tion, came "into being" at the same time the school corporation was so created. An appointment was made for such person to hold such one year term of office prior to the time the restraining order was so issued, all as contemplated by the reorganization plan. Such appointment was, therefore, legal and it was for a term of office to begin July 1, 1962 and expire July 1, 1963. Under the last referred to authorities, the fact the appointed member was unable to occupy such office would not result in an extension of such term of office. The temporary injunction, therefore, would not toll the time of the North Adams Community School Corporation coming "into being" or extend the one year term of office of the school board member appointed to take office July 1, 1962.

OFFICIAL OPINION NO. 40

September 10, 1963

Mr. T. Michael Smith, Administrator
Inheritance Tax Division
Indiana Department of State Revenue
100 North Senate Avenue
Indianapolis 4, Indiana

Dear Mr. Smith:

This is in reply to your letter requesting an Official Opinion on the following question:

> "Will you please advise me in the form of an Official Opinion as to the effective date of Senate Enrolled Act 268, Chapter 265, Acts of 1963 and as to whether it is retroactive to the estates of decedents dying before the effective date."

An analysis of the above-quoted inquiry reveals that it actually consists of two questions, to-wit:

(1) What is the effective date of Senate Enrolled Act 268, being the Acts of 1963, Ch. 265?

(2) What is the purpose and effect of said act as to whether the Legislature intended that the same be applied retroactively to transfers caused by

> death occurring prior to the effective date of said act?

For answer to the first phase of your inquiry, it is unnecessary to examine the text of said act, other than to observe that it does not contain an emergency clause and does not provide a specific date for its taking effect. Such act is included in the Acts of 1963, which were published and circulated by the office of the Secretary of State of Indiana by transmitting printed copies thereof to the office of the clerk of the circuit court in each of the ninety-two counties. The receipts from the various clerks show that the clerk last to receive his copy of said acts received the same on August 12, 1963, at 3:50 P. M. (E. S. T.), and this is evidenced by Executive Order No. 6-63 of the Governor reciting such fact, which proclamation was issued on August 13, 1963, at 10:10 A. M. (E. S. T.). From the above fact pattern, the actual time of taking effect of this act, and of other acts which contain neither an emergency clause nor a specific date for their taking effect, is dependent upon an application of the Indiana Constitution, Art. 4, Sec. 28, which section has remained unchanged from the version thereof appearing in the Constitution of 1851.

Among the very early decisions and opinions of the Supreme Court of Indiana containing a discussion of the purpose of said constitutional provision is the case of Jones v. Cavins (1853), 4 Ind. 305, particular reference being directed to the following appearing on pp. 310, 311 and 312:

> "Another question is made in the cause. The information, as we have stated, was filed pursuant to the provisions of the R. S. of 1852, in *April*, 1853, and it is contended by the defendant that those statutes were not then in force, as they had not been filed in all the counties of the state, though they had been distributed to the county of *Greene*. They were not distributed to all the counties in the state till the 6th of *May*, 1853.
>
> "The decision of this question must depend on the construction given to the following clause of the constitution:

" 'No act shall take effect until the same shall have been published and circulated in the several counties of this state, by authority, except in case of emergency; which emergency shall be declared in the preamble, or body of the law.' Art. 4, s. 28.

"On one side, it is insisted that, under this provision, a general law, designed to operate throughout the whole state, cannot take effect anywhere till it is distributed to all the counties in the state; while, on the other, it is claimed that every such law comes into force in each separate county on its being filed therein. All agree that the law does not operate over the whole state till it is filed in all the counties of the state. The difference, then, is in regard to the manner in which a law in this state gets into force; one side contending that it comes in at the same moment throughout the whole state; the other, that it comes in by piecemeal, dragging its slow length along through the period of two or three months.

