On the basis of that opinion, I think the board has the authority to execute the consent to refund, as described in your letter, on the basis that it is simply a step in the collection of the past due principal and interest of the original issue.

PUBLIC INSTRUCTION: County Superintendent—whether election of.

COUNTY AUDITOR: Right to vote in elections of County Superintendent.

June 6, 1941.

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

My dear Mr. Malan:

I have before me your letter calling attention to the provision of Section 28-702 of Burns' Indiana Statutes Annotated 1933, providing in part as follows:

"** In all elections of a county superintendent, the county auditor shall be the clerk of such election; and in case of a tie vote, the auditor shall cast the deciding vote. In case any one (1) candidate shall receive a number of votes equal to one-half of all the trustees of the county, the county auditor shall then and at all subsequent ballots cast his vote with the trustees until some candidate shall receive a majority of all the votes in the county, including the county auditor." * * * 

(Our italics.)

On the basis of the foregoing provisions of the statute you submit the following questions:

"Is the delegation of voting power to the county auditor contingent upon the existence of an actual tie vote among the township trustees present at the meeting?

"May the county auditor legally vote for county superintendent 'in case any one candidate shall receive a number of votes equal to one-half of all the
trustees of the county' regardless of the fact that there is no tie vote?"

Later on in your letter you submit an example to which you desire answers to be applied. It apparently is sufficient, therefore, to consider this particular case which illustrates possible similar situations which may arise.

In the case submitted there are six township trustees, five of whom met on June 2, 1941, to elect a county superintendent of schools. The other trustee was absent because of illness. On the first ballot three trustees voted for one candidate and two voted for another. The county auditor then assumed voting power, relying upon the provision of the statute that "in case any one candidate shall receive a number of votes equal to one-half of all the trustees of the county, the county auditor shall then and at all subsequent ballots cast his vote with the trustees until some candidate shall receive a majority of all the votes in the county, including the county auditor," et cetera.

In the case which you have submitted the county auditor cast his vote on the second ballot and on all succeeding ballots with the two trustees, thereby making a tie vote. The meeting was finally adjourned until June 9, 1941. You submit the following questions:

"Was the county auditor empowered by law to cast a vote in this case? Or, was the candidate who received three votes on the first ballot elected county superintendent of schools?"

The answer to the first of these questions is in the affirmative. The answer to the second is in the negative. The language of the section quoted at the beginning of this opinion was added by an amendment adopted in 1911. Prior to that time it had been held that a majority of a quorum was sufficient to effect an election but, I think the particular language of the 1911 amendment makes such decisions inapplicable to the present situation under the present law. Noticing particularly the underlined language of the above quotation, it will be observed that in any case when the county auditor is permitted to vote, there is the specific requirement that, in order to effect an election the candidate must receive "a majority of all the votes in the county, including the county auditor," —not simply a majority of a quorum which may happen to be
present—but a majority of all the votes "in the county." If such a requirement is made when the auditor is permitted to vote there seems to be no reason for a different rule in cases in which the several trustees are the only ones eligible to vote.

I think as the statute now stands, it was the clear intent of the Legislature to provide that before an election of a county superintendent could be effective, he must receive "a majority of all the votes in the county," meaning, of course, a majority of the trustees of the county, when the trustees alone are voting and a majority of the total number of trustees, including the auditor, when the auditor is voting. All questions are answered accordingly.

ALCOHOLIC BEVERAGE COMMISSION: Dancing permits only issuable to alcoholic beverages permittees by the Commission.

Dancing places subject to municipal ordinances insofar as not inconsistent with statute and rules and regulations of the Alcoholic Beverages Commission.

June 9, 1941.

Mr. Hugh A. Barnhart,
Excise Administrator,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your inquiry as to whether municipal ordinances concerning dancing are now operative insofar as they affect premises licensed by the Alcoholic Beverages Commission, and which have procured dancing permits as in the act provided. The act referred to is Chapter 237, Acts of 1941, Section 5 of which contains the following:

"Dancing permits may be issued as herein provided. It shall be unlawful for any permittee, other than a fraternal club, to allow any dancing, or for any person to dance, in any room in which alcoholic beverages are sold by the drink, in any manner, or in any room connected with such other room by means of a door or other opening, unless such permittee shall have a