time as the emergency exists by reason of labor shortage and the period of time that such transferred inmates of the Evansville Hospital remain at the Indiana Girls' School.

Trusting that this fully answers your inquiry.

GENERAL ASSEMBLY: Meaning of the term "salary" as used in Section 2, Article 15 of Constitution.

SALARY: Whether same includes fees.

February 17, 1943.

Hon. Hoyt Moore,
Member of the Senate,
Indianapolis, Indiana.

Dear Senator:

I have before me your request for an opinion as to the constitutionality of House Bill No. 172. You state that the bill has been amended and that you wish to know whether it can be construed to be a constitutional act. I do not have before me the amendment referred to, and my remarks concerning this bill are addressed to the bill as printed on January 28, 1943. The effect of this bill, among other things, seems to be to make the county assessors in all counties of the state the inheritance tax appraisers, thus effecting an abolishment of the office of inheritance tax appraiser in certain counties and conferring upon the county assessor in such cases the duties of inheritance tax appraiser, for which additional service an additional compensation, in the nature of a fee, is allowed. The question, as I understand it, is as to whether such a provision is in violation of Section 2 of Article 15 of the Constitution of Indiana which reads as follows:

"When the duration of any office is not provided for by this constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the general assembly shall not create any office the tenure of which shall be longer than four (4) years, nor shall the term of office or salary of any officer fixed by this constitution or by law be increased"
during the term for which such officer was elected or appointed."

In the consideration of this question, I first desire to call your attention to the fact that the constitutional provision above quoted in prohibiting salary increases during the term of an officer, uses the term "salary" as distinguished from compensation or salary and fees; and the question at once arises as to whether any significance is to be attached to that fact. It is interesting to note that the constitution makers seemed to have made a distinction between the terms, fees and salaries, in at least one other portion aside from the one which has just been quoted. I refer you to Section 22 of Article 4 of the Constitution which provides, among other things that:

"The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say: * * *
(14) In relation to fees or salaries except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required."

Moreover the two terms have been distinguished by the cases.

I call attention first to the case of Cowdin, Auditor v. Huff, 10 Ind. 83. I desire to quote from page 85 as follows:

"There are now, and were, at the adoption of our constitution, at least three modes in use of compensating persons engaged in the public service, viz., fees, salaries and wages. These modes are all different, each from the other; and the difference between them has been immemorially well understood. (Our emphasis.)

"Fees are compensation for particular acts or services; as the fees of clerks, sheriffs, lawyers, physicians, etc.

"Wages are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc.

"Salaries are the per annum compensation to men in official and some other situations. The word salary
is derived from *salarium*, which is from the word *sal*, salt, being an article in which the Roman soldiers were paid. * * *

"Where the constitution does not provide otherwise the State may adopt either of these modes of compensating those who may be in her service."

The above language was quoted, apparently with approval in the case of Seiler v. State ex rel., 160 Ind. 605 at pages 618-619.

So much for the Indiana cases, which clearly make a distinction between the word "fees" and the word "salary" although in neither of the cases cited is the distinction applied to the constitutional provision which I have under consideration.

I desire now to call your attention to a case which was appealed from the Court of Claims of the United States. I refer to the case of Benedict v. U. S. reported in 176 U. S. at page 357. The question in this case arose upon a petition by the District Judge for the Eastern District of New York for his retiring salary, under Revised Statutes, Section 714, at the rate of $6800 per annum, which the petition averred was the *salary* which was by law payable to him during the year previous to his resignation. The petitioner acknowledged the payment of $5000 and claimed a residue of $1800 to which he averred himself to be justly entitled. The controversy arose over the proper construction of the Congressional Act of February 7, 1873, reproduced in Revised Statutes, as Sections 658 and 613.

Section 658 provided that:

"the regular terms of the Circuit Courts shall be held in each year, at the times and places following: * * * in the Southern District of New York, at the city of New York, * * * exclusively for the trial and disposal of criminal cases, and matters arising and pending in said court, on the second Wednesday in January, March and May, on the third Wednesday in June, and on the second Wednesday in October and December;"
Section 613 provided that:

"the terms of the Circuit Court for the Southern District of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the Circuit Judge of the Second Judicial Court (Circuit) and the District Judges for the Southern and Eastern Districts of New York, or any one of said three judges; and at every such term held by said judge of said Eastern District he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another District Judge while holding court in said district."

