> 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:

"I hereby request your opinion regarding the following:

"The Greenwood News has been a newspaper of general circulation since 1893. It is 'published' in Greenwood, Indiana, i.e. — it has its second-class postal permit on file there and its issues are first entered in the mails there. Greenwood has been its only place of publication.

"The Franklin Daily Journal has been a newspaper of general paid circulation since 1963. It is 'published' in Franklin, Indiana, i.e. — it has its second-class postal permit on file there and its issues are first entered in the mails there. Franklin has been its only place of publication. Both are located in Johnson County, Indiana.

"It is proposed that the two publications be merged into a single newspaper, which would retain a general paid circulation classification. This merged newspaper would be 'published' in Franklin, Indiana, and would have a single second-class postal permit (presumably the postal permit now held by the Franklin Daily Journal would be amended to reflect the merger).

"The question has arisen regarding the eligibility of such a merged newspaper to publish legal advertising. In this connection, the following questions may be pertinent:

"1. Is the interpretation as set out above of the word 'published' as denoting the place of publication of a newspaper in accord with the correct legal or legislative interpretation of the term?

"2. Would merger of the two newspapers create a new entity, or would it be presumed that the new newspaper is a continuation of the two which have merged? (Both publications are owned by a partnership, Home News Enterprises.)

"3. What would be the effect of the 'five-year' clause in Burns 49-704 and Burns 49-707 on the eligibility of the merged newspaper to publish legal adver-

tising for the relevant governmental units which would be involved: city, town, township, city and town schools, county, state?

"4. What would be the effect of the 'five-year' clause in Burns 49-704 and Burns 49-707 on the eligibility of the merged newspaper to publish legal advertising for 'non-public' legal advertising, i.e. — those notices which must be published, such as non-resident divorce notices and estate notices, payment for which is not drawn from the public treasury but rather paid for by private individuals?

"5. Does the Attorney General still adhere to the 'preference theory' of eligibility to publish legal advertising as set out in prior Attorney General opinions of October 10, 1933 at p. 469; of May 12, 1934 at p. 260; of November 17, 1936 at p. 413, and of September 24, 1947 at p. 295 (No. 59)?

"6. If the Attorney General does still adhere to the 'preference theory' of eligibility to publish legal advertising, would this have a bearing on the eligibility of the merged newspapers?"

Legal advertising in newspapers is regulated by Acts 1927, ch. 96, as amended, the same being Burns §§ 49-701 through 49-709. The eligibility of newspapers is set out in Sections 4 and 7 (Burns §§ 49-704 and 49-707) which provide in part:

Section 4; Burns § 49-704

"In all cases where county, township, city, town and school officials are required by law to publish notices, ordinances and reports affecting county, township, city, town and school business, respectively, such officials are hereby required to publish such notices, ordinances and reports in two newspapers representing the two political parties casting the highest number of votes at the last preceding election published in such county, township, city or town. . . .

". . . The term 'newspaper' as used in this act shall be construed to mean a weekly, semi-weekly, tri-week-

> ly or daily newspaper which shall have been published for five consecutive years in the same city or town. . . ."

Section 7, Burns § 49-707

> "In all cases where the law provides for the publication of legal notices in a newspaper, it shall be legal to make such publication in either a daily, weekly, semi-weekly or tri-weekly newspaper which for at least five years, has been a newspaper of general circulation, printed in the English language and entered, authorized and accepted by the post-office department of the United States of America as mailable matter of the second class as defined by the Act of Congress of the United States of March 3, 1879 and having a bona fide paid circulation. . . ."

1. The term "published" as used in the above statutes to indicate place of publication has not been judicially interpreted in the State of Indiana. It has, however, been interpreted in other states and their interpretation is substantially the one you suggest, which is the location of the paper's second-class mailing permit. An example of such interpretations is found in *People ex rel. O'Connell v. Read,* 256 Ill. 408, 100 N.E. 230 (1912), a case challenging the validity of a village appropriation ordinance. The court said:

> "The character of the newspaper and the place of publication appeared thereon, as follows: 'The Post, by David Herriott, including The Ridge Record.—Published every Saturday morning in the interest of Morgan Park, Blue Island, and the entire country along the Blue Island ridge, in Chicago, by the Post Co. (not inc.)—Entered as second-class matter Nov. 19, 1910, at the post-office at Chicago, Ill., under the act of March 3, 1879.' Under the federal statutes a publication, to be admitted as second-class, must be issued from a known office of publication, and a newspaper is published where it is first issued to the public. The paper stated that it was so issued at the post office

> at Chicago. It is immaterial where the printing is done, but the place of publication of a newspaper is the place where it is first put into circulation, where it is first issued to be delivered or sent, by mail or otherwise, to its subscribers. Ricketts v. Village of Hyde Park, 85 Ill. 110; Village of Tonawanda v. Price, 171 N.Y. 415, 64 N.E. 191; State v. Bass, 97 Me. 484, 54 Atl. 1113; Leroy v. Jamison, 3 Sawy. 386, Fed. Cas. No. 8,271. A witness testified that The Post was published in Morgan Park and was a paper of general circulation in the village and outside, but the witness evidently understood that the paper was published in any community where it was circulated. He stated no facts showing where the paper was first issued to the public, which constitutes the place of publication, and his conclusion was not sufficient to overcome the evidence that the paper was not published in the village of Morgan Park. That village was no more the place of publication, according to the evidence, than the city of Blue Island and the entire country along the Blue Island ridge. The ordinance was not posted in the village, and, not having been published as required by statute, it never took effect as an ordinance. . . ."

See also *Madigan v. City of Onalaska,* 256 Wisc. 398, 41 N.W. 2d 206 (1950); *Wildwood Independent Record Pub. Co. v. City of Wildwood,* 35 N.J. Super. 543, 114 A. 2d 483 (1955).

Furthermore, both Acts 1927, ch. 96, § 7, Burns § 49-707, *supra,* and a supplementary enactment, Acts 1939, ch. 84, § 1, Burns § 49-710, specify that a newspaper carrying legal advertising must have a second class mailing permit, a clear indication of an intended correlation between place of publishing and place of mailing.

2. The question of whether the merger of the two newspapers would create a new entity I interpret as relating solely to the five-year publication requirement.

In *Lee v. Burns,* 94 Ind. App. 676, 182 N.E. 277 (1932), the question was whether a weekly newspaper which had

been published for 70 consecutive years, but which suspended publication in February, 1930, and was sold to a purchaser who resumed publication in August, 1930, had been "published for five consecutive years" by February, 1931, so that notice of suit filed against a non-resident given by publication in that paper would be valid. The court said, at 94 Ind. App. 679:

> "Statutes which interfere with legitimate enterprise or limit the right to construct or operate legitimate industries are to be given a strict construction. *Wheelwright v. Commonwealth,* 103 Va. 512, 49 S. E. 647; *Webb v. Baird,* 6 Ind. 13; *Ramsey v. Foy,* 10 Ind. 493.
>
> "This statute can have no purpose except to limit the newspapers eligible to participate in publication of legal notices to those which are five or more years old and to deny that right to all other newspapers. In that respect it effects a change of existing law. It makes no provision for the extinguishment of that right after it has been acquired by a newspaper. It does not provide that temporary suspension of publication, or suspension for a period of less than one year shall extinguish publication rights already acquired and enjoyed by a newspaper. It cannot be extended to extinguish the publication rights acquired and enjoyed by the Owen County Journal under the facts alleged in appellant's reply. 36 Cyc. 1179-1180.
>
> "This right of publication is a valuable asset to the newspaper owning it and to give it any other construction would tend to create a monopoly that is not favored in the law."

Thus the right of a newspaper to publish legal advertising is in a sense a property right which passes to the purchaser of a newspaper which has acquired the status which creates the right. Since a merger is, in this respect, the equivalent of a sale, the right would survive the merger.

The *Lee* case did not hold, however, that what it terms "[t]his right of publication" cannot be extinguished by any

event. More specifically and to the point of your question, it did not hold that the right would not be extinguished by transfer of the place of publication from one municipality to another.

Acts 1927, ch. 96, § 4, Burns § 49-704, *supra,* defines a "newspaper" as used in the Act as a "newspaper which shall have been published for five consecutive years in the same city or town." This introduces several questions:

> A. Has the "in the same city or town" provision in the 1927 Act been superseded or amended by subsequent legislation?
>
> B. If the "in the same city or town" provision is still valid, what city or town is meant?

A. The fourth section of the Act, which contains the definition of "newspaper," is concerned entirely with public legal advertising, and describes a procedure for determining which "newspapers" published or circulated within the confines of the governmental unit are eligible to carry the legal notices of the governmental unit. The seventh section of the Act provided:

> "In all cases where the law now provides for the publication of notices in any newspaper, it shall hereafter be legal to make such publication in either a daily, weekly, semi-weekly or tri-weekly newspaper: *Provided,* That such publication, if made in a daily or semi-weekly or tri-weekly newspaper shall be published once a week for the same period and time as now required by law, and it shall be made on the same day of each week."

Although the court in *Lee v. Burns, supra,* did not cite the above statute, it must be inferred that the court, *sub silentio,* construed the statute as applying to private legal advertising. The decision rested solely on the interpretation of the "published for five consecutive years in the same city or town" portions of section 4, but it was concerned with the application of that provision to an instance of "private legal advertising." If the 1927 Act did not apply to such adver-

tising, then the provision would not be applicable; the above section 7 is the only portion of the Act that could be construed to refer to such advertising. Thus, the Legal Advertising Act, as originally written, required a newspaper to be published five consecutive years in the same city or town to be eligible to carry legal advertising, whether public or private.

