond holders such interest as the Treasurers failed to pay. In the Henderson case the Supreme Court in holding that Henderson was subrogated to the amount of interest which he advanced, say:

"The stipulation in the contract, by which Henderson agreed, in case any interest on loans negotiated by him should remain in arrears for a period of ten days that he would immediately pay such interest himself, put him in such relation to the loan as entitled him to a remedy against the borrower, and to participate in the security, in the event he was called upon to pay the interest cou pons."

State ex rel. Kendall vs. Green, 101 Ind., 532.

Gillett vs. Hill, 102 Ind., 531, 1 N. E., 551.

Without much doubt, the city would be entitled to be subrogated to all the rights of the holder against the Treasurer, if it, the city has paid off the bond holder in full. In addition also are other reasons for holding that the old relation of debtor and creditor between the city and treasurer does not obtain in relation to Barrett Law trust funds. The very purpose and intent of the legislature in enacting the 1915 law was directly opposed to such debtor and creditor relation giving to the treasurer the right to the interest. Its very purpose was to give this interest to the city and thus destroy one of the chief elements of the debtor and creditor relation.

Under Acts 1921, Page 851, Burns' 1926, Sections 7850-7856, in force May 31, 1921, the new Fees and Salaries Act was declared. The import of this act is that the City Treasurer is no longer invested with the legal title, namely the right to the interest, is taken from the Treasurer. The significance of this is that the former ground upon which the City Treasurer was entitled to retain the interest of funds in his hands, namely the ground that the legal title of the same was in him, seemingly has been cut out from under such right. The pertinent Sections of such Act are as follows, to-wit:—

"7850. Salary of Officers in Counties of 300,000. 1. In counties having a population of 300,000 or more, according to the last preceding United States census the following named sums shall be the salaries of the respective officials named herein;___The County Treasurer shall receive an annual salary of $5,000.00____. The salaries named herein shall be in full for all services, and no other compensation or fees of any nature shall be paid to any of the above officials except as herein provided:— Provided, that the County Treasurer shall serve as the Treasurer of the Civil City and the Treasurer of the School City of any county seat city located in such county, and, for such services, he shall receive no compensation except as provided in this Act."

"7852. Fees to be paid into the county treasury.—3. All fees, interest, penalties, costs, fines and forfeitures provided by law shall be collected by the the proper officials, and shall be paid into the county treasury, except fees on delinquent tax collections and delinquent improvement assessments, which fees shall be distributed

as now provided by law; also except foreign fees collected by the sheriff, which shall belong to and be the property of the sheriff. It shall be unlawful for any official named herein to retain any fee as his own except as herein provided."

"7853. Deposits of funds.—4. Deposits must be made of all funds of any character whatsoever coming into the custody of any official named in this act, and such funds shall be held subject to the provisions of the depository laws of the State of Indiana."

"7956. Construction of Act.—7. This Act is not to be construed as diverting any portion of fees, interest, penalties, costs, fines or forfeitures from any public fund as now provided by law, but it is to be construed as supplementary to such existing law."

Under this Act the City Treasurer's salary of $5000.00 shall be in full for all of his services with no other compensation of any nature except fees on delinquent tax collections and delinquent improvement assessments. It declared that all interest, provided by law shall be collected by the proper officials and shall be paid into the County Treasury.

Although at no time in 1921 or thereafter was it perhaps possible to pay interest into the county treasury, which is the public depository, on account of the Federal injunction, yet the intent of Section 7852, coupled with Section 7850 and Section 7853, which is also as yet inoperative by reason of the Federal injunction, was clearly that the treasurer should no longer have legal title to the fund.

It might be said that the interest "Provided by law" which shall be collected by proper officials and paid into the County Treasury under Section 7852 is not interest such as that which might accrue under Barrett Law prepayments for the reason that the latter is not provided by law. While it is true that the latter is not provided by law in a strict sense, yet in the broader sense probably used by this statute, the title to the moneys being removed from the Treasurer, this interest is provided by law for the City.

It has been suggested that the 1921 Fees and Salaries Law has repealed the 1915 Act, Section 10450, by the statement in Section 7852 and Section 7853 that interest and funds of any character whatsoever coming into the custody of the Treasurer must be deposited in a public depository. However the Federal injunction was a part of the law of this State then as it is now and the Legislature must be presumed to have had that decision in mind and to have known that the same was unreversible and unrepealable by that body. The Legislature must have known also that Barrett Law funds are not public funds but dedicated to special purposes; that they may not be indiscriminately mingled with general funds in the public depository. Section 7856 of the Act declares that it is not to be construed as diverting any portion of — interest — from any public fund as now provided by law, but it is to be construed as supplementary to such existing law. Undoubtedly this Section refers to the Act of 1915 and to funds such as the Barrett Law funds, although in a popular sense calling it a public fund; otherwise such Section would have no meaning. If there were such repeal it must

needs be by implication and repeal by implication is not favored by the law. From the foregoing we deduce that the 1915 Act was not repealed by the Act of 1921.

It is our belief therefore that inasmuch as the 1921 Fees and Salaries Act clearly shows the intention of the Legislature not to give legal title of the Barrett Law funds to the Treasurer and thereby create the relation of creditor and debtor, but to create the condition of trust or bailment as is usual in regard to a custodian of funds, that the City Treasurers are responsible at least since May 31, 1921, for any interest money which they may have obtained by private investment of the Barrett Law prepayments. To the same effect is Burns' 1926, Section 10967, Acts 1909, P. 289.