"By the common law, a statute took effect at once throughout the jurisdiction to be governed by it. So it did under our former constitution, where there was no express legislative direction on the subject. In *England,* a statute took effect from the first day of the session of parliament enacting it. In this state, under the former constitution, from the time it was 'published in print, by authority, at any place within the state.' *Tredway* v. *Gapin,* 1 Blackf. 299. It had, however, before the framing of the new constitution, become a common practice for the legislature to provide that laws should take effect in each county when filed therein, thus producing, for a considerable length of time, an entire want of uniformity in the laws in force.

"In this state of things, the constitutional convention framed the provision we have quoted, declaring that no law should take effect till it was 'published' and 'circulated' (two words, as here used, meaning the same thing) 'in the several counties of this state;' and we think the intention was to arrest the piecemeal mode in which laws had, for a time, been brought into

operation, and to make their taking effect a single entire thing throughout the state. It seems to us that the language of the constitution will fairly admit of no other construction. It speaks of no partial taking effect of a law, no coming into force in the different or several counties, but it speaks of its taking effect as a single event, after distribution in the several counties. The term 'several counties,' is used in connection with the distribution, not the taking effect of the laws. Had the language been that laws should take effect in the several counties on distribution, &c., the construction contended for by the plaintiff might have prevailed; but such is not the language; it is prohibitory and clear. It says that no law shall take effect, any effect, anywhere, till a certain condition precedent has been performed, viz., till it has been distributed in, not one or more, but the several counties of the state. Now, the several counties of the state are all the counties of the state. If the law enacted that no opinion should be delivered by the Supreme Court till it had received the approval of the several judges of said Court, would it be pretended that an approval by a less number than all of said judges would fill the requirement of the law?

"We think the revised statutes did not take effect till distributed to all the counties in the state.

"If it be said that inconvenience will result from this construction, we here only answer that one way in which it may be easily obviated, is by the legislature providing that hereafter evidence shall be furnished to the auditor of state of the time of *filing* the *laws in the several counties,* and that, upon their being filed in all, *proclamation* shall be made *of the fact,* in a certain number of days after which the laws should come into force." (Our emphasis)

This case established the proposition that, pursuant to the Indiana Constitution, Art. 4, Sec. 28, *supra,* acts of the General Assembly are to become effective throughout the state at one and the same time. With respect to acts not containing an

emergency clause, it further established the proposition that statutes do not take effect until "distributed" to all the counties in the state, or, as the Constitution states, "until the same shall have been *published and circulated* in the several counties of this state, by authority * * *" (Our emphasis)

The Indiana Constitution then, and up to the present time, makes no reference to a proclamation of the Governor concerning the effective date of statutes not containing an emergency clause and does not state the "authority" by which the publication and circulation of legislative acts is to be accomplished. In Jones v. Cavins, *supra,* in the last paragraph quoted therefrom, the court recognized the "inconvenience" which may result from its construction of the Indiana Constitution, Art. 4, Sec. 28, *supra,* and suggested that the Legislature could provide that evidence be furnished to the auditor of state of the "time of filing the laws in the several counties * * *" The court also suggested that after the laws had been filed in all counties, a proclamation should be made "of the fact" and further suggested that the Legislature provide that the laws should come into force in a certain number of days after the issuance of such a proclamation. Thus, the court was suggesting that the Legislature provide not only for a proclamation as to the actual time of the completion of the filing of the laws throughout the state, but also that such laws should not come into force until the expiration of a given number of days after the issuance of such a proclamation.

It is significant that the Legislature, at its next session, apparently acted upon this suggestion, accepting the proposal for a proclamation announcing the fact of the completion of the filing of the laws throughout the state, but not accepting the proposal for staying the effective date thereof for a given number of days after the issuance of such proclamation. Reference is made to the Acts of 1855, Ch. 100, the title of which reads:

> "AN ACT providing for official notice of the time when the statutes of this State are in force."

The Acts of 1855, Ch. 100, Secs. 1 and 2, as found in Burns' (1946 Repl.), Sections 1-102 and 1-103, read as follows:

1-102 "It shall be the duty of the several clerks of circuit courts in this state, immediately on the receipt of the laws of any session, to transmit to the governor a certificate stating the day when such laws were so received."

1-103 "So soon as certificates from all the counties have been received, the governor shall issue and publish his proclamation, *announcing the date at which the latest filing took place;* of the facts contained in which proclamation, all courts shall take notice." (Our emphasis)

Burns' 1-102, *supra,* has been supplemented by subsequent enactment as hereinafter disclosed, but Burns' 1-103, *supra,* apparently is the authority pursuant to which the Governor has issued a proclamation concerning the publication and circulation of the acts of the Legislature ever since 1855. It is significant that Burns' 1-103, *supra,* does not provide that legislative acts become effective a given number of days after the issuance of such proclamation, nor does it authorize the Governor to fix the effective date of statutes not containing an emergency clause—which would empower him, by proclamation, to fix and thereby possibly delay the effective date of such acts. Instead, this section simply authorizes the Governor to issue his proclamation "announcing" a fact, to-wit: "the date at which the latest filing took place * * *" Comparing this section with the language appearing in the last paragraph quoted from Jones v. Cavins, *supra,* it would seem that the filing, to which the Legislature made reference in the statute, is the filing of the acts themselves in the several counties, since the court, in said case, suggested a proclamation to be made of the fact "of the time of filing the laws in the several counties * * *"

In an opinion of the Indiana Supreme Court issued subsequent to the Acts of 1855, Ch. 100, *supra,* in the case of The State, on the relation of Brown, Prosecuting Attorney, &c. v. Bailey and Others (1861), 16 Ind. 46, at p. 48, is the following:

> "Whenever, then, the acts, or any portion of them, of a session of the Legislature are distributed in a

> bound volume, in a manner and shape not substantially contrary to the statute on that subject, in all the counties of the State, by the Secretary of State, through his agents appointed for that purpose, they are distributed or published by authority * * *
>
> "* * * The inconvenience, the confusion, that would result from making the coming into force of a statute a question of fact for the jury, has led to the adoption of the principle everywhere, that it shall be a question of law for the judicial knowledge of the Court. The Court informs itself as best it can. Now, it takes judicial knowledge of the proclamation of the Governor, as to the time when the general volume of biennial statutes takes effect * * *"

Thus, the court in the foregoing case took cognizance of the provisions contained within Burns' 1-103, *supra,* by taking judicial knowledge of the proclamation of the Governor "of the facts contained in which proclamation, all courts shall take notice." Therefore, the proclamation of the Governor is but evidentiary of the time when the publication and distribution of the acts by authority throughout the entire state was completed.

There are certain cases on this general subject from which it might seem to some that the actual time of issuance of the proclamation of the Governor is the effective date. One of such cases is The State of Indiana v. Williams (1910), 173 Ind. 414, 90 N. E. 754, in which the court stated, in 173 Ind. 416:

> "It is beyond question that a legislative enactment can only go into effect either by the declaration of an emergency in the act itself, or upon distribution of the session laws to the various counties, and the proclamation of the Governor * * *"

However, this case is not authority in support of the concept that the date of the issuance of the Governor's proclamation is the effective date when there is a variance between such date and the date upon which the publication and circulation

was completed as provided by the Indiana Constitution, Art. 4, Sec. 28, *supra.* It does not appear from the case of The State of Indiana v. Williams, *supra,* that there was any difference in said dates. The case merely states in 173 Ind. 415:

> "* * * The acts were published and were circulated in the several counties November 20, 1908, and the Governor's proclamation so made * * *"

Thus, this case, by its reference to the necessity for the proclamation of the Governor, affords no basis for the proposition that the date of issuance of the proclamation is the effective date of acts not containing an emergency clause, but is merely a recognition of the fact that the Legislature has provided for the issuance of such proclamation to serve as the official certification of the date and time at which publication and circulation of such acts was completed in the several counties throughout the state.

Reference is made to the case of Herrick v. Sayler (1957), 245 F. 2d 171, which, among other things, concerned the effective date of the Indiana Acts of 1955. In this case, although the date of the receipt of a copy of the Acts of 1955 by the clerk last to receive such copy and the date of the proclamation of the Governor was the same date, to-wit: June 30, 1955, the court, in an opinion written by the Hon. H. Nathan Swaim of the United States Court of Appeals, Seventh Circuit, stated in 245 F. 2d 173:

> "* * * The amendment was signed by the governor on March 11, 1955, and the governor's proclamation as to legislative acts was on June 30, 1955. The amendment did not contain an emergency clause nor any provision concerning its effective date. In these circumstances Indiana law is clear that the amendment did not become effective *until distributed* to the several counties *as shown by* the proclamation of the governor on June 30, 1955, which was subsequent to the date of the alleged tortious act and the commencement of this action. Ind. Const. art. 4, § 28; State ex rel. White v. Grant Superior Court, 202 Ind. 197, 172 N. E. 897, 71 A. L. R. 1354; Schwomeyer v. State, 193 Ind. 99, 138

N. E. 823; State v. Williams, 173 Ind. 414, 90 N. E. 754; Lautenschlager v. Walgamott, 80 Ind. App. 198, 137 N. E. 781." (Our emphasis)

Under the Indiana Constitution, Art. 6, Sec. 1, the Secretary of State "shall perform such duties as may be enjoined by law * * *" Concerning the instant situation, the latest enactment of the Legislature provides that the publication and distribution of the acts shall be by the Secretary of State, as provided in the Acts of 1897, Ch. 69, as last amended by the Acts of 1957, Ch. 335, as found in Burns' (1963 Supp.), Section 49-1607 *et seq.* Burns' 49-1607, *supra,* directs the Secretary of State to print copies of the acts of each session of the General Assembly. Burns' 49-1612, *supra,* specifically directs that the Secretary of State "shall distribute the acts of each session of the General Assembly to the clerk of the circuit court of each county within the state of Indiana." Burns' 49-1613, *supra,* directs that the clerk of the circuit court of each county shall send to the Secretary of State, by first mail, a statement under the seal of such clerk's office showing his receipt for said acts. Thus, from the foregoing cases, together with the Acts of 1957, Ch. 335, which is the present statute providing for the printing and distribution of the Acts of the General Assembly, it is made to appear that the "authority" presently charged with the duty of publishing and circulating the Acts of the General Assembly, as contemplated by the Indiana Constitution, Art. 4, Sec. 28, *supra,* is the Secretary of State.

I am informed that the official receipt from the clerks of the various circuit courts of this state is a printed form which has been in use for many years and which is directed "To the Secretary of State and/or the Governor of Indiana." This apparently is because of the fact that the Acts of 1855, Ch. 100, Sec. 1, *supra,* (Burns' 1-102) providing for the receipts to be transmitted to the office of the Governor, has never been explicitly repealed, whereas the Acts of 1957, Ch. 335, as found in Burns' (1963 Supp.), Section 49-1607 *et seq., supra,* prescribed that such receipts be returned to the Secretary of State. I am also informed that some of these receipts are received by the one office and some by the other, but that

in practice, the office of the Governor forwards all such receipts received by that office to the office of the Secretary of State. Upon all clerks of the circuit courts of the 92 counties having transmitted such receipts and the same having been ultimately received by the office of the Secretary of State, that office determines from the dates and times shown upon said receipts, the date and time at which the clerk last to receive such copy of the acts received the same. Thereafter, the Secretary of State certifies this fact to the office of the Governor, which certification furnishes the basis for his official proclamation announcing the date and time at which such state-wide circulation was completed.

The Executive Order No. 6-63 by the Honorable Matthew E. Welsh, Governor of Indiana, issued on August 13, 1963, at 10:10 A. M. (E. S. T.) does not purport by order to fix the effective date of the Acts of 1963, but specifically states that the proclamation is merely the "announcing" of the date of August 12, 1963, at the hour of 3:50 P. M. (E. S. T.) "as the day and hour at which the last receipt and distribution of said Acts took place with each of the several Clerks of the Circuit Courts of the State of Indiana; and declaring said distribution of said Acts to have been completed as [of] said hour and said date * * *" This is in harmony with the theory that it is the fact of the completion of circulation of the acts, by authority, which establishes the effective date.

