

the constitutional prohibition against raising the salary, and a majority of the township trustees may now raise his salary.

State ex rel. v. City of New Orleans (1930), 171 La. 670, 131 So. 843.

In answer to your second question, it is my opinion that if a salary raise is constitutional within the principles just stated, then it would be mandatory upon the county council to make the appropriation for the salary as increased.

Your third question calls for an explanation of the effect of Section 2 of Article 15 of the Constitution upon Section 49-1014, Burns 1933 Supplement. The courts have generally construed such constitutional prohibitions as holding in abeyance the operation of the statute as it applies to officers whose terms are within the prohibition. The act is not void, but its operation is merely suspended as to such officers until a new term begins. 46 C. J. 1022. Therefore, it is my opinion that the act is not void; it may permit increases to some county superintendents now, and it does authorize future increases to those within the prohibition for their new terms.

STATE BOARD OF TAX COMMISSIONERS: Intangibles tax, whether issuer of intangible is liable for the tax.

July 22, 1943.

Hon. Charles H. Bedwell, Chairman,
State Board of Tax Commissioners,
State House,
Indianapolis, Indiana.

Dear Mr. Bedwell:

I have before me your letter which is in part as follows:

“A corporation organized under the laws of and domiciled in the State of Indiana has authorized an issuance of bonds in the amount of \$130,400.00, to be issued and delivered in exchange for preferred stock of the corporation that has been deposited with it under a reorganization plan. The bonds are registered

as to principal and interest on the books of a registrar and transfer agent which is a resident of Indiana, located in the city of Indianapolis, Indiana. A mortgage securing the bonds is executed by the issuer to a trustee, which is a corporation organized under the laws of the State of Indiana with its principal place of business in Indianapolis, Indiana. The property covered by the mortgage is real estate located in Marion County, Indiana, and certain personal property belonging to the corporation which is located in the building on the real estate. The covenants of the mortgage are the usual ones contained in instruments of this type, including the following:

“The mortgage is for the equal protection of all who shall hold bonds issued under it with the total amount of bonds limited to \$130,400.00.

“Bonds are payable at the office of the Trustee from funds deposited there by the Mortgagor.

“Payments of principal and interest are distributed to the registered holder of the bonds by the Registrar and Transfer Agent from the funds deposited with the Trustee.

“In event of default the covenants of the mortgage may be enforced by the Trustee for the benefit of all holders of bonds and the Trustee is required to take action to enforce default upon the request of the holders of 40% in face amount of the outstanding bonds. In event of failure of the Trustee to act upon the request of the holders of 40% of the bonds, the holders of the bonds themselves may institute action for enforcement of the mortgage.

“The bonds are not entitled to be recognized as valid until they have been authenticated by the Trustee and registered by the Registrar and Transfer Agent.

“The Mortgagor is required to deposit annually with the Trustee the amount of the Indiana Intangibles Tax which is due from the holders of the bonds and the Trustee is required to file a report annually with the Indiana State Tax Board showing the names and addresses of the holders of the bonds and the principal amount and serial numbers of the bonds held by such

holders and to pay such tax for the benefit of the holders. The Trustee is then required to send a certificate to the holders of the bonds that it has paid the tax for their benefit and to refer to the number of the receipt issued for such tax.'

"Of the total authorized issue of \$130,400.00 in bonds, the sum of \$100,800.00 principal amount of bonds, will be issued at the present time in exchange for preferred stock of that amount which has now been deposited under the reorganization plan with the issuing corporation. These bonds will be issued directly to the preferred stockholders and will be registered in their names prior to authentication. Of this amount of \$100,800.00 worth of bonds, there will be issued to non-residents of the State of Indiana, bonds in the total amount of \$16,300.00, and the question for determination, is whether these bonds in the amount of \$16,300.00 so issued to non-residents of Indiana, are subject to the payment of Intangible Tax."

This question requires a consideration particularly of certain language used in Section 2, Chapter 81 of the Acts of 1933, same being Section 64-902 of Burns' Indiana Statutes Annotated 1933. The applicable part of said section is as follows:

"On and after the passage of this act, every person residing in and/or domiciled in this state, shall pay a tax to the state of Indiana at the rate and in the manner provided in this act, for the right to exercise any one (1) or more of the following privileges:

"* * *

"Such tax at the rate provided in this act shall be measured by intangibles, wherever located:

"(a) Owned by any taxpayer except his intangibles having an actual business situs outside the state of Indiana.

"(b) Controlled by any person and/or fiduciary and having a business situs in this state and in the possession of or under the control and/or management of any such person and/or fiduciary."

This language was under consideration by the Supreme Court of Indiana in the case of Zoercher et al. v. Indiana Associated Telephone Corporation, 211 Ind. 447, in which case the Court held that the tax provided for in this section is against the owner of the intangible as distinguished from the issuer. In that case Justice Roll dissented and Justice Fansler concurred in the result with a short separate opinion setting out his views on the situation. In that case the appellee applied to the Public Service Commission of Indiana for permission and authority to issue its said First Mortgage 4½% Bonds, Series B, due October 1, 1965, and to execute a supplemental indenture, and on November 29, 1935, the appellee was authorized and permitted by the said commission to issue three million dollars of said bonds, dated October 1, 1935, to be negotiated and sold at not less than 98% of the par value thereof and was authorized to execute a supplemental indenture of trust. The appellee signed, executed, and issued said bonds of Series B and sold the same. The bonds were authenticated by the signature of The First National Bank of Chicago, as Trustee, and said bonds of Series B were signed on behalf of appellee, by its authorized corporate officers at Chicago and were then delivered by the appellee to The First National Bank of Chicago for authentication by the bank as trustee. The bonds were sold at Chicago, Illinois, and said purchasers were not, nor were any of them at such time, residents or domiciled in the State of Indiana. The appellee paid the sum of \$7,500 to the State Board of Tax Commissioners and the same was received by said board in escrow pending the determination of the taxability of said bonds. In the consideration of the question by the Court, that question was deemed by the Court to be simply the following:

“Does the General Intangible Tax Act impose a tax upon the issuer of intangibles?”

The Court seems to have given very little, if any, attention to the fact that the particular bonds were authenticated by a trustee resident in the State of Illinois and went directly to the question as the Court conceived it to be and as we have indicated above. After a very full consideration of the matter, the Court determined that the issuer was not taxable but

that the owner was taxable if such owner was taxable under the provisions of Section 64-902, already referred to in this opinion.

The concurring opinion by Justice Fansler disagreed with the prevailing opinion of the Court on the subject as to whether an issuer was taxable under Section 2 of the Act, expressing the opinion that (quoting therefrom),

“Section 2 provides for a tax to be paid by every person residing or domiciled in the state, who signs, executes, and issues an intangible, but the amount of the tax to be paid by such person must be measured by intangibles signed, executed, and issued by the person, and owned or controlled, within the state, as provided in the last clause of section 2. It follows that, since the intangibles signed, executed, and issued in this case were never owned or controlled by any person within the state, there is no tax due by reason of signing, executing, and issuing those intangibles. There is no liability for tax until the intangibles are signed, executed, and issued, and it may be assumed that intangibles are not issued until they are delivered. If when delivered, so that they are owned or controlled by some person other than the issuer, they are not owned or controlled within the state, there is nothing by which to measure the tax, and there is no tax.”

Zoercher v. Indiana Associated Telephone Corp.,
211 Ind. 447, at pages 462-463.

Upon the basis of the above opinion by the Court and likewise upon the theory followed by Justice Fansler in his concurring opinion, it seems to me that the bonds which were issued to non-residents in the sum of \$16,300.00 are not subject to the tax unless it can be shown that such bonds have a business situs in the State of Indiana.

In this connection, I desire to note more particularly the provisions of Section 64-902, which sets out the measure of the tax. Note the following:

“Such tax at the rate provided in this act shall be measured by intangibles, wherever located:

“(a) Owned by any taxpayer except his intangibles having an actual business situs outside the State of Indiana.

“(b) Controlled by any person and/or fiduciary and having a business situs in this state and in the possession of or under control and/or management of any such person and/or fiduciary.”

Subdivision (a), *supra*, applies to intangibles which are taxable to the Indiana owner and provides an exception in the case where such intangibles have an actual business situs outside the State of Indiana. This provision obviously does not apply to the present situation because in the supposed case submitted, the \$16,300.00 in bonds were issued to non-residents of the State of Indiana and presumably are in the possession of such non-residents.

As to Subdivision (b), *supra*, I do not think that the registering of said bonds on the books of the registrar in the State of Indiana or mortgaging real estate in Indiana to a trustee as security for the bonds is the type of control referred to. I am strengthened in this view by the consideration of the cataloging of instruments which are defined as intangibles in Section 64-901 of the December, 1942, Cumulative Pocket Supplement of Burns' Indiana Statutes Annotated, wherein, among many other cases the term, "intangible" is defined to include

“written instruments evidencing and/or securing a debt *not otherwise evidenced.*” (our emphasis)

Inferentially, it would seem to me that, if a debt in such a case is otherwise evidenced as is the case here, the mortgage would not be taxed, but the other instruments, the bonds, would be taxed, unless held by non-residents.

In my opinion, the \$16,300.00 bonds referred to in your letter, and issued to non-residents of the State of Indiana, are not taxable as intangibles.