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in Burns § 28-3911, repealed by Acts 1965, ch. 260, § 911.) It seems clear, therefore, that courts would not consider school buses to be within the intent of the Legislature when it adopted Acts 1967, ch. 317.

A further argument in support of this conclusion is the language found in subsection (g) of section 2 of Acts 1967, ch. 317, set out in full, *supra*, establishing a different procedure for vehicles registered both in Indiana and at least one other state, which procedure is specifically intended "to avoid duplicate inspections." Duplicate inspections of school buses would seem equally unnecessary.

This opinion does not consider the validity or the effect of any rule that may be adopted by the School Bus Committee requiring school buses to be inspected by an inspection station licensed by the Department of Vehicle Inspection.

In conclusion, it is my opinion that Acts 1967, ch. 317 has no effect upon either the duty of the Indiana State Police to inspect school buses or the power of the Indiana School Bus Committee to prescribe standards for the construction and equipping of school buses. It is my further opinion that the 1967 General Assembly did not intend to include school buses within the purview of ch. 317, nor to make school buses subject to the provisions of that Act.

OFFICIAL OPINION NO. 21

July 17, 1967

SCHOOLS AND SCHOOL CORPORATIONS—Formation of Schoolhouse Holding Corporation—How Organized.

Opinion Requested by Hon. Edgar D. Whitcomb, Secretary of State.

This is in reply to your recent request of an Official Opinion answering the following questions:

1967 O. A. G.

- (1) Does Acts 1947 ch. 273, p. 1087, as amended, being Burns § 28-3220 to and including § 28-3232, authorize the formation of schoolhouse holding corporations?
- (2) If not, what Act, if any, authorizes the formation of such corporations?
- (3) What is the proper fee to charge for the formation of such corporations?

These questions will be answered in the order presented above.

(1)

No provision of Acts 1947, ch. 273, p. 1087, as amended, purports, by express statement, to authorize the formation of schoolhouse holding corporations. Section 1 (Burns § 28-3220) empowers school corporations to lease school buildings. Section 2 (Burns § 28-3221) then provides as follows:

“No school corporation or corporations shall enter into a contract of lease, under the provisions of this act, except with a corporation organized under the laws of the State of Indiana solely for the purpose of acquiring a site, erecting thereon a suitable school building or buildings, leasing the same to such school corporation or corporations, collecting the rentals therefor and applying the proceeds thereof in the manner herein provided. Such lessor corporation shall act, entirely without profit to the corporation, its officers, directors and stockholders but shall be entitled to the return of capital actually invested, plus interest or dividends on outstanding securities or loans, not to exceed five per centum per annum and the cost of maintaining its corporate existence and keeping its property free of encumbrance. Upon receipt of any amount of lease rental by such lessor corporation over and above the amount necessary to meet incidental corporate expenses and to pay dividends or interest on corporate securities or loans, such excess funds shall be applied to the redemption and cancellation of its outstanding securities or loans as soon as may be done.”

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In general, the Act merely: (1) authorizes a school corporation, upon meeting certain conditions, to lease a school building for the use of said school corporation; (2) provides that the lease must be with a corporation that has certain characteristics, herein called a schoolhouse holding corporation; and (3) provides for various matters relative to the lease contract between the school corporation and the schoolhouse holding corporation and the construction of the school building by the schoolhouse holding corporation.

This limited scope of the Act is not only apparent from a reading thereof, but is evidenced by the title thereto, which title reads as follows:

“AN ACT concerning the acquisition of sites, construction, equipment and financing of buildings for school purposes by private corporations and the leasing and acquisition thereof by school corporations, and declaring an emergency.”

This limited scope of the Act is further evidenced by cases from the Supreme Court of Indiana and by opinions of the Attorney General of Indiana which, although not directly concerned with the question here in issue, have considered the Act as merely authorizing the leasing of school buildings by a school corporation from a corporation organized pursuant to the laws of the State of Indiana and the provisions of the Act.

See: *Protsman v. Jefferson-Craig Consolidated School Corp.*, 231 Ind. 527, 527-528, 535, 109 N.E. 2d 889 (1953); *Becher et al., v. Albion-Jefferson School Corp.*, 235 Ind. 204, 206, 208, 132 N.E. 2d 270 (1956); 1947 O.A.G., pp. 234, 235; 1954 O.A.G., pp. 29, 30.

However, it should be noted that Judge Gilkison, dissenting in the *Protsman* case, *supra*, took the position that:

“Section 2, Ch. 273, Acts 1947, *authorizes* the creation of a corporation organized under the laws of the state . . .” (at p. 546 of 231 Ind.) (Emphasis added.)