In support further of the theory that the Treasurer does not own the right to the interest on these trust funds, we might say that the decisions of the Supreme Court before 1907, that the interest belongs to the Treasurer, contrary to the great weight of American decisions, were so questionable in merit as to warrant the view that their import should be limited as much as possible. It is indeed contrary to public policy and public weel to push that import farther than the cases go themselves. They are old fashioned and not up to date with modern judicial reasoning which more highly regards the public right.

This law of Indiana in effect now except for the depository law and except for the peculiarities of specific trust funds, is to the mind of the better judicial thought in the majority of the opinions of the country, bad law.

State vs. Schamber, L. R. A. 1918, B. 803, 811 Note.

Adams vs. Williams, 30 L. R. A., (N. S.) 855 and note.

Lake County vs. Westerfield, 273 Ill., 124, 112 N. E. 308.

From the foregoing I think it would be clearly seen that the interest on Barrett Law funds, if any is privately earned by the Treasurer, belongs to the City.

If the Treasurer allowed the Barrett trust funds to lie inactive in his hands, it is a question of fact as to whether interest should be allowed against him.

"The general rule is well settled that where trust money cannot be applied either immediately or within a short time to the purposes of the trust, it is the duty of the trustee to make the fund productive to the cestui que trustent by the investment of it on some proper security."

39 Cyc. 390 and authorities.

Stanleys Estate vs. Pence, 160 Ind., 636, 66 N. E. 51.

This is but a reiteration of the law obtaining for the last 2000 years:—

Matthew, Ch. 25, v. 27.

"Where a trustee has made improper investments the cestui que trust has an election to take the original fund and legal interest

thereon, or to take the fund as invested at the time of the accounting, and all legal profits realized by the trustee thereon."

39 Cyc. 414 and authorities.

Stanleys Estate vs. Pence (supra).

Lewis vs. Hershey, 45 Ind. App. x 104, 90 N. E. 332.

"Ordinarily a trustee is not chargeable with interest on the trust funds unless he has used them for his own profit, or invested them so as to produce interest, or suffered them to lie idle when they might have been invested, or needlessly delayed settlement and surrender of the property, or in some other way shown a want of diligence and good faith."

39 Cyc. 422 and authorities.

"As a general rule, where a trustee applies trust money to his own use, as in trade, he is chargeable with interest; and also if he mingles it with his own and uses it in common."

39 Cyc. 424 and authorities.

Stanley vs. Pence (supra).

Lewis vs. Hershey (supra).

"The general rule covering the accountability of a trustee is that he shall not make a profit for himself out of the trust estate; and this rule subjects him to an account for all the interest which he makes or receives; but ordinarily he should not be charged with more than he actually receives, or in the proper exercise of his duties should have received."

39 Cyc. 426 and authorities.

" As a general rule trustees are not to be subjected to the payment of compound interest; simple interest is the rule and compound interest the exception. It is often asserted that a special case must be made out to justify the exaction of compound interest, such as wilful violation of duty or gross delinquency, and that ordinarily a trustee is chargeable only with such intrest, simple or compound, as he actually receives, or in the proper and faithful discharge of his duties should have received. Where the omission of a trustee is due to mere negligence, without fraudulent intent, simple interest alone is allowed to the cestui que trust on trust funds. Where, however, the trustee uses the trust moneys in trade or speculation for his own benefit or advantage, or sells trust stocks and applies the proceeds to his own use, or refuses to follow the directions of the trust instrument as to investments, or disregards a direction for accumulation, or conducts himself fraudulently in the management of the funds, and in all other instances depending upon like principles, interest may be compounded either as a penalty, or as a measure of damage for undisclosed profits and in place of them. A court of equity has power to compound interest annually, or at longer or shorter periods, according to the delinquency of the trustee."

39 Cyc. 428 et seq. and authorities.

The rule in Indiana seems to be that where a trustee improper-

ly uses the trust fund, he is liable at least for interest at the rate of 6% per annum thereon.

Stanley vs. Pence, (supra).

Lewis vs. Hershey, (supra).

37 A. L. R. 447-441

1 A. L. R. 1645.

Under the foregoing conclusions let us examine the method by which we can start right and start at once to get this interest into the City's hands. The 1915 law with its every obligation and duty is now in full force and effect. The present Controller should immediately ascertain the amount of this fund, immediately invest in the new bonds required of the full amount of the fund, and send his order at once for their payment to the City Treasurer. If he should fail in this he and his bondsmen will be liable to the City for damages on the ground of neglect of express statutory duty. The Treasurer should immediately honor such order for investment in the new bonds, receive the same and hold them for the purposes designated in the Act of 1915, at his peril. If he does not so do, suit of mandate or other appropriate legal action shall be brought against him by the legal department of the City or other proper authority and damages asked against him and his bondsmen for neglect of express statutory duty. The law also provides impeachment and even criminal prosecution for officers who refuse to perform such duties. The controller need not wait for the enactment of the ordinance I append hereto, for the same, although helpful, is not at all necessary.

