

tions which are found necessary in the premises and for the public safety."

Pursuant to the above Act of Congress the President of the United States by his proclamation number 2526, dated December 8, 1941, declared, "* * * that an invasion or predatory incursion is threatened upon the territory of the United States by Germany." Said proclamation further termed as "alien enemies" all natives, citizens, denizens or subjects of Germany being of the age of fourteen (14) years and upward who shall be within the United States or within any territories in any way subject to the jurisdiction of the United States, who are not naturalized. (55 Stat. 1705 *et seq.*)

So far as I have been able to determine the above proclamation has not been rescinded.

In an official opinion of this office being Official Opinion No. 103, 1945 Indiana O. A. G., it was held the cessation of hostilities did not officially end the war and that the war would not officially and legally be over until the proper constituted authorities of the nations involved officially declare the end of World War II.

I am therefore of the opinion an applicant for a veterinarian's license who was an alien enemy in 1943 due to his being a German subject, is still an alien enemy within the meaning of the above referred to rule of the Veterinary Examining Board.

OFFICIAL OPINION NO. 114

October 11, 1945.

Hon. Ralph F. Gates, Governor,
State of Indiana,
State House,
Indianapolis 4, Indiana.

My Dear Governor:

Your letter has been received requesting an official opinion on the following questions:

1. Can a county which has surrendered its common school funds to the State obtain a return of such funds,

and then borrow them for the purpose of acquiring park land to be transferred to the State Park system?

2. If a county has made a partial surrender of its unloaned common school funds to the State under the provisions of Chapter 181 of the Acts of 1943, may it borrow any of the remainder of such funds in the hands of the county for the purpose of acquiring park lands to be transferred to the State Park System?

The facts occasioning your request, as contained in your letter and as supplemented by further investigation, disclose that on December 13, 1943, the County Council of Ripley County, Indiana, passed an ordinance which in part reads as follows:

“Resolved that Whereas there are certain moneys of the Common School Fund, held in cash in the custody and possession of Ripley County as shown by Report of Auditor, filed with the Commissioners of said County, which are found cannot be loaned to advantage.

“Now therefore it is resolved that the County Council of said County now elects to surrender the custody of *part of such fund*, in amount \$55,681.07 to the Treasurer of the State of Indiana provided by H. B. 106, Chap. 181, Acts of 1943, and does authorize and direct the County Auditor to draw his Warrant for such amount of \$55,681.07 payable to the Treasurer of State and does further authorize and order the County Auditor and County Treasurer to take any and all steps necessary to surrender the custody of said funds amount as above set forth to the Treasurer of State.”
(Our emphasis.)

Thereafter pursuant to said ordinance the county auditor turned over to the Treasurer of State said sum of \$55,681.07 and thereafter without any further ordinance said auditor at stated periods turned over to the Treasurer of State accretions to said county school fund in the approximate sum of \$12,732.02.

Section 28-150 Burns 1943 Supplement, same being Section 1, Chapter 181, Acts 1943, provides as follows:

“On and after the effective date of this act the treasurer of state shall be the exclusive custodian of the common school fund and the Indiana University permanent endowment fund not held in trust by the several counties. On and after the effective date of this act the county council of the several counties of the state be and they are hereby authorized by a resolution duly adopted to elect to accept the provisions of this act to surrender the custody of the common school fund and the Indiana University permanent endowment fund, and to order and direct that the board of county commissioners, the county auditor and the county treasurer take any and all steps necessary to surrender the custody of said funds held in trust by the county and the amount of such funds heretofore distributed to and held in trust by any such county shall be due and payable to the treasurer of state in the manner hereinafter provided: *Provided, however, That at any time, as long as this act shall be in full force and effect, the county council of the several counties of the state be and they are hereby authorized to elect and determine whether the county shall surrender all or any part of said funds. Said funds, if any, so retained in the custody of the county shall be loaned as now or hereafter otherwise provided by law: Provided, further, That any part of said funds less than the whole so surrendered by the county shall be paid to the treasurer of state immediately after such election by the county council. The state board of finance shall have full and complete management and control of such funds and is hereby authorized and directed to invest the common school funds and the Indiana University permanent endowment funds as hereinafter provided.*” (Our emphasis.)

Section 28-157 Burns' 1943 Supplement, same being Section 8, Chapter 181, Acts 1943, provides the manner in which such common school funds coming into the custody of the Treasurer of State shall be invested. A redistribution and loan to the county of such funds is not one of the investments authorized by said section of the statute. An examination of the

other sections of said statute fails to reveal any authority for the redistribution of such funds lawfully paid in to the Treasurer of State by the auditor of any county.

In the absence of an express or implied power granted by the Constitution, public officers, although provided for by the Constitution, have only such power as granted by statute.

Sherrick v. State (1906), 167 Ind. 345, 357;
 State *ex rel.* v. Home Brewing Co. (1914), 182
 Ind. 75, 91, 92;
 Branham v. Lange (1861), 16 Ind. 497, 501, 502.

Especially is the requirement of statutory authority necessary where the office is created by statute.

Blue v. Beach (1900), 155 Ind. 121, 131;
 State *ex rel.* v. Goldthait (1909), 172 Ind. 210,
 216, 217;
 State *ex rel.* v. Home Brewing Co. (1914), 182
 Ind. 75, 91;
 The State v. The Portsmouth Savings Bank
 (1886), 106 Ind. 435, 451;
 Department of Insurance v. Church Members
 Relief Assn. (1940), 217 Ind. 58, 60;
 Wallace v. Dohner (1929), 89 Ind. App. 416, 420.

