School bus drivers are required to have the proper driver's licenses and legal possession of a school bus, and school buses (other than common carriers or certain buses transporting private school students) can only be operated pursuant to a contract with a public school corporation. But the State School Bus Committee is not empowered to enforce these statutory requirements.

In summary, the answer to your first question is that only a licensed regular route common carrier of passengers may contract with a school corporation to provide transportation for school children over several different school bus routes and hire drivers for those routes. Drivers hired by such common carriers are under the direct supervision and control of the carrier, who is responsible for their performing in accord with his contract. The answer to your second question is that the State School Bus Committee has the power and duty to inspect school buses and their equipment, but not the power to examine the driver's license, certificate of bus ownership, and contract.

OFFICIAL OPINION NO. 44

December 4, 1967

MARRIAGE—Performance of Ceremony by Nonresident—Criminal Sanctions Applicable in Certain Instances.

Opinion Requested by Hon. H. Charles Winans, Prosecuting Attorney, 75th Judicial Circuit.

I am in receipt of your request for an opinion on the following question:

> "Does Burns § 44-301, Acts 1897, ch. 86, § 1, p. 129, prohibit the performance of a marriage ceremony

in the State of Indiana by a priest or minister who both resides and practices his profession outside of the state?"

The statute to which you refer, Acts 1897, ch. 86, § 1, as amended by Acts 1967, ch. 98, § 1, the same being Burns § 44-301, provides:

> "Marriages may be solemnized by ministers of the gospel and priests of every church throughout the state, judges of courts of record, justices of the peace and mayors of cities, within their respective counties, and by the Friends Church and German Baptists according to the rules of their societies, and by the Bahai Religion in accordance with its rules: Provided, That no marriage, legal in other respects, shall be void on account of the incapacity of the [person] solemnizing the same."

The above statute as it relates to priests and ministers is indeed subject to several different interpretations, including:

1. Priests and ministers assigned to a particular church anywhere in the state may solemnize marriages within the county wherein that church is located;

2. Priests and ministers assigned to a particular church anywhere within the state may solemnize marriages anywhere within the state;

3. Any priest or minister, no matter where resident, affiliated with a denomination that maintains a church within the state may solemnize marriages within the county where that church is maintained;

4. Any priest or minister, no matter where resident, affiliated with a denomination that maintains a church within the state may solemnize marriages anywhere within the state;

5. Any priest or minister, no matter where resident, may solemnize marriages anywhere within the state.

No doubt other interpretations are possible.

Examination of the statutes of other states lends no help in arriving at a proper interpretation of the Indiana law. Each of the several states appears to have its own approach to the question of solemnization of marriage. The various approaches can be categorized as follows:

1. Those states that specifically permit non-resident priests and ministers to solemnize marriages. *E.g.*, Conn. Gen. Stat. (1958 Rev.) § 46-3. (Connecticut had disagreeable experiences early in the Nineteenth Century with a statute that permitted religious solemnization of marriages only by ordained ministers "settled in the Work of the Ministry" in his county of residence. This was interpreted to exclude circuit riders, thereby voiding a number of marriages performed by such ministers. See *Town of Goshen v. Inhabitants of Town of Stonington* [1821], 4 Conn. 209, 219, 10 Am. Dec. 121.)

2. Those that make special provisions for in-state solemnization by ministers and priests who reside outside the state. *E.g.*, Mass. Gen. Laws Ann., Ch. 207, §§ 38, 39.

3. Those who make no specific provision in relation to the residence of the priest or minister. *E.g.*, Cal. Civil Code, § 70.

4. Those that limit (usually by license) the solemnization of marriage to priests and ministers resident of the state. *E.g.*, Ky. Rev. Stat. Ann. § 402.060, as interpreted by Opinions of the Attorney General of Kentucky, No. 66-400.

No instance has been found of another state using the specific language contained in the Indiana statute.

There is, however, the possibility of answering your question without relying on either grammatical intricacies or analogies with other states.

