"The State Highway Commission respectfully asks that you render an official opinion on the question involved herein and determine whether or not, under the law, the State can enter into such an agreement and stipulation in a right of way grant."

In my judgment such an agreement can not be legally made. In the first place, it is against public policy for the State to enter into a contract whereby at some future time (ten years) it is to be held liable in damages in a contemplated suit. Secondly, if such a suit were instituted, the State might be the plaintiff and such an agreement to pay for readjustments would, in effect, amount to the State agreeing to pay a fine of one convicted of maintaining a nuisance. A public nuisance is punishable by fine. Sec. 10-2501; Sec. 10-2502, Burns Indiana Statutes, 1933. Thirdly, under Sec. 2-505, Burns 1933 Statutes, whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property is a nuisance and the subject of an action and damages may be recoverable by any person injured.

Such a contract as proposed would enter the field of speculative damages to such an extent that this alone, in my judgment, would make it illegal. The company might be sued by an individual for damages done him, and it might be prosecuted by the State of Indiana for maintaining a nuisance whereby the State Highway Commission would be helpless to prevent the prosecution. Moreover, under such an agreement the State would be placed in the position of agreeing to pay for a possible tort action for which it is never liable in the absence of a statute.

PUBLIC SERVICE COMMISSION: Jurisdiction to approve conveyance of not used and useful property by public utility.

August 11, 1939.

Hon. William A. Stuckey, Commissioner,
Division of Public Service Commission,
Indianapolis, Indiana,

Dear Sir:

I have before me your request for an official opinion as to the jurisdiction of the commission in view of the provisions
of chapter 19 of the Acts of 1939 to approve or disapprove the
sale and conveyance of not used and useful property of a public
utility when such sale and conveyance is made to a person,
firm or corporation other than another public utility corpo-
ration.

The answer to your question requires the consideration and
interpretation of the next to the last literary paragraph of
chapter 19, supra, which reads as follows:

“Any public utility corporation, upon the order of a
majority of its board of directors and with the approval
of the commission, may sell and convey or lease to any
other public utility corporation, any of its real or
personal estate or other property not used and useful
in its public service.”


Said chapter 19, supra, contains no other provision with
respect to the sale and conveyance or leasing of not used and
useful property of a public utility other than is contained in
the literary paragraph immediately preceding the one just
quoted, and which preceding paragraph provides as follows:

“Any public utility corporation upon the order of a
majority of its board of directors and with the approval
of the commission may acquire, purchase or lease any
real or personal estate or other property of any other
public utility not used and useful in the public service
of such other public utility.”


Chapter 19 of the Acts of 1939 is amendatory legislation
both in form and fact, and the language already quoted, when
taken as an entirety, constitutes an amendment to section 95 1/2
of the 1913 Public Service Commission Act as the same was
amended in 1925.

While, as I shall hereafter point out, the language which I
am required to interpret is, in my opinion, clear and unam-
biguous, it may be of aid to trace the history of said section
95 1/2 as it bears upon the question from the time of the enact-
ment of the Act in 1913. In the original Act, the provision for
the purchase or lease by a public utility of the property of
another public utility took no account of the question as to
whether the property involved was used and useful or was
not used and useful. In other words, the same provision applied to both and read as follows:

"* * * any public utility may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission."


It will be noted from the above that the purchase or lease involved only public utilities providing, first, that any public utility may purchase or lease the property, plant or business or any part thereof of any other public utility, and second, that any such public utility may sell or lease its property to another public utility. In each case, whether from the standpoint of the seller or the buyer, the statute very clearly expressed the intention to give to the commission jurisdiction over the matter. However, there was nothing said in the section with respect to the sale by a public utility to some individual or corporation which was not itself a public utility.

When this section was amended in 1925, for the purpose of similar treatment of the subject, the property of public utilities was divided into two classes, namely: "the used and useful property" and the "not used and useful" property, and substantially the same provision was made with respect to its sale and purchase by and from another such public utility as existed in 1913 as applied to all or any part of the used and useful property. The 1925 amendment contained this further provision:

"Any public utility corporation, upon the order of a majority of its board of directors and with the approval of the commission, may sell and convey any of its real estate not used and useful in its public service."

It will be observed that the above sale and conveyance by a public utility of its not used and useful property is not limited to the sale and conveyance to another public utility, and no express authority is contained in the Act expressly authorizing a public utility to buy the not used and useful property of another public utility.

