and has failed to register as required by that act is a valid contract so far as the state is concerned, but not enforceable in our courts by the corporation.

Farmers' Mutual Hail Ins. Co. of Iowa v. Gorsuch, *supra*.

Therefore, in summary, it would be improper for the Division of Public Works and Supply to contract with out of state corporations who are doing business in Indiana in violation of the Indiana General Corporation Act.

OFFICIAL OPINION NO. 3
January 15, 1958

Mr. George S. Diener
Speaker, House of Representatives
Hume Mansur Building
Indianapolis, Indiana

Dear Mr. Diener:

I have received and considered your letter of November 14, 1957, which reads as follows:

"I have been asked several times about an Act passed by the 1957 General Assembly that may cause confusion and I would certainly appreciate an opinion from your office.

"Chapter 226 of the Acts of 1935 repeals a 1905 Act giving towns the right to issue local liquor licenses. In Chapter 258 of the 1957 Acts an amendment to the 1905 Act was passed to permit towns to build sewers four miles beyond the corporate limits. This latter Act repeated in the main the right to issue liquor licenses contained in the 1905 Act.

"It seems that there are a few impoverished towns that could be aided by the small additional revenue that could be derived from this local license fee. The question is, does the 1957 Act authorize this or does the 1935 Act still prevail."
Acts of 1957, Ch. 258, Sec. 1, as found in Burns' (1957 Supp.), Section 48-301, amends Section 31 of an act concerning municipal corporations which is Acts 1905, Ch. 129, Sec. 31, as amended, as found in Burns' (1950 Repl.), Section 48-301. Section 31 of the 1905 Act enumerates the powers of a Board of Town Trustees and prior to the 1957 Amendment contained twenty-one (21) clauses.

Acts 1957, supra, amended Section 31 by omitting a proviso at the end of Clause 14, which concerned the power to require a railroad company to maintain a street light at a crossing and added a twenty-second clause giving the Board of Trustees power to construct, alter and maintain public sewers within the town and within four (4) miles of said town. Although the preceding two changes were the only ones made in Section 31, all of the clauses of said section were re-enacted apparently in conformance with Art. 4, Sec. 21 of the Indiana Constitution, which provides that the section amended shall be set out in full.

The language in question of the amendatory Acts of 1957, Ch. 258, Sec. 1, will be found in the seventh clause therein and is a mere re-enactment of Clause 7, Sec. 31 of the Acts of 1905, Ch. 129, supra. This section is also found in Burns' (1957 Supp.), Section 48-301, and reads in part as follows:

"Seventh. To license, regulate or restrain auction establishments, street auctions, transient salesmen, merchants and itinerant vendors of goods, wares and merchandise, of whatever nature, whether denominated bankrupt stocks, fire sales, assignee's sales or by any other terms used for the purpose of attracting trade, and whether managed by the owner or by agents; also hacks, drays and all vehicles carrying passengers for hire or moving goods or other articles for pay; and all tables, alleys, machines, devices and places for sports or games, kept for hire or pay; Likewise, the business of pawn-broking; also traveling peddlers, public exhibitors, and sale of spirituous, vinous, malt and other intoxicating liquors. A sum not exceeding the amount required by the statutes of the state for license to sell or retail intoxicating liquors may be required to be paid into the treasury of the corporation"
While it is correct that the Acts of 1935, Ch. 226, Sec. 43, as found in Burns’ (1956 Repl.), Section 12-923, the same being the repealer section of the Indiana Alcoholic Beverage Law, did repeal specifically the power of certain governmental units to regulate or license the sale of alcoholic beverages, there was no specific repeal of the powers of a Board of Town Trustees concerning the sale of alcoholic beverages as given in the above cited Clause 7 of Sec. 31, Ch. 129, Acts of 1905, supra.

Acts of 1935, Ch. 226, as found in Burns’ (1956 Repl.), Section 12-301 et seq., contains language which is inconsistent with Section 31, Clause 7 of the Acts of 1905, supra. More specifically, your attention is drawn to language in Burns’ (1956 Repl.), Section 12-517, which reads as follows:

"* * * No city or town or board of trustees or common council or other officer thereof shall have any power or jurisdiction to regulate or govern the sale of, traffic in, or transportation of alcoholic beverages, or to levy or impose any tax, fee, license fee or issue or to require any license to be issued by any such town or city or by the officer or agent thereof in respect thereto, excepting only that in towns and cities having a population of less than five thousand (5,000), according to the last decennial census of the United States of America, the board of trustees of such towns or common council of such cities shall have power and jurisdiction to enact an ordinance consenting that liquor retailer’s permits may be issued to applicants otherwise qualified under this act in respect to premises located within said town or city.