The implications in your request and the requirements of civic bodies and the public calling for an opinion from me on the liability of past officers for the loss of interest to the City necessitates an answer. This answer I am bound in good conscience and under oath of office to give. In all the discussion heretofore, one element as to the 1915 law has been overlooked as to liability of officers. The original primary duty of the investment plan of the 1915 law, is upon the City Controller. The statute expressly places upon the City Controller the duty of investing in bonds and placing the same in the hands of the City Treasurer for further action. According to report, this the Controller has never done under the 1915 Act. A mere verbal request upon the Treasurer for the funds would not exculpate the Controller; he must do his full duty; he must buy bonds and send his order to the Treasurer therefor and then and not until then does the Treasurer's duty begin. If according to report, the Controllers since its passage under emergency clause in February 1915, have failed to go the full length required of them by the law in investing in bonds and ordering their payment from the Treasurer, then each and all of such Controllers so offending may probably be successfully sued for neglect of duty and for damages easily ascertained from the loss of interest on bonds to be calculated on the amounts respectively which should have been invested under the Act. Recovery against controllers is clearer and easier in the law than against treasurers. Questions as to the running of the Statute of Limitations and the liability of bondsmen will be discussed later. To my view the the Controllers, if they have failed to do their duty as outlined, are primarily responsible for the loss of inter-

est to the city under the 1915 Act. If the City recovers against the Controllers its loss it cannot recover again from the Treasurers.

In addition to such liability of the Controllers, it goes without saying under the views expressed to show that the present City Treasurer has no right to interest on these funds; that all former Treasurers are probably legally liable to the City for such interest as they may have obtained by private investment of the same, unless the Statute of Limitations has run in their favor or the loss made good through suits against Controllers. This follows inevitably if the present Treasurer may not retain the interest.

It may be that your body and the public desire only that the thing shall proceed properly from now on and that a general amnesty be declared as to the past. It is common knowledge that the Treasurer, by political parties has been heavily assessed for campaign funds and amerced in many other ways because of the fact that he was reputed as a recipient of this interest. The people have known for years that the interest has made the Treasurer's office a prize, but they have never taken efficient steps to stop the practice. They are not estopped in law, but they may feel that they are in good conscience. However, the question of amnesty is to a great extent not for me to determine, but for you and the public. I think I can say with some degree of assurance that from now on the thing may readily be straightened out. The present Controller and City Treasurer are, I think, willing to do their duty, but if not they can be forced to do so either by mandate or impeachment or other remedy. The Mayor also has considerable powers to enforce obedience. Burns, 1926, Sec. 10311 (11th).

Should it be your desire and that of the public that I as Corporation Counsel proceed against past Controllers and Treasurers I will do so if in the case of the Treasurers, it should appear that this office has such power. The available method of obtaining the requisite information is apparently the State Board of Accounts. On such information it is the duty of the Attorney General, to whom the findings of the Board are first given, to bring the actions against the Treasurers and bondsmen for the interest. Such was the procedure in the Von Hake case. If the Attorney-General does bring suit first, suits by others are precluded.

Burns, 1926, Sections 12645, 12660, 12663, 12664.

State ex rel. vs. Sonderman, 80 Ind. App. 443.

The Sections giving the Legal Department power to represent the City in its legal business, etc., have not been repealed by such Sections 12645, 12660 and 12663. Such Sections are merely cumulative. Local self-government requires that a City should be permitted to look out for its own affairs.

As to actions against former Controllers it is my view that this department might possibly sue to the exclusion of the Attorney-General on the Board's report on the ground that the Attorney-General's power to sue to "carry into effect the findings resulting from such examination and secure to the proper municipality the recovery of any funds misappropriated, diverted or unaccounted for" might be read conjunctively and not disjunctively. In such case the Attorney-General could not sue except when both elements of such power

were present; carrying into effect the findings and also when funds are misappropriated, etc. Suit against the Controller would be for neglect of duty and for damages therefor, not for misappropriation. But the damages could not be well ascertained without the Board's findings as to amounts and various other facts.

Also Section 14351, Burns 1925, may be construed by the courts as giving the prosecuting attorney the authority to sue treasurers.

I might add that pursuit of past interest or for damages against Controllers and Treasurers will mean hard and bitter fights extending over years perhaps. If the order is to proceed against such individuals it will be necessary or at least wise that complete audits be made either by the State Board of Accounts or others of the Barrett Law funds at their proper intervals and then after suit is brought either by examination out of court or by interrogatories under oath, it can be ascertained what amount, if any, the Treasurers have earned privately on these funds and Controllers have lost by their neglect. It would probably be necessary in order that there be a continuity of effort uninterrupted by individuals passing out of office, that you or civic bodies furnish additional legal counsel or funds therefor before proceeding as against past officials. At least such information as I have suggested should be obtained. However, it is not legally a matter of my concern as to the wishes of the public in reference to the pursuit of past funds yet lawsuits of this kind are generally unprofitable in result unless following the public wish. I will therefore be pleased to know not only your attitude but also that of the public in this matter. Your attitude, of course, may be made known to me by furnishing me the information suggested, some thing which this office is utterly unequipped to find out and discover for itself. Pursuit of former interest in court by this office, an immense and complicated problem, could only be done by us without sacrifice to more pressing present problems, with additional legal help. This office for its ordinary problems is woefully undermanned. We would now welcome either as a volunteer or as one furnished by some civic body, an attorney at law well versed in Federal practice, to assist us in an immediate effort to modify or set aside the Federal injunction; to compel by proper legal steps, the officers charged with putting the 1915 law into effect, to perform their duties should they, as we do not now anticipate, refuse to so perform.