The above statute in and of itself has effect since, in addition to specifying who may solemnize a marriage, it provides

that marriages solemnized by persons other than those specified shall be valid. For the statute to have any effect it must be construed in conjunction with another statute, Acts 1905, ch. 169, § 651, the same being Burns § 44-305, which provides:

> "Whoever undertakes to join others in marriage when he is not lawfully authorized to do so; or whoever knowingly joins in marriage persons forbidden by law to become married, shall, on conviction, be fined not less than fifty dollars nor more than five hundred dollars, to which may be added imprisonment in the county jail not less than ten days nor more than three months."

It is thus evident that the authorization statute is enforceable only by the penalty of this criminal statute.

The basic principle in interpreting statutes that are penal in nature was set out in *Manners v. State,* 210 Ind. 648, 654, 5 N.E. 2d 300, 303 (1936), thusly:

> "It is fundamental that penal statutes are to be strictly construed; that a statute in derogation of a common right and highly penal in character is only to be applied to cases clearly within its provisions; that penalties may not be created by construction, but must be avoided by construction unless they are brought within the letter and the necessary meaning of the act creating the penalty. This requires that where there is ambiguity it must be resolved against the penalty, and only those cases brought within the statute that are clearly within its meaning and intention. . . ."

The above language has been quoted with approval and followed many times. See, for example, *Dowd v. Sullivan,* 217 Ind. 196, 202, 27 N.E. 2d 82, 85 (1940); *Simmons v. State,* 234 Ind. 489, 596, 129 N.E. 2d 121, 124 (1955).

The general principle described above has been applied to the penal provisions of statutes regulating the solemnization of marriages.

In 1852 the Indiana General Assembly adopted a thirteen-section Act entitled: "AN ACT declaratory of the law regulating Marriages, and enforcing the provisions thereof by proper penalties." See 1 R.S. 1852, ch. 67, p. 361.

The third section of that Act, as amended by Acts 1857, ch. 44, p. 91, authorized certain persons to solemnize marriage, and, except for these provisions relating to the mayors of cities and the Bahai Religion, read exactly as does Burns § 44-301, *supra,* and was in fact superseded by that statute.

Section 12 of the Act prescribed a penalty for persons who undertake to join others in marriage when not lawfully authorized to do so, and is practically identical to Burns § 44-305, *supra,* which superseded it.

Both §§ 3 and 12 of the 1852 Act were specifically repealed by Acts 1963, ch. 51, § 1.

Section 8 of the 1852 Act required every person who solemnized a marriage to file a certificate thereof in the office of the county clerk within three months. Section 11 imposed the following penalty:

> "If any person having solemnized a marriage, shall fail to file a certificate thereof in the proper clerk's office, as in this act required, he shall, upon conviction thereof, be fined the sum of five dollars for every month he shall continue to fail or neglect to file such certificate, from and after the expiration of the time within which he is required by this act to file the same."

In *Kent v. State,* 8 Blackf. 163 (1846) an earlier but identical statute regulating the filing of the certificate was considered. The certificate was not filed until three months and fourteen days subsequent to the solemnization, and an indictment followed. The trial court overruled defendant's motion to quash, accepted a plea of guilty, and assessed a fine of $2.50. The question was "whether any fine can be imposed for a delay of less than a full month from the expiration of the three months." The Supreme Court reversed, saying:

> "We think the Court erred. This is a penal statute and must be strictly construed. It certainly is not

> clear that a penalty is inflicted by it till the end of the fourth month's delay; and if it is ambiguous, and susceptible of two constructions consistent with reason, one of which will acquit and the other convict the defendant, that construction which will acquit must be adopted."

Thus statutes prescribing the duties of persons who solemnize marriages, as well as those defining who may so act, being penal in nature, must be strictly construed. The only interpretation of Burns § 44-301, *supra,* consistent with that rule is that all priests and ministers, no matter where resident, are authorized to solemnize marriages anywhere within the State of Indiana.

Therefore, it is my opinion that a priest or minister who both resides and practices his profession outside of the State of Indiana is not prohibited from performing a marriage ceremony within this state.

OFFICIAL OPINION NO. 45

December 12, 1967

LEGAL ADVERTISING BY NEWSPAPERS—Merger of Newspapers as Affecting Five Year Statutory Requirement—"Preference Theory."

Opinion Requested by Hon. James B. Young, State Senator.

I am in receipt of your inquiry concerning the eligibility of a newspaper to publish legal advertising. Your letter sets out the following situation and questions pertaining to that situation: