tracts by past continuous approval of the same, the court, in reversing the lower court, on page 60 of the opinion, said:

"That the court was in error in its first and second conclusions cannot be doubted. When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, no amount of acquiescence, or consent, or approval of the doing of it by a ministerial officer, can create a right to do the thing which is unauthorized or forbidden. The administrative officers of the state, as well as the appellee, were bound by the statute. The insurance department had no power to authorize or acquiesce in the issuance of policies unauthorized or forbidden by the statute. An estoppel against the state cannot arise out of the unauthorized acts of state officers. Platter v. Board of Com’rs (1885), 103 Ind. 360, 381, 2 N. E. 544, 556, 557; Sandy v. Board of Com’rs (1909), 171 Ind. 674, 677, 87 N. E. 131, 132; Ness v. Board of Com’rs, etc., et al. (1912), 178 Ind. 221, 232, 98 N. E. 33, 1002; 21 C. J., § 193, p. 1191; 19 American Jurisprudence, § 166, p. 818."

Therefore, the applicant referred to in your letter would be required successfully to pass to the satisfaction of the board the regularly prescribed re-examination before his license could be renewed.

STATE BOARD OF ACCOUNTS: SALE OF REAL ESTATE BY AUDITOR, OF LANDS VESTED IN STATE FOR USE OF SCHOOL FUNDS. TERMS, CONDITIONS AND METHOD OF PROCEDURE.

June 13, 1944.

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and Supervision
of Public Offices,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of recent date in which you state:
"The Attorney General, in an opinion given to this department under date of Dec. 20, 1943, held that the provisions of said Section 97 of Chapter 1 of the Acts of 1865, as amended, were not repealed by said Chapter 251 of the Acts of 1943 as to the procedure for the sale by the auditor of those lands vested in the State of Indiana for the use of the school funds, and that, as to those lands, sales may be continued until all are disposed of or until changed by legislative enactment.

"This department is now presented with a number of additional questions concerning any such sale as follows:

"1. Would the auditor be authorized to execute a deed to the purchaser of the real estate sold upon a compliance by the purchaser of the terms of sale?

"2. If the purchaser pays in cash one-third of the sale price, would the auditor be authorized to accept a mortgage to the school funds for the unpaid balance without regard to the assessed or appraised valuation of the real estate mortgaged or without any examination and approval of the abstract by the county attorney?

"3. What, if any, costs should be collected by the auditor?

"4. Would any liens or encumbrances upon such real estate, at the time of the execution of such mortgage, be prior and superior thereto?

"5. Would the auditor, upon any such sale, be authorized to accept one-half of the purchase price in cash and a mortgage to the school funds for the unpaid balance upon the terms, conditions and limitations as provided by law in making an original school fund mortgage loan?

"6. If your answer to Question No. 5 be in the affirmative would the terms, condition and limitations as provided by law be as provided by the law in force at the time of the bid by the auditor for the fund or at the time of the sale and execution of the mortgage?

"7. Would the auditor, at the time of such sale, be authorized to accept the full amount of the purchase price in cash?"
“8. Would the fact that prior to the date of sale of any real estate bid in by the auditor for the fund, the county council adopted a resolution to elect to accept the provisions of Chapter 181 of the Acts of 1943, to surrender the custody of the school funds, affect your answers to any of the questions hereinbefore submitted?”

I will attempt to answer your questions in the order in which they are set forth in your inquiry.

1. In the opinion of the Attorney General issued December 20, 1943, it was concluded that Section 97, Chapter 1, of the Acts of 1865 (28-244, Burns 1933) providing for sale by the auditor when property had been bid in by the auditor on account of the fund was still in effect for the purpose of selling those lands which are now held in the name of the fund. Obviously, the procedure for sale as outlined in that act is of little value unless the auditor may fully complete the sale by the execution and delivery of a deed. Section 99 of the same Act of 1865 (28-246, Burns 1933) provides with respect to those lands sold by the auditor for the fund:

“Upon full payment being made for such lands, the deed therefor shall be executed by the county auditor, and shall be entered in the record of the board of county commissioners before delivery.”