Therefore, as stated in the above case, the proclamation of the Governor is but the official notice of the time of completion of the process of circulation of the Acts of 1963 "in the several counties of this State, by authority," which time is the effective date of said acts which do not contain an emergency clause. Therefore, the same became effective on August 12, 1963, at 3:50 P. M. (E. S. T.) and not on August 13, 1963, at 10:10 A. M. (E. S. T.), the latter date being merely the date upon which the proclamation itself was issued.

For answer to the second phase of your inquiry, it is necessary, now, to examine the text of the specific act to which it relates. Senate Enrolled Act No. 268, being the Acts of 1963, Ch. 265, as found in Burns' (1963 Supp.), Section 7-2403, as passed by the 1963 Indiana Legislature, reads as follows:

"SECTION 1. Acts 1931, c. 75, s. 3, as amended by Acts 1947, c. 311, s. 1, is amended to read as follows: Sec. 3. There shall be exempt from the tax imposed by this act (a) all transfers to or for the use of any municipal corporations within this state; (b) all transfers to any public institutions for exclusive public purposes; (c) all transfers to any trustee or trustees in trust for the sole benefit of any charitable, educational, or religious organization, fund, or foundation; and (d) all transfers to any corporation, institution, society, association, or trust, wherever incorporated or organized, formed for charitable, educational, or religious purposes: Provided, That in all cases under subdivisions (a), (b), and (c) and in the case of transfers under subdivision (d) to corporations, institutions, societies, associations or trust not incorporated or organized under the laws of the State of Indiana, the exemption shall be granted only if the entire property transferred or the entire income therefrom is to be used exclusively, either according to the provisions of the will or other instrument of transfer or according to the past practices of the donee or donees, for one or more of such purposes within the State of Indiana, and in the case of transfers under subdivision (d) to corporations, institutions, societies, associations or trusts incorporated or organized under the laws of the State of Indiana the exemption shall be granted only if more than a merely nominal part of the property transferred or of the income therefrom is to be used, either according to the provisions of the will or other instrument of transfer or according to the past practices of the donee or donees, for one or more of such purposes within the State of Indiana, and only if, as respects that part of the property transferred or the income therefrom which is not to be used for one or more of such purposes within the State of Indiana, the use or uses which are to be made of a material share of such property or such income, either according to said provisions or according to said past practices, are for the benefit of mankind generally and not for the exclusive benefit of a particular locality outside the

State of Indiana; but in all cases under subdivisions (a), (b), (c) and (d) no such transfer shall be so exempt if any officer, member, shareholder or employee of such corporation, institution, society, association or trust shall receive or may be lawfully entitled to receive any pecuniary profit from the operation thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of a strictly charitable purpose, or if the organization of any such corporation, institution, society, association, or trust for any of the foregoing avowed purposes be a guise or a pretense for directly or indirectly making it, or for any of its officers, members, shareholders or employees any other pecuniary profit, or if it be not in good faith organized or conducted for one or more of such purposes: and Provided further, That the exemptions in all cases under subdivisions (b), (c) and (d) shall extend to persons, organizations, associations and corporations organized under the law of other states, and resident therein, provided the law of such other state grants to persons, organizations, associations and corporations organized under the law of the State of Indiana, and resident therein, a like and equal exemption.

"Transfers to a wife *and transfers to a husband* shall be taxable only to the extent that the value of the property so transferred exceeds fifteen thousand dollars ($15,000), and transfers to any child of decedent under the age of eighteen shall be taxable only to the extent that the value of the property exceeds five thousand dollars ($5,000), and transfers to any other person in Class A shall be taxable only to the extent that the value of the property exceeds two thousand dollars ($2,000). Transfers to any person in Class B shall be taxable only to the extent that the value of the property so transferred exceeds five hundred dollars ($500). Transfers to any person or corporation in Class C shall be taxable only to the extent that the value of the property transferred exceeds one hundred dollars ($100). The foregoing exemptions shall be deducted from that portion of the assigned