* * *

“No ordinance of any city or town shall in any way regulate, restrict, enlarge or limit the operation of business of the holder of any liquor retail permit or his privileges under such permit as prescribed by this act, directly or indirectly, nor may the board of trustees or common council of any town or city enact any ordi-
nance covering any other business or place of business for the conduct thereof in such wise as to prevent or inhibit the holder of a retail liquor permit from being qualified to obtain or continue to hold such permit, or operate to interfere with or prevent the exercise of said permittee's privileges under said permit. Immediately upon the enactment of any such ordinance, the town clerk or the city clerk of the town or city wherein said ordinance has been enacted shall immediately certify a copy of said ordinance and mail the same by registered mail to the commission at Indianapolis, Indiana, for which service he shall be entitled to a fee of one dollar [$1.00] payable by the state of Indiana as part of the expense of said commission. Said applications for each of said permits last mentioned may be made at the same time or in one application combining requests for each of said three kinds of permits last mentioned, and the publication of the notice of said applications may in any case be combined, if said applications are pending simultaneously, and may also be combined in one [1] publication with notices of the application of other applicants for a permit as elsewhere herein provided. * * *"

In addition to the above, Sec. 2 of the Acts of 1935, supra, as found in Burns' (1956 Repl.), Section 12-302, reads in part as follows:

"No person shall for commercial purposes manufacture for sale, bottle, sell, barter, import, transport, deliver, furnish or possess, any alcohol or alcoholic beverages, malt, malt syrup, malt extract, liquid malt or wort, except as authorized by this act, * * *.”

(Our emphasis)

From the above language of the Acts of 1935, it appears that the provisions in question in Clause 7 of Sec. 31, in the Acts of 1905, supra, were repealed by implication at the time of the passage of Acts 1957, supra.

A repeal of one statute by another by implication is not favored in the law. However, when the intention of the Legislature is clear and where the later act is so repugnant to, and
inconsistent with, another act, it must be assumed the Legislature did not intend both acts to stand.


In DeHaven v. Municipal City of South Bend (1937), 212 Ind. 194, 198, 7 N. E. (2d) 184, the Court said at page 198:

"* * * But, if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even when two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. * * *

In accordance with the above rule of statutory construction, it is apparent from the terms of the 1935 Indiana Alcoholic Beverage Law that the powers concerning regulation of alcoholic beverages given to town trustees in the Acts of 1905, Ch. 129, Sec. 31, Cl. 7, supra, were repealed by implication.

The remaining question is whether the Acts of 1957, supra, by re-enacting the provisions granting a Board of Town Trustees the power to regulate or license the sale of alcoholic beverages in the Acts of 1905, Ch. 129, Sec. 31, Cl. 7, supra, reinstated said provisions which had been repealed by implication in Acts of 1935, supra.

In Thompson v. Mossburg (1923), 193 Ind. 566, 139 N. E. 307, the Court discussed the effect of a re-enactment of the exact language of the statute by an amendatory act. The Court said at page 574:

"The recital in this manner, in an amendatory act, of language contained in the act amended, does not show a legislative intent to make any change in the law as expressed by the language so re-enacted; but the unchanged portions of the statute are continued in force, with the same meaning and same effect after the amendment that they had before. Worth v. Wheatley (1915), 183 Ind. 598, 604, 108 N. E. 958; State v. Kates

12
(1897), 149 Ind. 46, 48, 48 N. E. 365; Holle v. Drudge (1920), 190 Ind. 520, 129 N. E. 229, 230.

"So far as the section is changed (by amendment) it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the mere nominal re-enactment should have the effect of disturbing the whole body of statutes in pari materia which had been passed since the first enactment ***. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along.' Sutherland, Statutory Construction (2d Ed.) § 133. 'By observing the constitutional form of amending a section of a statute the legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated. Any other rule of construction would surely introduce unexpected results and work great inconvenience.' McLaughlin v. Newark (1894), 57 N. J. Law 298, 301, 30 Atl. 543, 544."

In support of the above proposition, see also

Public Service Comm. v. City of Indianapolis (1922),
193 Ind. 37, 137 N. E. 705;
1953 O. A. G., page 228, No. 48;
1950 O. A. G., page 235, No. 58;

Therefore, based on the above well-established rule of statutory construction, it is my opinion that the Acts of 1935, supra, was not superseded or repealed by the Acts of 1957, supra, and therefore a Board of Town Trustees does not have the power to regulate or license the sale of alcoholic beverages.