the legislature intended to put into a statute words which are meaningless (Garvin, Rec. v. Chadwick Realty Corp. (1937), 212 Ind. 499)." (Our emphasis)

Therefore, while any question as to applicability to "street railways" is perhaps moot due to the abandonment of this type of railway in Indiana, nevertheless, it is my opinion, in answer to your question No. 2, that House Enrolled Act No. 1076, *supra,* as written, is applicable to "street railway grade crossings," *if any there be,* which are outside or beyond any business or residence district.

OFFICIAL OPINION NO. 27

July 25, 1963

Mr. T. Michael Smith, Administrator
Inheritance Tax Division
106 State Office Building
Indianapolis, Indiana

Dear Mr. Smith:

This is in response to your letter, wherein you request an Official Opinion upon the following subject:

> "Will you please advise me by way of an Official Opinion as to whether that portion of the publicly financed retirement funds (namely, The Teachers Retirement Fund, The Public Employee Retirement Fund, The State Board of Accounts Retirement Fund, The State Police Retirement Fund and The Judges' Retirement Fund) payable on death is a transfer exempt from taxation under the Inheritance Tax Laws (Burn's, Section 7-2401, seq.), and if not, the extents to which such death benefits are taxable."

Any transfer to be taxable for inheritance tax purposes must be included in the provisions of the Acts of 1931, Ch. 75, Sec. 1, as found in Burns' (1953 Repl.), Section 7-2401, and more specifically as found in the fourth grammatical paragraph of said section, which reads in part as follows:

> "All transfers enumerated in this section shall be taxable, if made by will; or if made by the statutes regulating intestate descent; or if made in contemplation of death of the transferor, and any transfer of property made by a person within two [2] years prior to death, shall, unless shown to the contrary, be deemed to have been made in contemplation of death; or if made by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor * * *"

If the death benefits payable under the various retirement funds are includible in the transfers described in the foregoing section then, and only then, would such benefits be taxable under the Indiana Inheritance Tax Law.

The death benefit provisions of the various retirement funds enumerated in your request are set out below:

The Teachers' Retirement Fund in the Acts of 1915, Ch. 182, Sec. 14, as amended, as found in Burns' (1963 Supp.), Section 28-4511 (e):

> "As soon as practicable after the passage of this act the secretary of the fund shall secure from each teacher a designation of beneficiary, and the death benefit payable to such beneficiary or to the estate if no such designation is made shall be computed by applying three per cent (3%) interest compounded annually on the total assessments and payments made by the teacher to the date of death or separation from active service, whichever is earlier: Provided, That in the event of such death while drawing disability benefits, all payments made to such teacher under the disability provisions of this act shall be deducted from such sum; and in the event of such death while on regular retirement annuity, there shall be deducted from such sum the portion of annuity payments made from contributions of such teacher, made in conformity with the provisions of this act, if application therefor be made within three (3) years after the death of such teacher, but not otherwise. In the event of the death of a married teacher who is a member of the fund

and who has not designated a beneficiary, the death benefit shall be paid to said teacher's husband or wife or may be converted in accordance with sub-section (i) of this section at the option of such husband or wife."

The Public Employes' Retirement Fund in the Acts of 1945, Ch. 340, Sec. 11, as amended, as found in Burns' (1961 Repl.), Section 50-1611:

> "Upon death of a member while in service from any cause, there shall be paid to his estate, or to such person as he shall have nominated by written direction duly acknowledged and filed with the board a refund of the accumulated contributions of the member as of the date of death.
>
> "The person nominated by the deceased member to receive the benefits hereinabove described in this section may provide in a written designation duly executed and filed with the board of trustees that the accumulated contributions of the deceased member shall be paid in the form of an annuity, to be determined as of the date of death of the member, on the basis of the age of the beneficiary at that time, as the actuarial equivalent of the accumulated contributions; Provided, That such actuarial equivalent is a life annuity of at least one hundred twenty dollars [$120] per year, otherwise said benefits shall be paid in a single cash sum.
>
> "Upon death of a member who is receiving a retirement benefit, unless a reversionary annuity is payable under the provisions of section 10 (Sec. 60-1610) hereof, a death benefit shall be paid in a single cash sum to his estate, or to such person as he shall have nominated by written direction duly acknowledged and filed with the board, consisting of the excess, if any, of the accumulated contributions of the member at time of retirement over the total amount of all member's annuity payments received by the retired member prior to his death."

The State Board of Accounts Retirement Fund in the Acts of 1941, Ch. 107, Sec. 7, as amended, as found in Burns' (1961 Repl.), Section 60-247, which reads, in part, as follows:

> "Upon the death of any annuitant or member there shall be paid to a named beneficiary or to the annuitant's or member's estate, the amount of his contributions, including earnings, after deducting therefrom the total of any annuity or benefits paid to such member or annuitant prior to his death."

The Indiana State Police Retirement Fund in the Acts of 1937, Ch. 54, Sec. 1, as amended, as found in Burns' (1963 Supp.), Section 47-835 (6):

> "In the event a person ceases to be an employee beneficiary because of death, disability, unemployment, retirement or any other reason he, his beneficiary or his estate shall receive at least the net amount paid into the trust fund from his wages, either in a lump sum or monthly instalments not less than his pension amount;"

The Indiana Judges' Retirement Fund in the Acts of 1953, Ch. 157, Sec. 13, as found in Burns' (1963 Supp.), Section 4-3256:

> "Payment shall be made to widow or dependents if a participant shall have drawn no part of, or less than the amount he paid, into the fund, at the time of his death, then his widow, if any surviving, and if none survive, then any dependent or dependents surviving, shall draw from the fund the amount or the balance of the amount that participant paid into the fund, if no widow or dependents survive, then such balance shall be paid to the executor or administrator of participant's estate, payable within sixty [60] days from date of withdrawal application or in such monthly installments as he or they may elect."

It is quite obvious that the death benefits payable under the various retirement funds mentioned above are not transfers made by will.

The next type of transfer to which the Inheritance Tax Law applies, is that "made by the statutes regulating intestate descent * * *" Section 33 of the Act, as found in Burns' (1953 Repl.), Section 7-2433, contains statutory definitions of terms used in that act, one of which concerns "intestate descent," which is defined in the fifth grammatical paragraph of that section to mean the following:

> "The words 'intestate descent' or 'intestate succession,' as used in this act, shall be taken to refer to all transfers of property or any beneficial interest therein, affected [effected] by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, affected [effected] by operation of law upon the death of a person omitting to make a valid disposition thereof."

From this definition it is clear that the Legislature, by referring to "statutes regulating intestate descent," meant statutes by which to determine the distribution of a decedent's property in the absence of a will and those concerning the transfer of property by operation of law upon the death of a person who could have made a valid disposition by will of the property involved. This is in accord with the generally understood concept as to what is meant by "intestate laws," as meaning those governing the devolution of property which could be, but is not, disposed of by will. Thus, laws which control the disposition of property which could not be transferred by will, are not intestate laws.

> See: In re Rogers' Estate (1923), — Mo. —, 250 S. W. 576, 578.

Furthermore, it is clear that the death benefits under the various retirement funds enumerated herein are not transfers made in contemplation of death, for the reason that in no instance are such benefits payable until the death of the person covered by one of the various funds.

The next type of transfer enumerated in the Inheritance Tax Law is one "made by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor * * * " The authorities have universally held that under this type of provision the death benefits payable under various retirement and pension funds are taxable for inheritance tax purposes.

> In re Endemann's Estate (1954), 307 N. Y. 100, 120 N. E. (2d) 514;
>
> Gould v. Johnson (1960), — Me. —, 166 A. (2d) 481;
>
> In re Stone's Estate (1960), 10 Wis. (2d) 467, 103 N. W. (2d) 663;
>
> Dolak v. Sullivan (1958), 145 Conn. 497, 144 A. (2d) 312.

In the instance of each of the retirement funds herein involved, it is required that the employee contribute his own funds to the respective fund; in each instance provision is also made that upon death of the employee there shall be paid to the designated beneficiary or, if no designated beneficiary, except in the case of The Teachers' Retirement Fund, to the employee's estate, the amount of his contributions plus earnings thereon after deducting therefrom any retirement or disability benefits paid to such employee prior to his death. Further provision is made in each instance for the withdrawal of all contributions made by the employee, plus earnings thereon in certain instances, in the event such employee ceases to be an employee before retirement or death, except in the case of The Teachers' Retirement Fund, which provides for 100 per cent withdrawal of employee contributions upon termination of employment for reason other than retirement or death, only after ten (10) years of service with lesser percentages of withdrawal graduated according to the number of years of service completed.

The employee clearly has a vested interest in his respective fund to the extent allowed by statute.

In Gould v. Johnson, *supra*, there was involved a profit-sharing plan whereby only the employer made contributions to a trust fund for the benefit of its participating employees. The plan provided for retirement benefits and a death benefit.

Upon termination of employment for any reason other than retirement or death, the employee could forfeit either a portion or all of his share in the trust, depending on the length of his employment. There was no possibility of a reversion to the employer. The decedent designated his wife to receive the death benefit. The Supreme Judicial Court of Maine declared the succession to be taxable in said case, stating in 166 A. (2d) 481, at pp. 484, 485:

> "So in the instant case we think that the interest of the decedent in the trust fund, comprising what was in effect deferred compensation earned by him through loyal service, was not only more than a mere expectancy but was the 'equivalent of ownership' for 'purposes of taxation.' Thus the designation of the widow as beneficiary was more than the exercise of a limited power of appointment over the property of another— it was a 'grant' of an 'interest in property' within the meaning of R. S. Chap. 155, Sec. 2 intended to and in fact taking effect upon the death of the decedent. The designation served effectively to change the flow of economic benefits in which decedent had acquired an interest away from his estate and to the widow."

The above case does not present as strong a fact situation for taxability as does the situation under the funds herein in question for the reason that the death benefits thereunder received by the beneficiaries are sums in the nature of deposits previously made by the employee with the trustees of the particular fund involved. Also, the employee in this present case retains a vested interest in such "deposits" at all times, which he can recover upon termination of employment prior to retirement or death.

In Dolak v. Sullivan, *supra*, the Supreme Court of Errors of Connecticut dealt with a noncontributory retirement plan for employees which was not funded. If the employment of an employee should cease for any reason other than retirement or death, the employee would be automatically and completely withdrawn from the plan regardless of length of service. The plan was revocable by the employer at his pleasure and without limitation. Under the plan the employee would receive retirement benefits if he retired while actively employed by the employer, and if he died prior to retirement and while actively employed, his widow would receive a certain sum as a death benefit. The decedent died while actively employed. The Court in said case held that the accrual of the right to the benefits by the widow was a taxable transfer of intangible personal property taking effect in possession and enjoyment upon the decedent's death, stating, in 144 A. (2d) 312, at p. 317:

> "* * * It follows that the full benefits, such as they are, passing to the plaintiff by the annuity contract are taxable as a transfer or grant of intangible personal property * * * Those benefits were by the decedent intended to, and in fact did, take effect as to this plaintiff, in possession and enjoyment, at his death * * *"

Here, again, the death benefit was subject to many contingencies not found in the case of the retirement funds in question.

In the instance of The Public Employes', Board of Accounts, and Teachers' Retirement Funds, provision is made for the employee to elect to receive a joint and survivorship type of annuity benefit whereby the employee accepts benefits less than otherwise receivable upon retirement in consideration of annuity protection for his beneficiary as permitted by statute, such protection to be payable after the death of the employee.

The value of such survivorship annuity benefits has also been held to be taxable. In re Endemann's Estate, *supra*; In re Stone's Estate, *supra*. See also: People v. Schallerer (1957), 12 Ill. (2d) 240, 145 N. E. (2d) 585.

