INSURANCE COMMISSIONER: Paid-in Capital Stock requirement, in determining whether same is met—can premium paid as part of purchase price be considered.

July 31, 1941.

Mr. Frank J. Viehmann,
Insurance Commissioner,
Department of Insurance,
State House,
Indianapolis, Indiana.

My Dear Mr. Viehmann:

I have before me your request for an official opinion which presents an inquiry as to whether or not a stock indemnity insurance company organized under the Indiana Insurance Code of 1935 may compute the premium paid for stock in the corporation as part of the paid-in capital stock for the purpose of determining whether or not the requisite amount has been paid in under the statute. The par value of the shares of the corporation in question was set at $10.00 per share, but all shares are being offered, subscribed for and sold at $35.00 a share. You have attached to your request the subscription form utilized by this Indiana corporation, which specifically provides:

"I hereby subscribe for ............. shares of the capital stock of the ................. Indemnity Insurance Company, and agree to pay therefor the sum of Thirty-five Dollars ($35.00) per share, of which the first Ten Dollars ($10.00) paid in on each share shall be credited to capital and all succeeding payments shall be credited to surplus."

The requirements of Section 74 of Chapter 162 of the Indiana Acts of 1935 (8 Burns' Indiana Statutes Annotated, 1933 Ed., 39-3614) relating to paid-in capital stock as a requisite to the taking on of another line of casualty insurance is not complied with by the realization of the prescribed amount by the sale of stock at a premium, but the entire amount of stock, appraised at par, must be subscribed and paid for in order to meet the requirements of the Indiana Insurance Code.

"Capital" and "capital stock" are frequently used interchangeably. "Capital stock" refers to the property and assets of the corporation, and "capital" to the amount paid in or to be paid in by the stockholders. In general, profits and surplus
earnings do not constitute "capital stock" or "capital" when the latter term is used in the sense in which it is in Section 74, Chapter 162, of the Indiana Acts of 1935.

In People ex rel. Union Trust Company v. Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762, it is said:

"The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital existing in money or property or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power * * * While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved funds, or of undivided profits, or both, but that surplus is no part of the company's capital stock * * *. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form a part of the share stock, for that represents and absorbs into its own value surplus as well as capital."

The Oregon Supreme Court in 1913 decided a case, the principle of which is controlling when applied to the facts presented in your inquiry. This was the case of Union Pacific Life Insurance Company v. Ferguson, State Insurance Commissioner, 129 Pac. 529, 130 Pac. 978, 43 L. R. A. (N. S.) 958. There an Oregon statute provided that an insurance corporation should not be permitted to do business

"until such corporation shall have a paid-up, unimpaired cash capital equal to $100,000 United States gold coin which shall be invested in this state * * * in state or United States bonds, bonds or notes secured by first mortgage upon first-class, otherwise improved, unencumbered real estate, the market value of which shall be at least double the amount invested in or loaned thereon. * * *"

The Oregon Supreme Court held that the foregoing language clearly indicated that the term "capital" meant the capital stock
of a corporation as fixed by its Articles of Incorporation, which must not be impaired but which must be safely invested, and to remain as a fund for the security of the policy holders. The Oregon Supreme Court held that such capital did not include surplus or profit. The foregoing case was followed and applied in the decision of American Life & Accident Insurance Company v. Ferguson, State Insurance Commissioner (Ore., 1931), 134 Pac. 1031.

In the present instance the factual situation is the reverse of that dealt with in Union Pacific Life Insurance Company v. Ferguson, supra, due to the proviso of the subscription contract which has been reproduced above and which indicates that the first $10.00 paid in on each share shall be credited to capital and all succeeding payments shall be credited to surplus. This proviso is proper. It is in accordance with the purpose of Section 74 of the Indiana Insurance Code of 1935, and with the decisions cited herein. But this proviso further indicates that what is paid as a premium is surplus and cannot be used as paid-in capital within the meaning of the statute.

DEPARTMENT OF PUBLIC WELFARE: Right of State Department to permit temporary admission of non-resident insane persons to a State Hospital for the Insane.

July 31, 1941.

Mr. T. A. Gottschalk, Administrator,
State Department of Public Welfare,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Mr. Gottschalk:

I have your request for an official opinion construing Section 22-1501 Burns' Indiana Statutes, 1933, being Section 1, Chapter 56, Acts 1917, page 142, as amended by Section 1, Chapter 55, Acts 1923, page 169, and asking specifically if the State Department of Public Welfare may permit non-residents to be received into one of our mental hospitals temporarily until such person is deported to his place of legal settlement, or to the institution where he belongs.

The section in question is as follows:

"Settlement required—Exception—Non-resident insane may be admitted—Escaped inmates from other