It should be noted that the 1927 Act as originally adopted contained no further provisions concerning eligibility. Acts 1939, ch. 84, the same being Burns §§ 49-710 through 49-713, attempted to cure that defect by requiring all legal advertising, both public and private, to be published in a "newspaper printed in the English language and entered, authorized and accepted by the post-office department of the United States of America as mailable matter of the second class." (Section 1, Burns § 49-710) The second section of the Act also established a circulation requirement in certain counties. The fourth section of the Act, Burns § 49-713, specifically provided that the Act was not to be construed as repealing, altering or amending any other law requiring legal notices to be published in a newspaper of general circulation. Thus, all legal advertising was still required to be published in a "newspaper which shall have been published for five consecutive years in the same city or town."

Section 7 of the 1927 Act was amended by Acts 1949, ch. 123, § 1, to read:

> "In all cases where the law provides for the publication of legal notices in a newspaper, it shall be legal to make such publication in either a daily, weekly, semi-weekly or tri-weekly newspaper which for at least five years, has been a newspaper of general circulation, printed in the English language and entered, authorized and accepted by the post-office department of the United States of America as mailable matter of the second class as defined by the Act of Congress of the United States of March 3, 1879 and having a bona fide paid circulation: Provided, That such publication if made in a daily or semi-weekly or tri-weekly

> newspaper, shall be published once a week for the same period and time as required by law, and it shall be made on the same day of each week."

The amendment, then, incorporated into the section of the 1927 Act regulating private legal advertising further qualifications for eligibility similar to those contained in the first section of the 1939 supplementary Act. The question to be considered is whether the 1949 amendment supersedes, nullifies or impliedly repeals the "in the same city or town" provision contained in section 4.

It is my opinion that the 1949 amendment in no way affects the requirement that the newspaper be "published for five consecutive years in the same city or town."

My conclusion is premised on the principle that repeals by implication are not favored. In the case of *In re Marshall*, 117 Ind. App. 203, 210, 70 N.E. 2d 772 (1947), which involved the effect an amendment of one of two sections of the Workmen's Compensation Act dealing with the distribution of benefits to dependents of a deceased employee had on the other section, the court said:

> "Section 37 as amended did not expressly repeal § 38, and repeals by implication are not favored. Section 38 can only be disturbed or influenced by § 37 as amended if the latter is so repugnant to the former as to render the repugnancy or conflict between them irreconcilable. The two sections must be construed together, and they must, if possible, be so construed as to harmonize and give effect to each. *Woodring v. McCaslin* (1914), 182 Ind. 134, 104 N.E. 759."

In the present instance there is no irreconcilable conflict. The very provisions added by the 1949 amendment had been in effect for ten years as a result of the 1939 supplementary Act. A provision that is supplemental in one act cannot create an irreconcilable conflict when included in another act. (It should also be noted that if the "in the same city or town" provision were to be considered superseded there would be no geographical restriction on private legal advertising. Ab-

sent that provision, section 4 would still require public advertising in a paper published in the confines of the governmental unit, but section 7 would only require public advertising to be published in "a newspaper of general circulation.") Thus, the "in the same city or town" provision is still in effect and relates to both public and private legal advertising.

B. Three principles of statutory construction are relevant to the meaning of the phrase "in the same city or town":

First: "In determining the meaning of a statute it must be considered as an entity and each part considered with reference to all other parts." *McKee v. Hasler,* 229 Ind. 437, 449, 98 N.E. 2d 657 (1951).

The instant statute, Burns § 49-704, requires county, township, city, town and school notices to be published in a newspaper "published in such county, township, city or town." When the same statute defines a newspaper as one published for five consecutive years in the same city or town, it is reasonable to assume that the "same city" means the city in which the legal notice is to be published.

Second: " 'It is presumed that the legislature does not intend an absurdity, or that absurd consequences shall flow from its enactments. Such a result will therefore be avoided, if the terms of the act admit of it, by a reasonable construction of the statute.' Black, Interpretation of Laws § 48, p. 104." *Groher v. Colgate-Palmolive-Peet Co.,* 94 Ind. App. 234, 246, 178 N.E. 242 (1931).

To interpret the phrase "in the same city or town" as meaning any city or town regardless of location could easily produce absurd results, as can be readily illustrated by substituting other papers for the Greenwood News in the proposed merger. If the substitute were the Indianapolis Star the result would not be unreasonable since that paper is already circulated in that area. On the other hand, what if a neighborhood weekly published in Marion County were substituted? Or a neighborhood weekly published in Posey County? The statute contains no express requirement that that city or town be in Indiana, or even in the United States.

