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
then further provided by Chapter 220 of the Acts of 1933 (28-244 Burns’ 1933) which is an amendment to Section 97 of Chapter 1 of the Acts of 1865:

“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 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.”

It is to be noted parenthetically that Section 101 of the 1865 Acts provided that when it was necessary for the auditor to bid in the property as provided in the first part of Section 97, no deed to the State would be necessary, but a record of the sale would vest title in the State for the use of the proper school fund.

Thus, one of the procedures contemplated under the 1865 Act, as amended, was the summary sale by the auditor upon default. If no bids were received at such sale the auditor then was required to bid it in, whereupon title was vested in the State of Indiana for the benefit of the proper school fund, and after title had so vested the auditor was instructed to resell the property under the provisions of Section 97. Of course, it is not intended to imply that this was the only procedure for enforcement of school fund mortgages under pre-existing law.
The 1943 Act is entitled as follows:

"An Act concerning the loaning of the common school fund, the congressional township school fund, and the permanent endowment fund of Indiana University."

It proposes to cover the entire subject of the loan of school funds and provides two methods of enforcement: One by foreclosure (Section 23) and the other by voluntary conveyance to the county under certain circumstances as set forth in Section 24. That act makes no provision for vesting of titles in the State of Indiana for the use of the school funds, nor is there any provision for any divesting of those titles already in the State. There is no express repeal of former laws by the Act of 1943.

Consequently, we are confronted with the problem of whether the Act of 1943 repeals all of the 1865 Act and specifically that part which provides for sale of lands vested in the State for the use of school funds.

It is well settled in Indiana that implied repeals are not favored and should only be found where there is an inconsistency or repugnancy as stated in Medias v. City of Indianapolis, 216 Ind. 155 at 162:

"While the repeal of statutes by implication is recognized, this is not favored and that conclusion will not be indulged unless the later act is so repugnant to the earlier as to render the repugnancy of conflict between them irreconcilable. A court will always, if possible, adopt that conclusion which, under the particular circumstances in a given case, will permit both laws to stand and be operative."

While there is an obvious repugnancy between certain parts of the 1943 Act and the 1865 Act, yet since the 1943 Act does not cover the question of sales where title is vested in the State, there is no inconsistency insofar as that provision is concerned.

Furthermore, Section 98 of the 1865 Act provides that if upon the sale by the auditor of lands vested in the State "a sum is realized which is more than sufficient to pay the principal, interest, damages, and costs, the overplus shall be paid
to the original mortgagor, his heirs or assigns, when collected." As to mortgages which were made under that act, the mortgagor thus has a potential equity which cannot be determined until sale has been made. He has a vested right to any overplus after the payment of the debt plus expenses, and to attempt to deprive him of such a vested right would raise a serious question of impairment of contracts in violation of both the state and federal constitutions. It cannot be presumed that the legislature intended a repeal of an act which would divest vested rights in violation of either constitution. A somewhat analogous statement is found in Crittenberger, Auditor v. State Savings & Trust Co., 189 Ind. 411 at 425.

"Where a statute is susceptible to two or more possible constructions, one of which will render it constitutional and the other unconstitutional, that one will be adopted, if reasonable, which will rescue the act from unconstitutionality."

It is true that there is a general rule of statutory construction that where there is a new act which covers the whole subject-matter of an old act a repeal may be implied, but that general rule extends no further than its foundation which is, in the last analysis, legislative intent. As stated in Robinson v. Rippey, 111 Ind. 112 at p. 117:

"We are not unmindful of the general rule that where an act covers the whole subject-matter of the older law and contains provisions that can not be reconciled with it, a repeal will be implied; but, while keeping in mind the rule, we must also keep in mind the principle on which it rests, which is, that the enactment of the new statute covering the whole subject is an expression of an intention to repeal the old law. It is obvious that this reason fails where, as here, there is a positive and unequivocal assertion that there is no intention to repeal the older statute, and where the reason of the rule fails the rule fails."

The more reasonable inference is that its failure to provide for the sale of these lands by a similar enactment or by express saving clause, the legislature merely overlooked this particular problem and did not intend a repeal of the provision
for sale of state lands. See Wright v. State, 5 Ind. 290 at p. 293.

If a repeal is implied, the unfortunate result is that a state is vested with title to a rather large amount of non-taxable land with no means of sale. As stated in Lost Creek School Township v. York, 215 Ind. 636 at p. 644:

"Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship, or injustice; to favor public convenience; and to oppose all prejudice to public interests. Consideration of attendant evils and hardships may properly exert an influence in giving a construction to a statute when its language is ambiguous or uncertain and doubtful."

I am, therefore, of the opinion that the 1943 Act would not repeal that provision of the 1865 Act, as amended, which set up a procedure for sale by the auditor of those lands vested in the State of Indiana for the use of the school funds. It follows, then, that as to those lands sales may be continued until all are disposed of or until changed by legislative enactment.

Your second question is:

"Can the county by paying to the fund the total amount due acquire title to the property?"

The county may acquire title to the property from the mortgagor only under the provisions as set forth in Section 24 of Chapter 251 of the Acts of 1943. The provisions of that section read as follows:

"Where there is a default in the payment of the interest or principal, and the mortgagor is unable to make such payments but is willing to make a conveyance to the county of the real estate covered by the mortgage, the board of commissioners may, at any time either before or after suit may be filed to foreclose such mortgage and before a public sale is held of the mortgaged property, during a regular or special session of the commissioner, if it is for the best interest of the county and the mortgagor, and there are no
It is my opinion that they are now controlling as to such voluntary conveyances.

In my opinion the only other means by which the county could obtain title to the property is by bidding in the same upon foreclosure sale as provided by Section 26 of the 1943 Act. In expressing that opinion I do not mean to imply that Section 2, of Chapter 39 of the Acts of 1899 (28-251 Burns’ 1933) has been repealed, but it will be noted that that section does not provide for a taking of title by the county, but for subrogation of the county to the lien of the state.

Your third question is:

“A county held sales as provided by Chapter 220, Acts 1933 on June 14, 1943, June 21, 1943, September 10, 1943, and October 22, 1943. In these sales, bids were received on property covered by eight mortgages and part payment was accepted on three of the properties. The clerk holding the sale orally stated that the purchaser could await the promulgation of the 1943 Acts and enjoy the benefits thereof, if any. Can the sales now be completed under the 1933 Act?”

Since in answer to your first question it was my opinion that the procedure for sale of lands held by the state was unrepealed, such sales could be completed even though the 1943 Act has gone into effect in the meantime.

Your fourth question is:

“The auditor has given notice of a sale to be held November 15, 1943, under the same section, the first
notice having been given October 22, 1943. Can he hold this sale?"

Likewise, in answer to this question, since the sale of state lands is held as heretofore, the sale of November 15, 1943, was a valid sale.

STATE REPRESENTATIVE: Selection of County Superintendant of schools of Long Beach and Lakeland.

December 22, 1943.

Hon. Henry Kreft, Jr.,
State Representative,
La Porte County,
Michigan City, Ind.

Dear Mr. Kreft:

This will acknowledge receipt of your recent letter which reads as follows:

"At the request of citizens of the towns of Long Beach and Lakeland, I am communicating with you in respect to the rules and regulations covering the selection and authority of the County Superintendent of Schools.

"In the past it has been the practice for the school boards of Long Beach and Lakeland to attend the county meetings with the school trustees but having no voice in the deliberations of the meetings or as to the selection of the county Superintendent of Schools.

"They are now inquiring as to the possibility of operating their own schools and the selection of their teachers, or having a voice in the county meetings.

"Thanking you for an interpretation of the law in respect to the position of these two School Boards of Long Beach and Lakeland."

Answering your letter, I beg to advise that your letter fails to state several pertinent facts which must be known before a complete answer can be given to your letter. In the absence of such statements I must assume that the towns of Long