It appeared that after the passage of this Act of February 7, 1873, the petitioner held each year the six terms of the District Court of the U. S. for the Southern District of New York referred to in the statute and received for holding each of said terms the sum of $300, amounting in all, to $1800 per annum, which he claimed was a part of his salary and therefore should be paid to him as a part of his retiring salary. The Court said on page 360:

"The case in reality turns upon the meaning of the word 'salary,' as used in section 714. The word 'salary' may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered. * * * As applied to District Judges in general, and indeed to every District Judge except the Judge of the Eastern District of New York, it doubtless refers to the salary of $5000 fixed by the Act of February 24, 1891. Such salary is an annual stipend, payable in sickness as well as in health, for duties much more onerous in some districts than in others, and regardless of the fact whether such duties are performed by the Judge in person, or by the Judge of another district called in to take his place. It is a compensation which cannot be diminished during the continuance of the incumbent in office, and of which he cannot be deprived except by death, resignation or impeachment."
"Wholly different considerations apply to the compensation provided for by Sec. 613. To entitle the Judge of the Eastern District of New York to the $300 per term, provided for by that section, it is necessary that the term be actually held by him, when he is paid for his services in the manner provided by law for the expenses of a District Judge holding court in another district than his own. He may hold but one term a year, for which he would receive $300. He may hold three terms, for which he may receive $900, or he may hold the entire six terms and receive $1800. Such compensation is a variable quantity, dependent upon the number of terms held by the Judge. Upon the theory of the petitioner, if he had held but one term during the year previous to his resignation, he would be entitled to but $300 in addition to his regular salary of $5000. The fact that he was able to hold the entire number of six terms for the twenty-four years preceding his resignation is a tribute to his industry, faithfulness and capacity, as well as to his good health, but it does not affect the question in a legal point of view. This compensation was not only for services actually performed, but was subject to be diminished or taken away at the will of Congress. It was something entirely distinct from the salary paid to him as Judge of the District Court for the Eastern District of New York, but was in fact, as was held by the Court of Claims, extra pay for extra work performed—for particular as distinguished from continuous services." (Our emphasis.)

Upon that basis the Court decided that the $300 per term provided by Section 613 was not "salary" as the term was used in Section 714, and therefore could not become a part of his retirement salary.

I call your attention next to the case of Lobrano v. Police Jury of Parish of Plaquemines (Supreme Court of La.) decided December 10, 1921 and reported in 90 Southern at page 423. In this case, by the terms of the Act No. 212 of 1912, the Clerk of the Court was made ex officio Registrar of Voters, for which service it was provided that he should
receive 10c for each name that he registered in his office and $5 a day for the time actually employed where registration places were, under the law, opened in places other than the Court House. Act No. 180, page 290, of 1920 contained a Call for a constitutional convention. This Call contained certain limiting provisions, among which is the following: Said convention was prohibited from framing any article or provision whereby the terms of office of certain named officers shall be reduced or shortened or salaries thereof reduced, prior to the expiration of the terms of office which such officers may be holding at the time of the adoption of the new constitution. Pursuant to that Call Article 8 of Section 18 of the Constitution was adopted, which provides as follows:

"Sec. 18. There shall be a registrar of voters for the parish of Orleans, who shall be appointed by the Governor, and one for each parish in the state, which shall be appointed by the police jury or other governing authority of said parish."

One of the questions in the case was as to whether this provision violated the Call by reducing the salary of the Clerks of the District Courts, who, under Act No. 212 of 1912, were ex officio registrars of voters. I quote from the language of the Court on page 425 as follows:

"So far as concerns the question of salary, we are very clear that the compensation allowed to the clerk of court for the discharge of the duties imposed upon him by the said Act No. 212 of 1912 is not a salary, but merely fees; and we are equally clear that by the term 'salaries', used in the said call of the constitutional convention, was meant salary as contradistinguished from fees. While the two terms may be more or less synonymous in many connections, they are not so as ordinarily used in connection with the compensation of an office."

I next call your attention to the case of Tayloe et al v. Harwell G. Davis et al (Alabama Supreme Court) reported in 102 Southern at page 433. This was a taxpayer's bill to enjoin the State Auditor from issuing and the State Treasurer from
paying certain warrants to members of the budget commission for compensation allowed them by Act of the Legislature, and further compensation to the Attorney General, under an Act relating to his office. It was contended that a certain section of the Act to create the State Budget Commission was unconstitutional and void, and that, on account thereof, the entire Act should be held void. It was further contended that, if the Act is valid, the compensation Act is violative of Sections 118 and 281 of the constitution forbidding increase or decrease of the compensation of officers during the term for which they have been elected. The Act under consideration created a State Budget Commission composed of the Governor, as chairman, the Attorney General, and the State Auditor, which, by amendment, was made to include the Chief Examiner of the Board of Accounts. It will not be necessary to consider anything else in the opinion other than that which has to do with my immediate question, and on that subject the Court said on page 436:

"It has now been long declared by this Court that for new and additional duties an incumbent of a public office may be awarded extra compensation without violation of Sec. 118 or 281, forbidding an increase of salary during term. It may be said a rule of legislative policy has grown up by the sanction of this court's construction of these sections. * * *  