It can readily be seen that, in each of the retirement funds herein involved, the employee has a vested interest in his contributions to the fund to the extent allowed by statute and may exercise control over the distribution after death of such contributions. The various *death* benefits paid in lump sum consist only of funds contributed by the employee, including earnings thereon. By controlling and designating, prior to death, the manner in which and to whom the contributions are to be distributed after death, the employee makes a transfer of such contributions "by gift or grant intended to take effect in possession or enjoyment" at, or after, his death.

Subsequent to the creation of the above mentioned retirement funds, the Indiana Legislature enacted the "Indiana Public Employees Social Security Integration and Supplemental Retirement Benefits Act." Acts 1955, Ch. 329, as found in Burns' (1961 Repl.), Section 60-1911 *et seq.* Although the Teachers' Retirement Fund, Public Employes' Retirement Fund and the State Board of Accounts Retirement Fund are all eligible to come under the provisions of this Act, the State Board of Accounts fund has not as yet elected to come under its provisions.

Section 12 of the above Act, as amended, as found in Burns' (1961 Repl.), Section 60-1923, reads, in part, as follows:

> "* * * The benefits provided under this act shall be in lieu of all benefits to which such employees would or might have become entitled as members of any existing retirement system, and the contributions required under this act shall be in lieu of all contributions heretofore required with respect to such retirement system * * *"

The death benefit provisions of this act are set out below:

Section 13 (d) and (f), as amended, as found in Burns' (1961 Repl.), Section 60-1924 (d) and (f):

> "(d) Subject to the provisions of section 17 hereof in the event of the death of an employee prior to retirement the entire amount of contributions credited to him under section 13 (b) of this act and any interest credits thereon, but less any benefits paid to such employee under the provisions of section 19 of this act, shall be paid to his beneficiary, if one has been designated as hereinafter provided, or, in the absence of such designation, to his estate. In case no such beneficiary or other person entitled to such moneys shall claim the same within three [3] years from the death of such employee, all such moneys shall be for-

feited, and the retirement system of which he was a member shall be credited therewith."

"(f) A member may elect to make additional annuity contributions. The amount of a member's additional annuity contribution shall not exceed his contribution for the period of his service required pursuant to subsection (a) of this section 13. Each board shall maintain a separate account to be known as the additional annuity account in which shall be deposited all contributions made under this subsection and each member shall be credited individually with the amount of such contributions. Interest shall be credited in accordance with subsection (c) of this section 13. In the event of a member's death prior to retirement, the entire amount of contributions credited to him under this subsection and any interest credits thereon shall be paid to his beneficiary, if one has been designated, or, in the absence of such designation, to his estate. At the time any member goes on retirement, the additional annuity account maintained by the board administering the retirement system of which he is a member shall be charged with the entire amount of contributions credited to him under this subsection, if any, and any interest credits thereon, and the state's portion of the retirement allowance account shall be credited with such amount, and shall be responsible for the payment of the annuity to be provided therefrom. Such additional annuity contributions may be withdrawn by the member prior to retirement date."

Section 17 (c) (i), (iv) and (d), as amended, as found in Burns' (1961 Repl.), Section 60-1928:

"(c) Each employee subject to this act shall have the right, subject to the provisions of this subsection, to elect to have his retirement benefits payable under any of the nonconflicting options set forth in this subsection in lieu of the retirement benefits otherwise payable to him upon retirement under the provisions of this section. The amount of any such optional retirement benefits shall be determined by the rules and regulations of the board administering the fund; provided that such optional retirement benefits shall be the actuarial equivalent of the retirement benefits otherwise payable under this section. Such election shall be made by written request to the board administering the affairs of the system of which he is a member."

"(i) Request for this option shall be made at least twelve [12] months prior to retirement unless evidence of the employee's good health, which is satisfactory to such board, is provided. The employee may elect to receive a decreased retirement benefit during his lifetime and have such retirement benefit (or one-half [½] or two-thirds [⅔] thereof if so designated) continued after his death to another designated person during the lifetime of such person. If the employee dies before going on retirement the designated beneficiary shall receive only the amount provided in section 13 (d) and 13 (f) of this act except as provided in section 14 (c) and section 17 (d) [this section] of this act. If the designated beneficiary dies before the employee goes on retirement, such election shall be automatically cancelled. If the designated beneficiary dies while the employee is receiving benefits the amount of benefits received by such employee by reason of such election shall be affected."

"(iv) The employee may elect to receive the portion of his retirement benefits provided by his own contributions in the form of a cash refund annuity which shall provide for payment to his beneficiary at the time of his death of the excess, if any, of (1) the total amount of his contributions and interest credits used at retirement to provide such annuity, over (2) the total payments which shall have become due under such annuity prior to the date of his death."

"(d) If an employee with fifteen [15] or more years of creditable service shall designate a beneficiary under this act, or if no designated beneficiary survives the employee, he may elect, or his spouse may elect upon

> his death in service, to provide annuity survivor benefits as follows: Upon the death in service of such employee, if the spouse shall have been married to the member for at least three [3] years and shall survive him, or if a designated dependent beneficiary shall have been so designated for a period of six [6] months a survivor annuity shall become payable immediately in an amount equal to that which would have been payable under the supplemental retirement benefit system had the employee retired at age fifty [50] or at the time of his death whichever would be later under an effective election of the option provided in subsection (c) (i) of this section 17; provided that any additional annuity contributions under section 13 (f) shall be disregarded in the determination of survivor benefits under this subsection (d). If a survivor annuity becomes payable under the provisions of this subsection with respect to a deceased employee, such annuity shall be in lieu of all benefits otherwise payable under this Act with respect to such deceased employee, except for any death benefit that may become payable under section 13 (f)."

It can readily be seen that the various death benefits provided in this act are the same in principle as those provided in the separate retirement funds herein above discussed, except for the provision in Section 17 (d), *supra,* whereby the *surviving spouse* may elect to receive survivor annuity benefits if no beneficiary has been designated by the employee, in lieu of the death benefits provided in Section 13 (d) and (f), *supra.* In the instance where the surviving spouse makes such election the portion attributable to employee contributions plus interest thereon would be tantamount to the employee transferring upon his death such benefits as provided in Section 13 (d) or (f), *supra.*

In conclusion, therefore, it is my opinion that the death benefits, payable as provided by the various retirement fund statutes herein in question, are taxable under Section One of the Indiana Inheritance Tax Law, *supra.* And further, it is my opinion that the value of the survivorship annuity benefits, (except the portion *not* attributable to the employee's contributions plus interest thereon payable upon election by the surviving spouse as noted above) payable under the particular funds and statutes mentioned herein, is also taxable for inheritance tax purposes.

OFFICIAL OPINION NO. 28

July 26, 1963

Hon. A. Morris Hall
State Senator
302 Marion National Bank Bldg.
Marion, Indiana

Dear Senator Hall:

This is in response to your request for my Official Opinion concerning the responsibility as between several governmental agencies for the expense of hospital services rendered by a private hospital to a person shot by a state police officer while resisting arrest. Because of the unusual nature of the situation here involved, a brief statement of facts is in order.

It appears that a state police officer stopped a motor vehicle on a state highway in Huntington County, but the driver fled in his vehicle after attempting to strike the officer who was standing by the police car. Thereupon, the officer placed a general alarm by radio, and sometime later a second state police officer saw the vehicle and the driver in Miami County. Upon being ordered to surrender, the driver fled into Grant County, and was pursued by the second police officer. After crossing into Grant County, the driver abandoned his vehicle and fled by foot. He paid no attention to the order of the officer to halt, and as a result, the officer fired his pistol in order to stop him.

The driver was struck by a bullet, and was hospitalized for a period of several months. After being released from the hospital, he was taken to Huntington County where he was tried, convicted of a misdemeanor and fined one dollar and costs. Since this person was indigent, the expense of treat-