The bond of the City Controller shall cover all of his official acts. This is sufficient to cover any neglect of his in complying with the 1915 Act.

Burns, 1926, Sec. 10309, Acts 1909, p. 236.

The bondsmen of the Treasurer in my view are liable for his retention of any interest privately earned.

Burns, 1926, Secs. 10311 (11th), 10949, 10967, 10971, 11567, 11597.

As to limitation of actions, the statute declares:—

"Second. All actions against a sheriff or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty (suit shall be brought), within 5

years; but an action may be brought against the officer or his legal representative, for money collected in an official capacity and not paid over, at any time within six years."

Burns, 1926, Sec. 302.

It would appear by the cases cited under the above section that the same would apply to suits by the City. However, under the above cited sections wherein the Attorney-General sues for the State on the relation of the City, a different rule might apply. The statute of limitations does not run as to the State, except in case of sureties, and in a case such as this if the public has an interest to the extent that the State is not a mere nominal party, limitations would not run as against former treasurers and controllers.

State ex rel. vs. Halter, 149 Ind. 392, 47 N. E. 665.

Penn. Co., vs. State, 142 Ind., 428, 41 N. E. 937.

To the contrary there is a more recent decision of a court of lesser authority.

State ex rel. Board vs. Stuart, 46 Ind., App. 611, 91 N. E. 613.

There may be other grounds under the theory of trusts, the express wording of the bonds, or statutes or ordinances overlooked, which might further arrest the operation of the limitation of the statute.

Until the Federal injunction is modified so that the Barrett prepayments may be placed in the public depository pursuant to the 1921 Act, it should be the duty of the Controller to see that all special funds, including the payments in full and in advance by persons assessed capable of bringing in interest now to the public on large sums for thirty days before being applied to improvements, and Barrett prepayments before bonds can be purchased with them, are carefully checked up daily. Such sums as the Controller could not forthwith invest in new bonds, should by agreement between the Controller and Treasurer be placed in the City's name at three or four per cent. interest in a sound bank or trust company or the ordinance I have suggested could be invoked to compel that the same be done as a temporary measure pending the modification of the Federal injunction.

Under our views, it is now premature to suggest any changes in the State law as to Barrett law funds. Let the 1915 Act be given a chance for the remainder of the year. If it approximates the wishes of its framers it will have vindicated itself; if it does not, then a new plan should be considered. Much tampering with a law will result in the chaos which for so many years has lost the public very large sums.

It is undoubtedly true that both Treasurers and Controllers in the past have done as they have done in good faith and under competent legal advice. The Treasurers under the decisions of the cases mentioned herein and the interpretation of the debtor and creditor theory of funds, have to my view honestly thought themselves to be entitled to the interest and now probably have under such notion spent the same. The Controllers as well as the Treasurers, relying

upon the advice or lack of advice of the legal department of the City, of the State Board of Accounts, and other authorities, have rested in the belief that they were pursuing the right course. The public failing to insist that some competent legal authority thresh out this question to the very rags, has encouraged this belief. In bringing suits for the past, the City would be making to some extent, scapegoats of those in office during the last five years and releasing all the others for 25 years back. Well meaning orators urge the immediate pursuit of these claims which I must inform you are to some extent debatable, but it is well before any action that you consider whether under all the facts and circumstances, such pursuit would be fair, keeping in mind the deliquencies of the public heretofore. Perhaps in such persuit one might get a legal slap such as the Federal and Von Hake decisions, which would disarrange all efforts to properly adjust the matter from now on, putting us to sleep for another twenty years.

Respectfully Submitted,
ALVA J. RUCKER,
Corporation Counsel.

REPORTS FROM SELECT COMMITTEES

Indianapolis, Ind., May 18, 1926.

To the Honorable President and Members of the Common Council of the City of Indianapolis, Indiana:

Gentlemen—We, your Special Committee to whom was referred General Ordinance No. 30, 1926, entitled "Transferring $2,000 in Board of Works Department," beg leave to report that we have had said ordinance under consideration, and recommend that the same be passed.

MILLARD W. FERGUSON, Chairman
OTIS E. BARTHOLOMEW
AUSTIN H. TODD
WALTER R. DORSETT
CLAUDE E. NEGLEY

INTRODUCTION OF GENERAL AND SPECIAL ORDINANCES

By the City Controller:

GENERAL ORDINANCE NO. 31, 1926

AN ORDINANCE, abolishing the position of one of the two regular foremen employed at the rate of Fifteen Hundred ($1,500.00) Dollars per year each, in the Asphalt Repair Department under the Board of Public Works, and increasing the salary of the Assistant Superintendent of such Asphalt Plant Department from Sixteen Hundred and Twenty ($1,620.00) Dollars to Two Thousand Four Hundred ($2,400.00) Dollars per annum, and declaring a time when the same shall take effect.

Be It Ordained by the Common Council of the City of Indianapolis, Indiana:

Section 1. That the position of one of the two regular foremen employed at the rate of Fifteen Hundred ($1,500.00) Dollars per

annum each in the Asphalt Repair Department under the Board of Public Works be hereby and the same is now abolished.