"We think there is no need to review the grounds of these decisions. We may say that while a public officer takes his office cum onere and is required to perform the duties from time to time prescribed by law, there is inherent justice in granting compensation for the increased labor and responsibility imposed by new legislation. The just legislator may be rather disposed to create a new office, than to impose unexpected new burdens on an existing officer without compensation, nor do we think any sound objection obtains to conferring new duties with compensation, upon the officer who, by reason of knowledge and experience, is best fitted to the new task. Fitness for the new duties growing out of experience and former official labor may furnish the opportunity to get efficient service at minimum expense to the state."
"That the duties required of members of the Budget Commission are substantial, that they involve added labor and responsibility is not questionable. There appears no purpose to create a more colorable pretext to increase salaries. They are new duties, joint or cooperative duties, having no existence before. They become incident to the office only by their creation and assignment to the office. The same is true of the duty of the Attorney General to furnish opinions to county officers under the act of 1923. While it was his former duty to give official opinions, this act extended his labor into a new field of official advice.

"We conclude that both compensation acts are valid and the State Auditor and State Treasurer are in performance of official duties in issuing and paying the warrants involved."

Of similar import is the case of State ex rel. Ward v. Henry, (Supreme Court of Alabama), decided November 19, 1931, and reported in 139 Southern, page 278. In this case there was under consideration Section 281 of the constitution of Alabama which reads as follows:

"The salary, fees, or compensation of any civil officer holding any civil office of profit under this state or any county, or municipality thereof shall not be increased or diminished during the term for which he shall have been elected or appointed."

The Court said, in interpreting this section:

"We cannot accede to the view that section 281 forbids a transfer of official duty from one officer to another, during the term of the former, because he would thereby be deprived of fees allowed for the performance of such duty. The doctrine contended for by appellant would be far-reaching. For example, if valuable fees accrue to an officer, say sheriff or clerk, because of laws which greatly enhance the litigation from which he derives fees, no one would contend the Legislature could not repeal such laws because incidentally the fees of the officer would be decreased. If the judge
of probate derives large income from the issuance of licenses, no one would insist the Legislature was powerless to increase or decrease the license schedule during his term of office. The insistence subordinates the public interest to an incidental one. Such is not the intention of section 281."

See also Nehrens et al v. Bauman (Nebraska), 231 N. W. 701.

The question which has been submitted to me, however, does not need to involve the positions taken and relied upon in the Alabama cases above cited, because under the Indiana constitutional provision under consideration, the emolument which cannot be increased during the officer's term of office is expressly limited to "salaries" as distinguished from "fees", unless the term "salary" is enlarged by construction. To do so, however, would require that the distinction recognized by the Constitution itself between "salaries" and "fees" should be ignored, as well as the decisions in the cases cited from our own Supreme Court. It should be remembered in this connection that the cases cited from our own Supreme Court, defining and distinguishing between the terms "salary" and "fees" pre-date the adoption of the language of Section 2 of Article 15 by many years. It is a very sound principle of construction of statutes that language already defined by the Supreme Court should be given the same construction in subsequent enactments, unless a different construction is clearly provided for in the subsequent enactment. The same rule applies here and requires that the term "salary" as used in the amendment of Section 2 of Article 15 be given the meaning as previously defined by the cases. Note again this language of Cowdin v. Huff, supra, where the Court said:

"There are now, and were, at the adoption of our constitution, at least three modes in use of compensating persons engaged in the public service, viz., fees, salaries and wages. These modes are all different each from the other; and the difference between them has been immemorially well understood." (our emphasis)

In view of the foregoing, it is my opinion that the assignment of new duties to an officer during his term, for which he
is compensated by a stipulated fee, is not an increase of his salary in the constitutional sense.

SECURITIES COMMISSION: Whether less than all holders of preferred may consent to change in priorities so as to bind those not consenting.

February 18, 1943.

Hon. C. Warren Day,
Securities Commissioner,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter in which you state that you have before you an application to register an aggregate principal amount of $135,700 of Leasehold Mortgage Bonds of Marion-Washington Realty Corporation. You state that it is proposed that these Leasehold Mortgage Bonds will be exchanged, par for par, with all of the presently outstanding preferred stock of the corporation. You state further that the plan of exchange is entirely voluntary and cannot be operative until three-fourths of the outstanding preferred stock consents to the creation of the mortgage involved in the reorganization. You set out at length what you regard as the pertinent provisions of The Articles of Incorporation, including a copy of the proposed Mortgage Bonds already referred to. It is admitted by all parties concerned that the Mortgage Bonds, if and when issued, will be prior in point of preference to the existing preferred stock.

In view of the above facts, you submit a group of questions, in answer to which you desire an official opinion. Your first question is as follows:

"Is the issuance of mortgage bonds valid when the terms of such bonds seek to allocate the net earnings of the corporation in view of the allocation which the Articles of Incorporation require with respect to the payment of dividends and the retirement of outstanding preferred stock; a conflict of allocations being inevitable unless the holders of all of the outstanding