1. Therefore, in answer to your first question I am of the opinion said sum of \$55,681.07 which was under the terms of said ordinance turned over to the Treasurer of State as a *part surrender* of such funds so held by the county cannot be returned to Ripley County to be thereafter loaned to such county for any purpose.

It is equally clear from the above authorities that the subsequent accretion of such fund in the approximate sum of \$12,732.02 so turned over to the Treasurer of State by the auditor of Ripley County, was not paid into the general school fund of the State treasury pursuant to law. That the auditor's act in paying such additional amounts, and the State's act in accepting such additional amounts, was void. Therefore said sum of \$12,732.02 is still a part of the common school fund distributed to Ripley County and should be returned to such county by the Treasurer of State.

2. In answering your second question it is therefore necessary to determine if said sum of \$12,732.02 when returned to the Treasurer of Ripley County, together with any other assets remaining in said common school fund in said county, may be loaned to the county for the purpose of purchasing park land to be thereafter transferred to the State Park system.

The only statute applicable to Ripley County (which had a population of 18,898 as shown by the last preceding United States census) is the general statute of 1927 authorizing all counties to acquire by purchase or otherwise lands within the county for park purposes and to convey such lands to the state. This statute, Acts 1927, Chapter 174, same being Section 26-1512, *et seq.*, Burns' 1933, provides: Section 1. "The board of commissioners of each county in this state is hereby authorized and empowered to acquire by purchase or otherwise any lands within such county for park purposes and to convey and transfer the said lands to the State of Indiana for park purposes, in the manner hereinafter provided."

Sections 2 and 3 of the last mentioned statute, same being Sections 26-1513 and 26-1514, respectively, Burns' 1933, provide the procedure necessary to acquire such lands for State Park purposes by the county. Section 3 of said statute further in part provides: "And if there be not sufficient money, not otherwise appropriated, in the general funds of a county treasury to pay for the purchase and acquirement of said lands, said board may, in said order, fix the amount of and levy a tax upon the assessed property of such county for the purchase and acquirement of said lands, * * *."

Section 4 of said statute, same being Section 26-1515, Burns' 1933, also requires the written consent of the Governor and Director of the Department of Conservation to the acceptance by the State of the lands prior to the granting of any petition filed with the county board of commissioners for the acquirement of any said land. Section 5 of said statute, same being Section 26-1516, Burns' 1933, provides the manner in which such lands shall be conveyed to the State after such purchase by the county.

The question is therefore presented as to whether the county, not having sufficient money in its general fund, can borrow from its school funds and then having sufficient money in its general fund thus direct its use to the purchase of park lands under the 1927 Act.

The statute covering the authority of a county to borrow common school funds for county purposes is Chapter 251 of the Acts of 1943, same being Section 28-201 to Section 28-262, Burns' 1943 Supplement. Section 3 of said Act, same being Section 28-203 Burns' 1943 Supplement, provides as follows:

"In any county in this state where the common school fund, congressional township school fund, or the permanent endowment fund of Indiana University, or either of said funds, or any other items constituting parts of the principal of school funds of the State of Indiana, subject to loan by the county auditor, shall accumulate to the amount of one thousand dollars (\$1,000) or more, and shall remain unloaned for a period of thirty (30) days or more, it shall be lawful for such county to borrow and use such unloaned funds, or any portion thereof, *for any lawful purpose*, for a period of not exceeding five (5) years." (Our emphasis.)

Sections 4 and 5 of said Act, same being Sections 28-204 and 28-206, respectively, Burns' 1943 Supplement, provide the procedure to be followed in obtaining such loan and said Section 5 further provides: "** * * and such sum shall become a part of the general revenue funds of the county.*" (Our emphasis.)

Under the express provisions of Chapter 251 of the Acts of 1943 said school funds can be borrowed by the county for "any lawful purpose."

Therefore, in answer to your second question I am of the opinion said sum of \$12,732.02, when returned to the county, together with any other part of such common school funds or permanent endowment fund of Indiana University, in the hands of the county treasurer of Ripley County, remaining unloaned for a period of thirty (30) days or more, can be loaned to the county, to be paid into the general fund of the county, for the purpose of acquiring such land to be thereafter transferred to the State Park system, providing the other requirements of the foregoing statutes are fully complied with.

Under Sections 3 and 6 of Article 8 of the Constitution of Indiana the county would not only be liable as a borrower but as a lender of such school funds.

Summarizing the foregoing I am of the opinion that in answer to your first question the sum of \$55,681.07 transferred by the county to the State under said ordinance cannot be returned to the county for loans for any purpose; that the sum of \$12,732.02 paid into the State treasury to become a part of the State common school fund or permanent endowment fund of Indiana University, by the county auditor without authority must be returned to Ripley County to become a part of the common school fund or the permanent endowment fund of Indiana University in such county. In answer to your second question I wish to advise the said sum of \$12,732.02 together with any other funds in such common school fund or permanent endowment fund of Indiana University in said county may be loaned to the county for the purpose of acquiring such land to be thereafter transferred to the State Park system, by complying with all the requirements of the statutes heretofore cited.

OFFICIAL OPINION NO. 115

November 13, 1945.

Hon. Clement T. Malan,
State Superintendent of Public Instruction,
State House,
Indianapolis, Indiana.

Dear Doctor Malan:

I have your letter of October 30, 1945, requesting an official opinion on the following questions:

"1. If the Acts of 1945 are not promulgated more than thirty (30) days prior to December 15, 1945, may the State Board of Textbook Commissioners give a thirty (30) days notice of adoption of text books and make a legal adoption on December 15th if the 1945 Acts become effective on or before December 15th?

"2. If the Acts of 1945 are not promulgated before December 15th, may a legal adoption be made subsequent thereto under the provisions of Chapter 243 of the Acts of 1945?"