But this position appears to be more of a mandate of the conclusion to which Judge Gilkison was directing himself than a reasonable construction and interpretation of the Act.

(2)

In determining what act, if any, authorizes the formation of a schoolhouse holding corporation, such a corporation must first be defined. For purposes of this Opinion, considering the various provisions of the Acts 1947, ch. 273, a schoolhouse holding corporation may be defined as :

A corporation which :

(1) Is organized under the laws of the State of Indiana ;

(2) Is organized solely for the purpose of acquiring a site, erecting thereon a suitable school building or buildings, leasing the same to such school corporation or corporations, collecting the rentals therefor and applying the proceeds thereof in the manner provided in the Act ;

(3) Acts entirely without profit to the corporation, its officers, directors and stockholders ;

(4) Is entitled to the return of capital actually invested, plus interest or dividends on outstanding securities or loans not to exceed 5% per annum and the cost of maintaining its corporate existence and keeping its property free of encumbrance ;

(5) Applies any amount of lease rental over and above the amount necessary to meet incidental corporate expenses and to pay dividends or interest on corporate securities or loans to the redemption and cancelation of its outstanding securities or loans as soon as may be done ;

(6) Has the power to issue stock, bonds and other securities and to sell the same ;

(7) Is exempt from state intangibles tax and from all other state, county and other taxes, except inheritance taxes, as to its property, stock and other securities issued by it ; and

(8) Is exempt from the Indiana gross income tax as to its rental income.

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With the definition above in mind, let us now turn to the only three acts in Indiana which could, at least on first impression, conceivably be considered as authorizing the formation of schoolhouse holding corporations, and determine which of these acts, if any, authorizes the formation of such corporations. These acts are:

(1) The Indiana Foundation and Holding Company Act of 1921 (Acts 1921, ch. 246, p. 730, as amended, being Burns § 25-1101 to and including § 25-1111);

(2) The Indiana General Not For Profit Corporation Act (Acts 1935, ch. 157, p. 557, as amended, being Burns § 25-507 to and including § 25-553); and

(3) The Indiana General Corporation Act (Acts 1929, ch. 215, p. 725, as amended, being Burns § 25-101 to and including § 25-265).

Foundation or Holding Company Act: Consideration of this Act primarily arises from the fact that the corporations here being considered are called schoolhouse *holding* corporations. However, upon realizing that a corporation authorized by the Holding Company Act (1) is one which has as its main purpose the receiving and holding of real estate and the expenditure of the increment therefrom for not for profit purposes,

See: §§ 3 and 4 of the Act; § 25-1104 of Burns;

Schortemeier, Indiana Corporation Law, p. 433, No. 1 (1952), and (2) is one which cannot have any capital stock, but only members.

See: Schortemeier, *supra*, p. 434, No. 6;

it must be concluded that schoolhouse holding corporations are not authorized by this Act. A schoolhouse holding corporation (1) does not have as its main purpose the receiving and holding of real estate and the expenditure of the increment therefrom for not for profit purposes (See, subdivision (2) and (5) of definition, *supra*, and (2) has the power to issue capital stock (See, subdivision (6) of definition, *supra*).

Not For Profit Corporation Act: Consideration of this Act primarily arises from the fact that § 2 of the Acts 1947, ch.

273, p. 1087 (Burns § 28-321) uses the phrase "without profit to the corporation, its officers, directors and stockholders" (See, subdivision (3) of definition, *supra*), and from the further fact that a number of authorities which have considered Acts 1947, ch. 273, p. 1087, have considered, by way of dicta, schoolhouse holding corporations as being not for profit corporations. However, no case or opinion of the Attorney General has expressly held this to be the case; what has been said in this respect has primarily been a by-product of the main thrust of the case or opinion.

However, even in light of the above two facts, it must be concluded that schoolhouse holding corporations are not authorized by the Not For Profit Corporation Act. This is so for two reasons: (1) A not for profit corporation cannot have any capital stock or pay any dividends;

see: § 7 of the Not For Profit Corporation Act; § 25-513 of Burns;

whereas, schoolhouse holding corporations may have capital stock and may pay dividends (See, subdivision (4) and (6) of the definition, *supra*); and (2) The purposes for which schoolhouse holding corporations are formed are not within the "purposes" provision of the Not For Profit Corporation Act. A corporation authorized under the Not For Profit Corporation Act may be organized for "not for profit" purposes; see: section 3 of the Not For Profit Corporation Act; § 25-509 of Burns. "not for profit" being defined as follows:

"The term 'not for profit' as applied to any corporation organized or reorganized under this act shall mean and include any corporation which does not engage in any activities for the profit of its members and which is organized and conducts its affairs for purposes other than the pecuniary gain of its members.

