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STATE OF NEBRASKA
OFFICIAL
MAR 27 1991
DEPT. OF JUSTICE

DATE: March 22, 1991

SUBJECT: Whether LB 143 as proposed would violate Art. VII Sec. 5 of the Nebraska Constitution because the fees collected would not be used to support schools.

REQUESTED BY: Senator Rod Johnson

WRITTEN BY: Don Stenberg, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

LB 143 provides that as part of court costs a fee of $25.00 shall be assessed "[u]pon the conviction of any person for violation of the provisions of section 39-669.07 or of driving a motor vehicle while under the influence of alcoholic liquor or of any drug in violation of any city or village ordinance" and a fee of $3.00 shall be assessed "[w]hen a person has been convicted in any court in this state of any traffic offense." Such fees are to be remitted to the State Treasurer for deposit in the Emergency Medical Services System Fund to be created by the bill.

We have concluded that such a disposition of those fees would be unconstitutional as discussed below.

Art. VII sec. 5 of the Nebraska Constitution provides in part:

> [A]ll fines, penalties, and license money arising under the general laws of the state, . . . shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties and license money arising under the rules, bylaws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All

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> such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, . . .

"Fines" and "penalties" which must go to the school fund as directed by that section of the constitution were defined in School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N.W.2d 24 (1947):

> We think that the provisions of the foregoing section of the Constitution infer that the word "penalties" as therein used, means exactions imposed in the enforcing of the criminal laws and police regulations of the state and its governmental subdivisions. The word "fine" is broad enough ordinarily to include all exactions imposed in a criminal proceeding. But the draftsmen of the Constitution specifically provided that it should have application to rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, violations of which are generally considered as penalties recoverable in a civil suit, although having the general characteristics of a criminal proceeding. This clearly indicates an intent that fines and penalties assessed in criminal prosecutions are to come within the constitutional provision, plus such fines and penalties that are assessed under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, which are criminal in character but collectible by civil action.

Supra. at 1064, 1065. The rationale suggested for that disposition of fines and penalties was the general notion that money exacted as punishment for crimes should go to the school fund as a general deterrent to crime by supporting a better public school system. Id.

There are some limitations. It is not enough that the exaction be punitive to the wrongdoer; it must also not be compensatory to the government. Thus, in the Adams case, above, the fee was held not subject to Art. VII sec. 5 because it was compensatory as well as punitive. In School District of McCook v. City of McCook, 163 Neb. 817, 825, 81 N.W.2d 224 (1957), a fee was held subject to that section because it was only punitive, not compensatory.

In LB 143 the additional fees are characterized as court costs. "Court costs have never been treated as penalties for the violation of a law." DeCamp v. City of Lincoln, 202 Neb. 727, 732,

277 N.W.2d 83 (1979). Court costs are "something distinct from either fines or penalties;" they are "payable both in civil as well as criminal cases," "[s]ome of such costs are in partial recompense for the expenses of court operation, while others reimburse the party for expenses incurred," and they are uniform throughout the entire range of offenses. Id. at 731, 732, 735. Calling the fees court costs is not controlling if they are penalties disguised as court costs. Id. at 733 and School District of McCook, above, at 825.

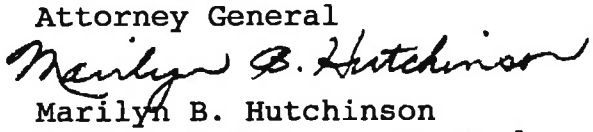
Under LB 143 the court costs prescribed are not uniform throughout the entire range of covered offenses. They do not recompense the court for any expenses of operating the court or reimburse filing fees. Thus a court may well conclude that such fees, which are additions to existing court costs when a person is convicted of certain offenses, are actually additional penalties for those convicted of the covered offenses.

"License moneys" as used in Art. VII sec. 5 does not include fees collected for the issuance of a state license, but includes only those imposed by a county or some minor municipal corporation. See, State ex rel. Stevens v. Nickerson, 97 Neb. 837, 839, 151 N.W. 981 (1915), School District of Omaha v. Gass, 131 Neb. 312, 318, 267 N.W. 528 (1936), and Wilcox v. Havekost, 144 Neb. 562, 13 N.W.2d 889 (1944). Therefore, the moneys collected for a license imposed by the state may be directed to the state school fund. Id. Or they may be appropriated by the Legislature for some legal purpose other than maintenance of schools. Wilcox v. Havekost, above, at 566. We have found no similar exception for fines and penalties.

We have concluded that the additional fees which would be imposed by LB 143 are probably penalties and subject to Art. VII sec. 5. Thus the proposed disposition of those fees for a use other than for use of the common schools as provided by that section of the constitution is unconstitutional.

Sincerely yours,

DON STENBERG
Attorney General



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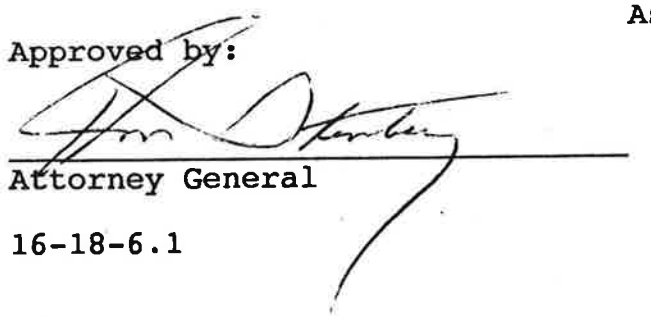

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