I am of the opinion that for the same reasons mentioned in my opinion of December 20, 1943, that section of the 1865 law remains unrepealed and effective so long as there are any lands held by the auditor in the name of the fund.

2. Section 97 of the 1865 Act, supra, as amended, now provides for the sale by the auditor as follows (28-244, Burns 1933):

“In case of no bid for the amount due, the auditor shall bid in the same on account of the fund, and, as soon thereafter as may be, shall sell the same, having first caused it to be appraised by three (3) disinterested freeholders of the neighborhood, upon the following terms, viz.: One-third cash in hand, and the balance in four (4) equal instalments due in one, two, three and four (1, 2, 3 and 4) years respectively from
the day of sale, bearing interest at six (6) per cent per annum, payable annually in advance said deferred payments to be secured by first mortgage on the real estate so sold, but no such sale shall be for a less sum than the appraised value thereof; Provided, however, That the auditor shall, at any time, accept the full cash price of said sale, and cancel the outstanding obligation and unearned interest, or, he (auditor) shall, at any time, when one-half of the purchase-price is paid, accept a mortgage for the unpaid balance upon the same terms, conditions and limitations as provided by law in making an original school fund mortgage loan.”

(Emphasis and parenthesis ours.)

In speaking of the security required, the Legislature used the word “mortgage”—a word commonly used and of well-known meaning. As used therein, there is no reason to interpret it other than in its well recognized meaning. In Garvin, Receiver v. Chadwick Realty Corp., 212 Ind. 499 at 506, the Court said:

“Words and phrases must be given their plain, ordinary, and usual meaning, unless a contrary purpose clearly appears, and in seeking the intent of an act effect must be given to every word and clause therein, if it is possible to do so. * * *.”

See also:

City of Richmond v. Miller, 58 Ind. App. 20 at 22;
Dreves v. Oslo School Twp. of Elkhart, 217 Ind. 388 at 397;

and in Western Union Telegraph Co. v. Scircle, 103 Ind. 229, it was stated:

“* * * Where the statute employs common law terms having a known meaning, it is presumed, unless the contrary affirmatively appears, that the terms were used in their common law meaning. * * *,”

and in 2 Sutherland Statutory Construction 438:

“In the absence of a legislative intent to the contrary, legal terms in a statute are presumed to have been used in their legal sense. * * *.”
I am therefore of the opinion that upon such a sale involving deferred payments the auditor should take a mortgage appropriately worded to cover whatever interest the purchaser acquires in the real estate. Such a mortgage being a security device upon sale of the realty would not be a school fund mortgage in the recognized sense, although the State of Indiana on behalf of the school fund is the mortgagee. The sale can not be for less than the appraised value. The mortgage can not be for less than two-thirds of the purchase price, which must equal or exceed the appraised value. Since the state has title before sale, no examination and approval of the abstract is necessary.

3. Since no provision for collection of costs is made in the statute upon the execution of this type of mortgage, and since the transaction is a part of the sale by the auditor, I do not believe any costs may be charged to the purchaser.

4. In answer to your fourth question, it is undoubtedly true that as a general rule, a lien upon the property prior and superior to the mortgage executed by the purchaser, would retain its priority. In the absence of inadvertence or oversight the exact nature of such a prior lien is difficult to anticipate. Consequently, I would suggest that specific answer herein be deferred until the situation arises.

5. I believe the language of the statute is broad enough to cover the answer to this inquiry. The last clause of the statute reads as follows:

"* * * he (auditor) shall, at any time, when one-half of the purchase-price is paid, accept a mortgage for the unpaid balance upon the same terms, conditions and limitations as provided by law in making an original school fund mortgage loan." (Parenthesis ours.)

The words "at any time" would include at the time of the sale as well as later.

6. The gist of the opinion rendered by this office on December 20, 1943, was to the effect that the new school fund loan act passed in 1943 (Chapter 251 of the Acts of 1943) was broad and intended to cover the whole scope of school fund loans except where it failed to provide a remedy as in the case of lands already held by the fund. Ample provision is made in the new 1943 Act for the making of new loans.
There is no necessity to retain any of the loan making provisions of previous acts. They are repealed by implication.

See:

Thomas v. Town of Butler, 139 Ind. 245;
State ex rel v. Flickinger, 211 Ind. 361 at 367.

There is, then, only one statutory method by which an original school fund mortgage can now be made and that is under the terms, conditions and limitations of the 1943 Act. I am therefore of the opinion that the purchase money mortgages contemplated in the last clause of Section 97 should be made on the terms, limitations and conditions as are provided in the 1943 Act.

7. Here also the language of the 1865 Act is sufficiently broad to answer your question. There it is provided: "** * * that the auditor shall, at any time, accept the full cash price of said sale, and cancel the outstanding obligation and unearned interest, * * *." Hence, the auditor may accept the full cash price at the time of sale.

8. I do not believe that the acts of a county council surrendering school funds to the state would affect the obligation of the county to continue the collection of the funds outstanding. The impression gained upon reading the 1943 Act is that the surrender would operate immediately upon funds held by the county and leave outstanding mortgages and properties in status quo: the funds derived therefrom to be paid over to the state when collected. Section 1 of Chapter 181 of the Acts of 1943 provides in part as follows (28-150, Burns' 1943 Supplement):

"** * * 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 pay-
Sections 3 and 4 of the same Act (28-152 and 28-153, Burns' 1943 Supplement) provide:

"The board of county commissioners shall examine such reports, and, if found correct, such board shall order that such report be entered on its records, and shall thereupon order and direct the county auditor to draw his warrant, payable to the treasurer of state, for the amount of the common school fund which is not loaned and which is held in cash in the custody and possession of such county as shown by such report; and the said board of county commissioners shall, in like manner, order and direct the county auditor to draw his warrant, payable to the treasurer of state for the amount of the permanent endowment fund which is not loaned and which is held in cash in the custody and possession of such county as shown by such report. The county auditor shall thereupon forward such warrants, so issued, to the auditor of state together with a certified copy of such report." (Emphasis ours.)

"On and after the passage of the resolution by the county council of any county electing to surrender the custody of said funds no part of the common school fund or of the permanent endowment fund which is in the possession and custody of any such county shall be loaned by such county or by any official thereof. All loans of the common school fund and of the permanent endowment fund outstanding and unpaid at the time of the passage of the resolution of the county council, as hereinbefore provided, shall be collected when due: Provided, however, that any loan which matures and becomes due and payable on or after the passage of the resolution by the county council, as hereinbefore provided, may be renewed for one additional five (5) year period, on the application of the person owing any such loan, as now provided by law. Provided further, That no loan which is more than one (1) year delinquent in payment of principal or interest at the time of the passage of the resolution of the county council, as hereinbefore provided, shall be renewed."
And Section 5 (28-154, Burns' 1943 Supplement) provides in part:

"At the time of making the semi-annual settlement of taxes beginning with the settlement due next after the passage of the resolution of the county council, as hereinbefore provided, all of the money collected and on hand belonging to either the common school fund or to the permanent endowment fund shall be paid to the treasurer of state as provided in section 3 (§ 28-152) of this act. * * *"

I am therefore of the opinion that a surrender of school funds by the county having been previously made would not affect my opinion. In other words, the opinion has dealt with a construction of Section 97 of the 1865 Act and Section 97 is wholly devoted to means and methods of collecting school fund mortgages: all of its provisions facilitate the conversion of real estate held by the fund into cash. The alternative procedures there outlined are all collection devices and none are loans of school funds. Upon complete collection by any means provided in that section, the cash should be surrendered to the state treasurer.

DEPARTMENT OF PUBLIC INSTRUCTION: Township Trustee—removal from township—effect on office. School bus driver—no statutory requirement that he must be a resident of township in which route is located.

June 16, 1944.

Opinion No. 58

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

Dear Dr. Malan:

This will acknowledge receipt of your letter dated June 7, 1944, which reads as follows:

"Will you kindly give me an official opinion relative to the following questions:"