Whether the absence from the 1925 Act of express authority in a public utility to buy the not used and useful property of another utility had any material bearing in the making of the subsequent amendment, it is unnecessary to determine. However, that may be, when the legislature came to amend the section in 1939, it adopted substantially the same plan in expressing its intent with respect to not used and useful property as had theretofore been used with respect to used and useful property, and in addition included the leasing as well as the selling and conveying and the acquiring and purchasing; also providing that the provision should apply not only to real estate, as had been the case in the 1925 amendment, but to real or personal estate or other property. In other words, the legislature adopted the plan as to not used or useful property which had theretofore been used as to used and useful property by providing, first, that a public utility might acquire, purchase or lease such type of property from another public utility, and then to complete the authority by providing that a public utility might sell and convey or lease to any other public utility corporation.

Having thus traced the history of the legislation finally resulting in the language which I am asked to interpret, I desire to call special attention to just what the language is. It has already been quoted in this opinion, but to more easily visualize it I quote it again. It is as follows:

“Any public utility corporation, upon the order of a majority of its board of directors and with the approval of the commission, may sell and convey or lease to any other public utility corporation, any of its real or personal estate or other property not used and useful in its public service.”

As already pointed out, the correlative of this provision immediately precedes it, providing for the acquiring, purchasing or leasing. The material part showing the change from the similar provision in the 1925 Act is the language
"or lease to any other public utility corporation." This language is added immediately following the words "sell and convey." It has been suggested that this language should be set off in commas by inserting a comma after the word "convey" thus attempting to limit the limiting phrase "to any other public utility corporation" to the word "lease" immediately preceding it. I am obliged to say, however, that I do not see any justification for the insertion of such punctuation in order to aid in the interpretation of such section. In the first place, I do not see any real basis for limiting the leasing to another public utility corporation and authorizing the sale and conveyance to anyone. In addition, it is so well settled by the authorities that in the absence of ambiguity the language used by the legislature in enacting an Act is to be taken in its plain and usual sense, or as stated in some of the cases:

"Where the language of a statute is clear and plain there is no room for construction, and courts have no power to supply supposed defects or omissions, or to resort to construction for the purpose of limiting or extending its operation."

Taelman v. Bd. of Fin. of School City of South Bend, 212 Ind. 26, at p. 33;
See also Leach v. City of Evansville, 211 Ind. 444, at page 446.

I think the language of the Act above quoted is very clear and plain and I am obliged, therefore, to conclude that the language of the statute as applied to the sale, conveyance or lease of "not used and useful property" so far as express jurisdiction is conferred upon the commission, is limited to sales, conveyances or leases where both parties involved are public utilities.

It is my opinion, therefore, that the Public Service Commission has no jurisdiction to either approve or disapprove the sale and conveyance of not used and useful property of a public utility when such sale and conveyance is made to a person, firm or corporation other than a public utility, and that upon it being made to appear to the satisfaction of the commission in a proceeding brought before it to obtain the commission's approval that one of the parties involved is not a public utility and that the property involved is the not used and useful property of a public utility, it would be the duty
of the commission to dismiss the proceeding for want of jurisdiction.

FINANCIAL INSTITUTIONS, DEPARTMENT OF: Small Loan Act, whether licensee may conduct investigation and record mortgages in county other than that named in license.

August 16, 1939.

Hon. Ross H. Wallace, Director,
Department of Financial Institutions,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter calling attention to the following provision from section 1 of chapter 154 of the Acts of 1933, to wit:

“No licensee shall transact such business or make any loan provided for by this Act under any other name or in any other county than that named in the license.”

The business referred to is the business of loaning money pursuant to a license granted under the Small Loan Act.

Referring to the above provision, you submit the question as to whether it is a violation of the above provision if a resident of a county wherein the loan company is not licensed shall make application for a loan at the office of the licensee, and thereafter returns to the lending agency to sign the necessary papers and receives the money,—whether the Act upon the part of the licensee would violate the above provision.

You call attention to the fact that between the time the application was made and the time when the money is actually loaned there would doubtless be some investigation in the county where the borrower resides, and also that the licensee would record the chattel mortgage in the county where the borrower resides. Your question narrows down then to the question as to whether the fact of this investigation and the fact that the mortgage is recorded in a county other than that of the licensee results in a violation of the provision first above quoted. I have not been able to find any direct authorities upon the subject. However, in the consideration of when a foreign corporation is doing business within a State other