Section 2. That the salary of the Assistant Superintendent in such Asphalt Plant Department is hereby increased from the sum of Sixteen Hundred and Twenty ($1,620.00) Dollars per annum to the sum of Two Thousand Four Hundred ($2,400.00) Dollars per annum, such increase to go into effect immediately upon the passage of this ordinance.

Section 3. This ordinance shall be in full force and effect from and after its passage.

Which was read a first time and referred to a special committee appointed by the President of the Council, consisting of Mr. Ferguson, Chairman; Messrs. Albertson, Todd, Bartholomew and Dorsett.

By the City Controller:

GENERAL ORDINANCE NO. 32, 1926.

AN ORDINANCE, providing for the immediate investment by the City Controller in bonds of all prepayments and moneys prepaid by persons assessed for public improvements and who have taken theretofore the privilege of payment by installments under the Barrett law; providing a method for the immediate payment of such bonds by the City Treasurer upon warrant of the City Controller; providing for the immediate deposit in a bank or trust company to be selected by the Mayor, of all special funds in the hands of the City Treasurer undeposited in public depositories, in the name of the City of Indianapolis, as trustee, and incapable at the time of being used in the purchase of such bonds; providing that such deposits shall draw interest at the rate of 3% per centum or more per annum and that such interest shall be the property of the City as such trustee for the payment of interest due on bonds issued originally for the payment of such public improvements and declaring a time when this ordinance shall take effect.

Be It Ordained by the Common Council of the. City of Indianapolis, Indiana:

Section 1. It is one of the intents of this ordinance to put into immediate effect provision of Section 1 of Chapter 129 of the Acts of the General Assembly of Indiana for the year 1915, page 548.

Section 2. That it shall be the duty of the City Controller, acting for and in behalf of the City to immediately invest the "Special Fund" created by said Act of 1915, and all prepayments and moneys prepaid by persons assessed for public improvements and who have taken theretofore the privilege of payment by installments under the Barett law, commonly so called, and all moneys of such nature and kind in the hands of the City Treasurer, in bonds similar in kind and character, at par, for the benefit of said city as trustee for the holders of the bonds and interest coupons upon which such prepayments were made and such Controller shall immediately purchase and arrange for the purchase of such bonds of such "Special Fund."

Section 3. The City Controller immediately upon such purchase by him of such bonds shall make warrant and order upon the City Treasurer for the payment thereof from such "Special Fund" and such prepayment money, and shall forthwith upon the receipt by him, the City Controller, of such bonds after their purchase, place and deposit the same in the hands of the City Treasurer, who shall hold and collect the same as other bonds are collected, applying the money thereof in payment of the installment of interest and principal of the bonds upon which said prepayments were originally made, or to said city, provided that it has paid the same.

Section 4. The City Controller shall keep a constant check and account of all such prepayment money paid into the hands of the City Treasurer and shall immediately make such purchase of such bonds of such "Special Fund," whenever there are sufficient sums in the hands of such City Treasurer to purchase any bonds or bonds as defined in said Acts of 1915.

Section 5. The warrant or order of the Controller for the payment of such "Special Fund" bonds shall be in the form as now required by law except that such warrant or order shall not have the name of the public depository stamped thereon until such time as such prepayment money is or may be deposited in a public depository.

Section 6. That it shall be the duty of the City Treasurer to forthwith honor and pay all orders and warrants so issued and directed to him in relation to said money of said "Special Fund," and the same is hereby legalized and declared to be lawful and mandatory upon said City Treasurer.

Section 7. That it shall be the duty of the City Controller to keep constant check and to know at all times the exact amount in the hands of the City Treasurer paid in heretofore or hereafter for public improvements of any nature and description, whatsoever, including such moneys so paid in by persons assessed therefor, who without accepting the installment privilege of the Barrett law, pay or have paid their assessments therefor in advance and in full in accordance with law, and all other special or specific funds whatsoever, and it shall be the duty of the City Controller to ascertain and to know as to whether or not such moneys together with the said moneys of said "Special Fund" of the said 1915 Act incapable of being used for the purchase of said "Special Fund" bonds for any reason, have been properly deposited by the City Treasurer pursuant to the provision of this ordinance, and in case of any such failure on the part of the City Treasurer, it is hereby declared to be the duty of the Controller to forthwith report the same to the Mayor for proper action.

Section 8. That it is hereby made the duty of the Mayor, until such time as the "Special Funds," trust funds, and other moneys mentioned herein may be deposited in public depository, to forthwith name a certain bank or trust company or banks and trust companies which have complied with the requirements of the banking and trust company laws of this state or of the United States and are of good repute and sound, and shall forthwith in writing order the City Treasurer to deposit such moneys in such bank or trust company or banks and trust companies in the name of the City of Indianapolis, Trustee,

such deposits to bear interest in favor of such city, trustee, at the rate of 3% per annum or more if obtainable.

Section 9. That it shall be the duty of the City Treasurer to forthwith comply with such order of the Mayor as prescribed in the next preceding section hereof and in case the Mayor should fail to forthwith make such order then the City Treasurer shall immediately deposit such moneys in a similar bank or trust company, banks or trust companies of his own chosing in the name of the City of Indianapolis, Trustee, at the rate of 3% interest per annum in favor of such city, trustee, or more, if the same be obtainable. The City Treasurer shall forthwith honor all legal warrants and orders by the Controller on any sums so deposited.