Therefore, if interpreted as meaning any city or town, why not a merger with the New York Times, or the London Times, or with an obscure Australian weekly (assuming the latter two papers have second-class mailing permits)? Such an interpretation is patently absurd.

Third: "It is not to be presumed that any part of an Act is meaningless and without a definite purpose. If possible, effect must be given to every word and clause used in the Act." *Combs v. Cook,* 238 Ind. 392, 397, 151 N.E. 2d 144 (1958).

The phrase would have little relationship to the evident purpose of the statute considered as a whole if it were interpreted to mean any city or town wherever located. Insofar as the city in which the newspaper relocates is concerned, there would be no difference between a newspaper that had been published for five years in one other city or town and one that has been published for five years but in several other cities or towns. Conversely, the phrase has great significance if interpreted as meaning the same city or town in which it is then located. A newspaper's circulation is usually concentrated in the city in which it is published, and so a newspaper successful enough to have been published in the same city for five consecutive years must necessarily reach a goodly number of the residents and would thus be a proper vehicle for public notices. On the other hand, a newspaper published elsewhere for five years might have no circulation in the city in which it relocates and thus be ineffectual as a vehicle for public notices.

The rules stated support as the most logical interpretation that which would define "the same city or town" as the city or town in which the newspaper is being published when it is to carry the advertising, and which would disqualify a previously qualified newspaper when it changes its place of publication to a different city or town.

In the situation you describe the merged newspaper would be "published" in Franklin, Indiana. Thus one of the papers, the Greenwood News, would cease being "published" in the city in which it is presently being published, although the other, the Franklin Daily Journal, would, in a manner of

speaking, still be "published" in the same city wherein it is now published. Therefore, the newspaper resulting from the merger would succeed to the legal advertising rights of the Franklin Daily Journal but not to those of the Greenwood News.

3. The merger, if carried out in the manner you describe, would, for the reasons discussed above, extinguish the right of the Greenwood News to publish legal advertising for various governmental units, but would not affect any right the Franklin Daily Journal may have acquired. Since the Franklin Daily Journal has not as yet been published for five consecutive years the merged newspaper would not be eligible (until its 1968 anniversary) to publish legal advertising for governmental units, if there are other newspapers eligible. (See answers 5 and 6, *infra*)

4. The merger, if carried out in the manner you describe, would, for the reasons discussed above, extinguish the right of the Greenwood News to publish private legal advertising, but would not affect any right the Franklin Daily Journal may have acquired. Since the Franklin Daily Journal has not been published for five consecutive years the merged newspaper would not be eligible to carry private advertising.

5. The "preference theory" of eligibility to publish legal advertising of governmental units, as developed in the Opinions of the Attorney General cited in your letter, is based on the several clauses (a clause for each class of governmental unit) of Acts 1927, ch. 96, § 4, Burns § 49-704, which provide:

> ". . . If only one of said political parties is represented by a newspaper published in such county [or township, city, town, school city, school town, as the case may be], then such county [or township, etc.] notices and reports shall be published in such newspaper and also in any newspaper of general circulation published in the county [or township, etc.]. If neither of said political parties is represented by a newspaper published in such county [or township, etc.] then such county [or township, etc.] notices and reports

> shall be published in any two newspapers of general circulation published in the county [or township, etc.]. If there be but one newspaper published in a county [or township, etc.], publication in such newspaper shall be sufficient."

The "preference theory" expressed in 1934 O.A.G., p. 260, 1936 O.A.G., p. 413 and 1947 O.A.G., p. 295 is that the Act describes an ideal condition and that the above provision[s] regulate those instances where the ideal condition does not exist. The ideal condition is the existence in the geographical area of the governmental unit of at least one newspaper of the political faith of each of the two major political parties, each such newspaper having been published for five years. The theory is basically that publication, especially bi-party publication, is the intent of the statute and that that intent should be satisfied as closely as possible when the ideal condition does not exist. Thus, a newspaper published less than five years is eligible if it is the only newspaper (1936 O.A.G., p. 413), or the only newspaper representing one of the major political parties (1934 O.A.G., p. 260), but not if it represents the same political party as a paper that has been published for five years (1947 O.A.G., p. 295).

In answer to your question, the Attorney General still adheres to this "preference theory."

6. There can be no doubt that the "preference theory" would have some effect on the eligibility of the newspaper resulting from the merger to publish legal advertising for governmental units. Despite its not having been published for five consecutive years, the paper would be eligible to publish advertising for those governmental units in whose geographical area it is the only paper published, or the only paper representing one of the two major political parties. If politically unaffiliated, the paper would also be eligible as a newspaper of general circulation provided both that one or both of the two major political parties is not represented by a newspaper, and that there is not a politically non-affiliated newspaper that has satisfied the length of publication requirement.