court, should be selected and appointed from eligible lists secured from competitive examination, as provided by Burns' Replacement Sec. 9-2904.

SECURITIES COMMISSIONER: Banks organized under Federal law doing business in Indiana and acting as agent in buying and selling securities need not register under the Indiana Securities Law.

December 20, 1943.

Hon. Warren Day, Securities Commissioner,
State House,
Indianapolis, Indiana.

Dear Mr. Day:

I have your letter of November 10, 1943, in which you ask the following question:

> "Is a bank, organized under the laws of the United States, and which is under the supervision of the Comptroller of the Currency, Washington, D. C., required to register as a dealer under the provisions of the Indiana Securities Law, when such bank, doing business within the State of Indiana, acts as agent for its customers in buying and selling both listed and unlisted securities within the State of Indiana?"

The Indiana Securities Law, being Section 11 of Chapter 120 of the Acts of 1937 as amended by Section 10 of Chapter 30 of the Acts of 1941 (25-839 Burns' 1933 Supplement), provides that no dealer shall engage in business in this state as such dealer or sell any securities unless the dealer has registered in the office of the Securities Commission. Such registration requires the filing of certain information and the payment of a seventy-five dollar ($75.00) registration fee.

"Dealer," in the Securities Law, is defined by subsection (d) of Section 3 of the above mentioned act, as follows: (25-831 Burns' 1933 Supplement.)

> "The term 'dealer' shall mean any person other than an agent as defined in this act who in this state engages

> either for all or part of his time, directly or indirectly, as principal or agent, in the business of offering, buying, selling, or otherwise dealing or trading in securities. An issuer of securities selling such securities in this state shall be deemed to be a dealer: Provided, That the term 'dealer' shall not include a person having no place of business in this state who sells or offers to sell securities exclusively to dealers actually engaged in buying and selling securities as a business."

Since the definition of the word "person," in the act, includes corporations created under the laws of this or any other state, country or sovereignty, the definition of "dealer" would include a national bank if the national bank engages in offering, buying or selling or otherwise dealing or trading in securities. I am of the opinion, however, that a national bank need not register as a dealer under the provisions of the Indiana Securities Law for two reasons:

National banks are permitted by federal law (Title 14, Section 24, U. S. C. A. Supplement, 54 Stat. 261) to deal in securities with certain restrictions. The express provision is:

> "The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term 'investment securities' shall mean marketable obligations, evidencing indebtedness of any person, copart-

> nership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. * * *"

The general rule upon state regulation of national banks is that they are subject to state laws and regulations so long as those laws and regulations do not tend "to incapacitate a national bank from discharging its duties to the government or impair its efficiency as an agency of the government,"

McMillan v. Chipman, 164 U. S. 347,

or conflict with federal regulations.

> Commissioner of Banks v. Chase Securities Corp., 10 N. E. (2d) 472 (Mass.);
> Lindsey v. Standard Accident Insurance Co., 173 So. 53 (Ala.).

To require a national bank which is permitted by federal law as a bank to deal in securities, to secure a license and pay a fee therefor, not only conflicts with the rights of the bank under federal law, but impairs to that extent its efficiency as a federal instrumentality. For that reason I am of the opinion that the licensing requirement can not be applied to national banks.

The second reason is equally pertinent. Subsection (e) of Section 5 of the Securities Law (25-833 Burns' 1933 Supplement), provides that certain transactions are exempt and expressly,

> "Transactions, by banks or trust companies organized under the laws of this state and operating under the supervision, examination and control of the department of financial institutions of this state, executed upon customers' orders on an exchange or in the open or counter market, but not the solicitation of such orders, where there is no intent to avoid the provisions

> of this act: Provided, That such banks and trust companies shall be required to keep and maintain the same record of such transactions on customers' orders as required by subsection (d) of this section."

Thus, if the act is applied to a national bank, it is by state law receiving different treatment than is a state bank. It is fundamental that under the Fourteenth or "Due Process and Equal Protection" amendment to the United States Constitution, and under Section 23 of Article 1 of the Constitution of Indiana, which provides that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens," there may be valid classifications for the purpose of regulation, but those classifications must be founded upon some reasonable difference. As stated in Bedford Quarries Co. v. Bough, 168 Ind. 671 at 674,

> "The legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand. It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class; that is, the reason for the classification must inhere in the subject-matter, and rest upon some reason which is natural and substantial, and not artificial. Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all within the class to which it is naturally related. Neither mere isolation nor arbitrary selection is proper classification."
>
> Also see Street v. Varney Electrical Supply Co., 160 Ind. at p. 338.

Is there any reasonable basis for a classification between national and state banks for the purpose of securities regulation? Both are engaged in a general banking business, both are regulated and examined by the respective sovereignties (in fact under Indiana law (Section 33, Chapter 40 of the Acts

of 1933, 18-230 Burns' 1933) the department of financial institutions of Indiana may accept an examination of a financial institution made by federal authorities in lieu of an examination made under the provisions of the Financial Institutions Act) and both are empowered to do a similar securities business. Since there is no reasonable basis for differentiating between these competing institutions, I am of the opinion that they must be treated alike under state and federal constitutional provisions, and any attempt to apply the act to a national bank when it is not applied to a state bank deprives the national bank of equal protection of law.

DEPARTMENT INSPECTION AND SUPERVISION OF PUBLIC OFFICES: Interpretation of Chapter 251 of the Acts of 1943 as applied to loan of school funds.

December 20, 1943.

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

Dear Mr. Jensen:

I have your letter of November 5th in which you request an interpretation of Chapter 251 of the Acts of 1943 as applied to the previous existing laws regulating the loan of school funds in Indiana. Your first question is:

> "How can the property that is now held by the Common School Fund, title having been acquired by the auditor bidding in for the fund as provided by Chapter 220, page 1012, Acts 1933 be disposed of?"

Under the old law and specifically section 87 of Chapter 1 of the Acts of 1865, upon default of the debtor the auditor was given the right summarily to sell the mortgaged premises for the purpose of recovering the money loaned. The manner and notice for such sale were prescribed by statute. It was