Section 10. That it is hereby declared that such funds so deposited in the name of the City of Indianapolis, Trustee, shall together with the interest theron, be held by such Trustee in trust for the purposes to which they have been dedicated and should any interest thereon be unclaimed by the specific creditors or cestui que trusts of such funds or any parts thereof, then it shall be the duty of the city to apply the same to any deficiencies in the Barrett Law fund to meet principal or interest on bonds theretofore issued for the payment of public improvements.

Section 11. That should for any reason the funds and moneys herein mentioned not be deposited as required by this ordinance yet any interest earned thereon shall be the property of said City as Trustee.

Section 12. That it shall be the duty of the City Treasurer to report daily in writing to the Controller of all such funds and moneys so received by him as such treasurer, if any are so received.

Section 13. That should any part or parts hereof be or become invalid yet such invalidity shall not affect the validity of any other part of section of this ordinance.

Section 14. This ordinance shall be in full force and effect from and after its passage.

Which was read a first time and referred to the Committee on Finance.

By Mr. Bartholomew:

GENERAL ORDINANCE NO. 33, 1926.

SWITCH CONTRACT

AN ORDINANCE, granting to the Link Realty Company the right to lay and maintain a sidetrack or switch, from the east line of Koehne Street to the west line of Koehne Street, according to the blueprint attached hereto, in the City of Indianapolis, Indiana.

WHEREAS, the Link Realty Company, a corporation of Indianapolis, Marion County, Indiana, desires the right to lay, maintain, and operate a sidetrack across Koehne Street, a public highway, in the City of Indianapolis, Marion County, Indiana, said sidetrack to

run from the east line of said Koehne Street to the west line of said Koehne Street, as per the blueprint hereto attached, and which is for identification, marked "Exhibit A;" and

WHEREAS, on the 15th day of April, 1926, the said Link Realty Company filed its petition before the Board of Public Works in the City of Indianapolis, Indiana, as follows:

To the Honorable Roy C. Shaneberger,
Honorable L. H. Trotter,
Honorable Oren S. Hack,
Members of the Board of Public Works of Indianapolis, Indiana:

Gentlemen—We, the owners of the property bounded on the north by Market Street, on the east by Harding Street, on the west by Koehne Street, and running south from Market Street to the right of way of the C. I. & W. and P. E. Railway Company, in the City of Indianapolis, Indiana, hereby respectfully petitions your Honorable Board for authority to construct a switch east and west across Koehne Street, in said city, for the following reasons, towit:

1. The switch for which we petition was originally across the street, but owing to the improvement or lowering of the street by reason of the elevation of the railroad tracks across Koehne Street, it became and was necessary to make such an approach on Koehne Street both from the south and north of said elevation, that it left the switch three or four feet above the surface of the street as it was afterwards constructed, and that then and thereby and as a result of said improvement it became and was necessary to remove said switch across said street.

2. The necessity for the maintenance and operation of said switch still remains, and your petitioners, by and through their counsel, now respectfully petition for permission to reconstruct said switch connecting the east side of Koehne Street with the west terminus of the switch on petitioner's property on the east side of Koehne Street, thus re-establishing the switch across said street.

3. Your petitioners further petition for permission to construct said switch at their expense, and they agree to construct it in such a manner and form and under such terms and conditions as may be imposed on them by the City of Indianapolis, by its Engineer.

4. That inasmuch as Koehne Street is now proposed to be improved, it becomes necessary for said Engineer, if your Honorable Board will grant such permission, to make an inspection thereof promptly, and report back to your Honorable Board.

5. Your petitioners further show to your Board that Koehne Street is a very little used street, and that there is little or no vehicular traffic over the same, and that the running of said switch will not impose any additional burden or servitude upon the people of Indianapolis or the adjacent property owners.

6. That in support of the contentions of your petitioners herein the petitioners file herewith and make a part hereof, and for certainty marked as "Exhibit A," a blueprint of the right of way of said railroad, of the streets contiguous to the proposed street and containing a general outlay of the community and proposed switch.

7. Your petitioners further show that if said switch can be reconnected they have in mind certain negotiations for an industrial establishment at that point, but on account of the situation as outlined in "Exhibit A" they cannot complete said negotiations and cannot secure an outlet which they formerly had from the people, and under present conditions cannot secure any outlet for the proposed purchasers or purposes in the use of said switch, unless said switch is built across Koehne Street as it originally existed.

8. Your petitioners further say that they will do and abide all reasonable rules and restrictions concerning the establishment and maintenance and operation of said switch.

THE LINK REALTY COMPANY, A CORPORATION,
By JOSEPH A. COHEN, Pres.

NOW THEREFORE, this agreement, made and entered into this 15th day of April, 1926, by and between the Link Realty Company, of the City of Indianapolis, County of Marion, State of Indiana, party of the first part; and the City of Indianapolis, by and through its Board of Public Works, party of the second part;

WITNESSETH: That the party of the first part being desirous of securing a right of way for a sidetrack or switch from the east line of Koehne Street, in the City of Indianapolis, Marion County, Indiana, to the west line of Koehne Street, in said city and state, said switch to reach at its termini across said street and sidewalk thereof, and to be connected with the tracks of the party of the first part on the property of the party of the first part, on the east and west boundaries of said Koehne Street;

WITNESSETH: That the party of the first part being desirous of securing such right of way for such switch or track, hereby covenants and fully binds itself, its successors, legal representatives and assigns, that, in consideration of the grant of the privileges and authority herein given, it will lay, construct and maintain said track upon the terms and conditions hereinafter set forth, to-wit:

(1) It shall be so laid, improved, constructed, and kept in repair as to be safe for persons on foot, in vehicles, or otherwise, and shall at all times be subject to the reasonable orders of the Board of Public Works of the City of Indianapolis, Indiana.

(2) Said track and switch shall be laid upon such grade as shall be established by said Board, and shall be put down under its supervision and to its satisfaction and approval. Said track shall be raised or lowered to conform to any grade from time to time hereafter established, whenever so ordered in writing by said Board, and shall be made to conform in all respects with any ordinance passed by the Common Council or wth any resolution or resolutions made by said Board, for the elevation or depression of said tracks.

(3) The crossing where said track intersects said Koehne Street shall, at all times, be kept improved and in repair and free from obstructions or defects of any kind. No car or cars shall be permitted to obstruct such crossing or to be thereon except for such time as may be absolutely necessary in moving them back and forth, and they shall be at no time stopped or detained thereon in such manner as to obstruct public travel.

(4) Said party of the first part agrees, upon the written order of said Board, made for any good cause affecting the interest of the City or the public welfare, to take up and remove said track, and upon said party's failure so to do, upon such notification in writing, of ten (10) days, to promptly pay the cost of having the same done, and the party of the first part hereby releases all claims for damages whatsoever that may arise by reason of such removal; and in removing said track or causing the same to be done, said Board shall in no wise become a trespasser.

(5) The party of the first part agrees to pave between said tracks to the entire satisfaction of the second party, and in case said tracks shall be or become out of repair or in need of being reconstructed or become in any way defective (of which fact the said Board shall be the exclusive judge), it shall be the duty of the said party of the first part to promptly repair or remove same, failing in which, after notification in writing of ten (10) days, said Board shall do or cause to be done at the expense of the said party of the first part, and for which expense and cost the said party of the first part shall be liable.

(6) The said party of the first part herein binds himself to hold said party of the second part and said City harmless from any and all claims for damages growing out of the existence, maintenance or use of said track, and to pay any judgment, with costs, that may on that account be rendered against the said party or said city, and also to pay all necessary expenses that may be incurred by said city in defending against any such claims.

(7) Any violations of any of the provisions of this instrument by said party of the first part, or by any one for it or at its instance or with its permission, shall operate as an immediate and absolute forfeiture of the privileges and authority given or granted by the contract, provided, however, that the same may be terminated by said Board as hereinafter set forth.

(8) That said track and switch shall be built under and pursuant to the blueprint and plat which is attached hereto, made a part hereof, and for certainty marked "Exhibit A."

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 15th day of April, 1926.

THE LINK REALTY COMPANY,
By Joseph A. Cohen, President
Benjamin Cohen, Secretary
Party of the First Part.

Witness:
G. W. Jacque.

CITY OF INDIANAPOLIS,
By R. C. Shaneberger, President
R. C. Trotter
Orin S. Hack,
Board of Public Works.
Party of the Second Part.

AND WHEREAS, said contract has been submitted by the Board of Public Works to the Common Council of the City of Indianapolis, Indiana, for its consideration and action, now therefore,

Section 1. Be it ordained by the Common Council of the City of Indianapolis, Indiana, that such contract above set forth be and the same is hereby in all things confirmed and approved.

Section 2. This ordinance shall be in full force and effect from and after its passage.

OTIS E. BARTHOLOMEW.

Which was read a first time and referred to the Committee on City Welfare.

By Dr. Todd:

GENERAL ORDINANCE NO. 34, 1926

AN ORDINANCE to amend Section 760 of General Ordinance No. 121, known as "Municipal Code of Indianapolis, 1925" and entitled "An Ordinance concerning the Government of the City of Indianapolis, providing penalties for its violation, and with stated exceptions repealing all former Ordinances."

Be it ordained by the Common Common Council of the City of Indianapolis, Indiana:

SECTION 1. That Section 670 of General Ordinance No. 121 known as "Municipal Code of Indianapolis, 1925" and entitled "An Ordinance concerning the governmet of the City of Indianapolis, providing penalties for its violation and, with stated exceptions repealing all former ordinances" be amended to read as follows:

"Section 670. Right of Way. (a) Fire Department vehicles, Police Department vehicles, Salvage Corps vehicles, U. S. Mail vehicles, Emergency Ambulances, both public and private, and Emergency Repair vehicles of all public utility companies and funeral processions shall have the right of way over all traffic in any street or other public place and through any procession provided however, that the Fire and Police Department vehicles shall have the right of way over every other kind of traffic whatsoever and provided,

further, that the Fire Department shall have the right of way over Police Department vehicles, and all others shall have right of way in the order named.

(b) Traffic from the right shall have the right-of-way over traffic from the left, except as hereinafter provided.

(c) Traffic on Washington Street and all boulevards as established by the Common Council or the Department of Park Commissioners of such city, shall have the right-of-way over all traffic on other streets unless hereinafter otherwise provided.

(d) Traffic on Massachusetts, Indiana, Kentucky and Virginia Avenues, shall have the right-of-way over all traffic on other streets.

(e) On East New York street, from the Big Four Railroad tracks to Emerson Avenue, east and west traffic shall have the right-of-way over the north and south traffic. On East Michigan Street from the Big Four Railroad tracks to Emerson Avenue, the east and west traffic shall have the right-of-way over the north and south traffic. On East Tenth Street from the Big Four Railroad track elevation to Emerson Avenue, the east and west traffic shall have the right-of-way over the north and south traffic. On West Michigan Street from White River, west to the City limits, east and west traffic shall have the right-of-way over the north and south traffic. On Oliver Avenue from White River west to the City limits, the east and west traffic shall have the right-of-way over the north and south traffic. On Morris Street from Shelby Street west to Eagle Creek, the east and west traffic shall have the right-of-way over the north and south traffic, and all traffic in Harding Street at the intersection of Morris Street shall come to a complete stop before entering into or crossing Morris Street at the intersection of Morris and Harding Streets. On Capitol Avenue from Washington Street to Maple Road Boulevard, the north and south traffic shall have the right-of-way over the east and west traffic. On Meridian Street from Washington Street to the canal the north and south traffic shall have the right-of-way over the east and west traffic.

(f) All vehicles, city and interurban cars approaching any of the following named streets and avenues shall come to a complete stop before continuing into or across the same: North Capitol avenue from Washington Street to Fiftieth Street; Meridian Street from Washington Street to Canal; East New York Street from the Big Four Railroad tracks to Emerson Avenue; Marlowe Avenue from Dorman Street to Randolph Street; East Michigan Street from the Big Four Railroad tracks to Emerson Avenue; Washington Street from the city limits on the east to the city limits on the west; Maple Road Boulevard from Northwestern Avenue to Fall Creek and Fall Creek Boulevard north; Clifton Street from Roache Street to and including Thirty-Sixth Street. The above named streets and avenues as set out in this sub-section (f) are hereby declared to be preferential streets for the purpose of regulating traffic upon or crossing over the same.

(g) At street intersections where silent policemen are placed, vehicles entering such intersection shall not cross the center of such intersecting streets, if at such time another vehicle is approaching from its right and about to cross its path, and is at a point within

three (3) feet of such intersection. Such vehicle at the right unless herein otherwise provided, shall have the right-of-way over such other vehicle.

(h) The driver of any vehicle on the approach of any fire or police apparatus shall immediately drive said vehicle to the curb at the right hand of the driver and stop such vehicle until such apparatus is passed.

(i) No vehicle shall follow closer than three hundred (300) feet of any fire apparatus while the same is answering an alarm of fire, and shall not approach said fire apparatus, or park said vehicle within six hundred (600) feet of the same after said apparatus has arrived and stopped at the destination of a fire.

(j) Street cars, upon the approach of such fire or police apparatus shall be stopped immediately, if between a street intersection.

(k) The driver of any vehicle shall not enter any street intersection, if police or fire apparatus is approaching such street intersection within a distance of three hundred (300) feet."

SECTION TWO This ordinance shall be in full force and effect from and after its passage and due publication as required by law.

Which was read a first time and referred to the Committee on Public Safety.

INTRODUCTION OF MISCELLANEOUS BUSINESS

Mr. Albertson presented the following written motion:

Indianapolis, Ind., May 17, 1926.

Mr. President: I move that the President of the Council, appoint a committee to work in conjunction with the Board of Safety in trying to get better protection at the following R. R. crossings at 25th and C. I. & L. Ry. Co., L. E. & W. R. R. Co., N. Y. C. & H. R. R. Co.

O. RAY ALBERTSON,
Councilman.

The above motion, seconded by Mr. Springsteen, was unanimously adopted and referred to the Committee on Public Safety.

ORDINANCES ON SECOND READING

Mr. Bartholomew called for General Ordinance No. 30 for second reading. It was read a second time.

On motion of Mr. Bartholomew, seconded by Dr.

Todd, General Ordinance No. 30 was ordered engrossed, read a third time and placed upon its passage.

General Ordinance No. 30 was read a third time and passed by the following vote:

Ayes, 8, viz.: Messrs Dorsett, Todd, Bartholomew, Springsteen, Albertson, Ferguson and President Boynton J. Moore.

On motion of Mr. Albertson, seconded by Dr. Todd, General Ordinance No. 26 was stricken from the files.

At this time Mr. Bartholomew addressed the Council as follows: "I understand there have been some hard remarks on this ordinance. (General Ordinance No. 32). I wish to notify everyone present that it is not our policy for anyone to suspend the rules to pass an ordinance or make a law without due consideration. You will find that it is going to be hard to pass any ordinance under suspension of the rules. Now there are some citizens who say we are working to pass this ordinance. I want to say this—we will be glad at any time to be investigated on anything on all of our actions in this City Council. We are for the City of Indianapolis and we ask your co-operation and I believe we can make Indianapolis better and bigger so please don't say hard things of matters you know nothing about."

A representative of the Irvington Business Men's Association addresed the Council in regard to Special Ordinance No. 2 referring to the extension of the city limits to the east side of Arlington Avenue from Washington Street to Tenth Street.

Mr. Dorsett notified the Council that there would be a meeting of the Committee on Public Works in the Council Chamber at one o'clock p. m. May 19.

On motion of Mr. Bartholomew, the Common Council of the City of Indianapolis adjourned at 8:30 o'clock p. m.

Boynton J. Moore

President.

Attest:

William A. Boyce Jr.

City Clerk.