"The term 'not for profit' as used in this act also shall include but not be limited to any religious, civil, social, educational, fraternal, charitable or cemetery association organized or reorganized under this act which does not engage in any activities for the profit of its trustees, directors, incorporators, or members."

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See: Section 3 of the Not For Profit Corporation Act; § 25-508, Burns.

Corporations organized under the Not For Profit Corporation Act are generally called "eleemosynary corporation," i.e., corporations "created for charitable or benevolent purposes."

See: Black's Law Dictionary, p. 611 (4th ed. 1957).

Schoolhouse holding corporations are not eleemosynary corporations, i.e., are not corporations created for charitable or benevolent purposes, i.e., are not corporations created for purposes for which not for profit corporations are created. A schoolhouse holding corporation has no purpose whatsoever of bestowing charity and gratuitous benefits upon any person or organization.

General Corporation Act: Schoolhouse holding corporations are authorized by the Indiana General Corporation Act.

There are only two factors which cast doubt, at least on first impression, upon the validity of the above conclusion. The first relates to the purposes for which schoolhouse holding corporations are created as compared with the purposes for which corporations under the General Corporation Act are created. The second relates to the fact that the Acts 1947, ch. 273, provides that a schoolhouse holding corporation "shall act, entirely without profit to the corporation, its officers, directors and stockholders;"

see: Section 2 of the Act; § 28-3221 of Burns;

whereas the primary objective of corporations under the General Corporation Act is the realization of a profit from various business ventures for the benefit of the corporation, officers, directors and stockholders. However, close scrutiny of schoolhouse holding corporations reveal that these factors are not as impressive as they appear on first impression.

In the first place, although schoolhouse holding corporations are organized for the purpose of:

“. . . acquiring a site, erecting thereon a suitable school building or buildings, leasing the same to such school corporation or corporations, collecting the rentals there-

for and applying the proceeds thereof in the manner herein provided.”

(see: Section 2 of the Act; § 28-3221, Burns)

such corporations are also organized for the purpose of making a profit. Without such a purpose, it would be impossible for the schoolhouse holding corporations to experience a return on capital invested, pay interest or dividends and cover costs of maintaining corporate existence and keeping property free of encumbrance, plus redeeming and cancelling outstanding securities and loans.

See: Section 2 of the Act; § 28-3221, Burns.

Therefore, it can be reasonably concluded that schoolhouse holding corporations are organized, at least in part, for the purpose of making a pecuniary profit, the purpose for which corporations are organized under the General Corporation Act.

See: Section 2 of the General Corporation Act; § 25-201, Burns.

In the second place, schoolhouse holding corporations do not operate “entirely without profit to the corporation, its officers, directors and stockholders.” As noted above, schoolhouse holding corporations must realize such profit as will return capital, cover maintenance expenses and redeem and cancel outstanding securities and loans. Further, the corporation must realize such a profit as will permit it to pay interest or dividends. It should be noted that dividends can only be paid out of “the surplus earnings or net profits or surplus paid in case of the corporation.”

See: Section 12 of General Corporation Act; § 25-211 of Burns.

Since dividends may be paid by schoolhouse holding corporations, it must be concluded that such corporations realize a profit from which such dividends may be paid.

(3)

Since schoolhouse holding corporations are authorized by the General Corporation Act, the proper fee to charge for

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the formation thereof is determinable by reference to the Corporation Fee Act of 1957 as it relates to domestic corporations for profit. (Burns § 25-601 to and including § 25-606).

OFFICIAL OPINION NO. 22

July 18, 1967

OFFICERS—Dual Office Holding—Mayor of City as Salaried Employee of City School Corporation.

Opinion Requested by Hon. Quentin A. Blachly, State Representative.

I am in receipt of your request for an Official Opinion, which request reads as follows:

“A problem has arisen in an Indiana community which might possibly create an illegal conflict of interest problem in violation of certain Indiana laws pertaining to public officials.

“The situation concerns the possibility of a mayor also serving in an administrative capacity within the city school corporation wherein most of the school board members are appointed by the mayor.

“The specific question is, can a mayor of such a second class city under these circumstances also serve in a salaried administrative position as the physical education and athletic co-ordinator for the respective school corporation?”

In any question pertaining to the legal right of an individual to hold more than one position under state government the following tests should be taken into consideration, namely: