

I do not think that a special judge selected from nominations made by the clerk of the Supreme Court would be in any other or different class. The rule would apply to both classes.

INDIANA STATE FAIR BOARD: Who has control of the operation of the Indiana State Fair?

January 29, 1942.

Mr. J. B. Cummins,
 President, Indiana State Fair Board,
 State House,
 Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of a certain resolution passed by your Board on January 8, 1942, which resolution, by its own terms, constitutes a formal request for an official opinion of the Attorney General. Without setting the resolution out in full, the substance may be summarized as follows:

In view of certain enactments of the 82nd General Assembly (1941) and of the decision of the Supreme Court of Indiana in the case of Tucker et al. v. State et al., — Ind. —, 35 N. E. (2d) 270, what is the present legal status and what are the present powers and duties of the Indiana State Fair Board and other state officers with respect to their relations to the State Fair grounds and agriculture?

In view of the fact that the Indiana State Fair Board, under laws of 1921 and 1923, became responsible for the management of the property known as the State Fair Grounds and from time to time since then, has issued bonds to erect buildings and make improvements without violating the constitutional provision that the State may not (Article 10, Sections 5 and 6) incur a debt, what is the present legal status of the Board in the light of certain Acts of 1933 and 1941 which have abridged the erstwhile powers of the Board and have attempted to confer certain rights, powers and duties upon the Lieutenant Governor and/or the Commissioner of Agriculture?

The very breadth of your questions require a review of the historical development of the Indiana State Fair Board from its very beginning and at the same time a consideration of several legislative enactments relating to the Board and the control of the State Fair grounds. In 1851 the General Assembly enacted a law under the title "An Act for the Encouragement of Agriculture", which granted to certain people a charter as a body corporate under the name and style of the Indiana State Board of Agriculture. This Board existed as a private corporation but engaged in the performance of public duties and the conduct of annual State Fairs until 1921. During this long period this private corporation had acquired the property now known as the State Fair grounds, which, at all times, had been devoted to public uses but which had been encumbered by mortgage indebtedness and large assessments for public improvements. In 1921 the General Assembly (Chapter 77, Acts of 1921) authorized the conveyance to the State of Indiana of all real estate and personal property belonging to the old Indiana State Board of Agriculture, subject to a certain mortgage, the conveyance to be concurrent with the payment by the State of Indiana of all the indebtedness of the Board. The same act which authorized the conveyance to the State and the delivery to the Governor of the deed of conveyance created the Indiana State Board of Agriculture to be the agent of the State in the management of the real estate and personal property formerly owned by the old Board of Agriculture. It is unnecessary to consider all of the provisions of the 1921 law but suffice it to say that part of Section 5 and all of Sections 9 and 10 of Chapter 77 of the Acts of 1921 were declared unconstitutional by the Supreme Court of Indiana in the case of *Scott v. Indiana Board of Agriculture*, 192 Ind. 311. This decision was by a divided court and there was a strong dissenting opinion by Ewbank, J., but the chief effect of the holding, namely, the invalidation of Sections 9 and 10 was that the legislative attempt to authorize the issuance of bonds up to a million dollars by the newly created Board of Agriculture, was in contravention of Sections 5 and 6 of Article 10 of the Constitution, which sections provide in substance that "no law shall authorize any debt to be contracted on behalf of the State * * *".

In order to meet the objections of the Supreme Court, the General Assembly of 1923 (Chapter 6, Acts of 1923; Section

15-212, Burns' Indiana Statutes Annotated 1933) modified the language which had been employed to authorize the issuance of bonds and a tax levy, and, in Section 2 of said Act, inserted the following proviso:

“* * * Provided that the credit of the State in its sovereign capacity shall not be pledged for the repayment of any such bonds or other obligations, but all the property and property rights held by it in trust, as aforesaid, and under the control and management of said Indiana Board of Agriculture, may be fully pledged as security for any and all such loans * * *. All of said notes or bonds and the mortgage or mortgages securing the same shall be executed and issued in the name of said Indiana Board of Agriculture.”

Under the 1921 law, establishing the Board of Agriculture, as amended in 1923, said Board from time to time has issued bonds and obligations, but in no case has the sum total of these obligations exceeded one million dollars.

In 1933, by Chapter 257, Acts of 1933 (Section 15-101 et seq., Burns' Indiana Statutes Annotated 1933), the General Assembly created a Division of Agriculture under the Department of Commerce and Industries (the latter Department being one of the major governmental departments under the Executive-Administrative Act of 1933. See Section 60-101 et seq., Burns' Indiana Statutes Annotated 1933). It was further provided that the chief administrative officer of the Department of Commerce and Industries should be the administrative and executive officer of the Division of Agriculture and all of the rights, powers and duties conferred by law on the Indiana Board of Agriculture under the provisions of the 1921 and 1923 Acts, *supra*, were conferred upon the newly created Division of Agriculture.

The Indiana Board of Agriculture, as formerly constituted, continued to serve as a non-executive Board in an advisory capacity to the Division of Agriculture, to have and possess such other powers and duties as might be conferred upon the Board by the Executive Department and with the power to hold State Fairs and to have the entire control over said State Fairs. The manner of election and appointment to the Indiana Board of Agriculture was in no wise changed by this law. One

of the lesser provisions was the abolition of the office of secretary-treasurer and of the office of superintendent of buildings and grounds which had formerly existed under the old setup. Under the powers granted to the Chief Executive by the Executive-Administrative Act of 1933, to reorganize the State Government and to appoint officers, et cetera, the then Lieutenant Governor (Townsend, 1933) was appointed the chief administrative officer of the Department of Commerce and Industries and ex officio the executive officer of the Division of Agriculture. This appointment was made by Executive Order and was duplicated by the Chief Executive in 1937 and again in 1941. Under the Division of Agriculture, further bonds were issued upon State Fair property, and I shall discuss the legality of their issue later.

In 1941 the General Assembly by Chapter 126, Acts of 1941 (Section 15-105 et seq., Burns' Indiana Statutes Annotated 1933, Supp. of 1941) abolished the Division of Agriculture (successor to Board of Agriculture) which had been established in 1933 and attempted to transfer all the rights, powers and duties of the Indiana Board of Agriculture and of the Division of Agriculture, including all *property* rights, to the Lieutenant Governor. It was provided further that the Lieutenant Governor should also be Commissioner of Agriculture. The Indiana Board of Agriculture (its name changed to Indiana State Fair Board by Chapter 230, Acts of 1941) continued to serve as a non-executive board in an advisory capacity to the Lieutenant Governor in all matters contemplated in Chapter 77, Acts of 1921 and the Board was given specific power to hold State Fairs and to have the entire control of same, subject to the approval of the Governor and the Lieutenant Governor. The act further provided that the Lieutenant Governor should have in his charge and management the State Fair grounds and buildings thereon and the authority to appoint such employees as might be needed and to fix their salaries.

It will be seen, today, that although the number of members and the manner of election to the Indiana State Fair Board has remained unchanged, the Board has been stripped of some of the powers and duties placed upon it by the Acts of 1921 and 1923. It retains the power to hold and entire control over the annual State Fairs, but other powers and duties connected with the management of the State Fair property were

conferred (in 1933) to a Division of Agriculture and, latterly, in 1941, to the Lieutenant Governor as Commissioner of Agriculture. That the State Fair Board could be thus stripped of some of its powers and duties by proper legislative enactment, is not doubted, nor is there any suggestion of invalidity in the legislation of 1933 which created the Division of Agriculture, for the reason that it was valid to create a new agency of State Government to perform certain governmental functions as long as the appointment of the officers to carry out those functions was retained in the Chief Executive. This was accomplished by the 1933 Act as is witnessed by the fact that the Chief Executive, by Executive Order, designated the head of the Division of Agriculture (see appointment of M. Clifford Townsend, Henry F. Schricker and Charles W. Dawson as heads of the Division of Agriculture in 1933, 1937 and 1941 respectively).

Chapter 126 of the Acts of 1941, however, presents certain difficulties. The General Assembly had the power to abolish the Division of Agriculture and to create the office of Commissioner of Agriculture, but it had no power to designate a certain official and vest him with executive power, namely, the Lieutenant Governor, to be Commissioner of Agriculture as that was clearly in derogation of the sole appointive power residing in the Governor. (In referring to the Lieutenant Governor, we are referring to the office insofar as the executive functions here contemplated are concerned.) This statement rests upon two foundations, first that the power of appointment of officers vested with executive authority, is an executive power and resides solely in the Governor; and, secondly, that the management of the State's property, being an executive function, cannot be removed from the control of the Chief Executive in any way. To support this view, I call your attention to pertinent statements to be found in the opinion of the Supreme Court in the case of *Tucker et al. v. State et al.*, — Ind. —, 35 N. E. (2d) 270.

“That the power to appoint to office is not a legislative function, it seems there can be no question.”

“Is it an executive function? That the power to appoint to office is intrinsically an executive function, has been decided over and over again and so held by this as well as other courts.”

"It is concluded that there is no direct grant of power to the legislature to fill offices like that of director of the Department of Geology and Natural Resources and that the legislature has no power to elect the officer in question. This is based upon the view that the right to provide the manner of appointment is limited by the division and delegation of power."

(At page 296.)

"But the Constitution has vested in the Governor not certain specific powers, executive or otherwise, which carry with them incidentally or secondarily the executive power to appoint to office, but he has been vested with the general executive power of the State which carries with it the general power to appoint to office, not as an incident to some other power, but as a principal power in itself."

(At page 284.)

"But it may be reasonably concluded that the principal reason for creating the office of Lieutenant Governor was to provide an available substitute to fill the Governor's office in case of the Governor's death * * * and it is expressly provided in Section 10, Article 5 that in such case the duties of the office of Governor would devolve upon the Lieutenant Governor. We must conclude from this that it was not intended that he should exercise *any of the functions* of the Governor's office except in such a contingency. *No executive powers* are otherwise conferred upon him. He is not the Governor, and clearly was not intended to have powers equal to the powers of the Governor, and there is nothing in the constitution to indicate that he was to exercise any executive powers or functions whatever except in the contingency provided for in Section 10 of Article 5." (Our italics.)

(At page 293.)

"The legislature does not have general authority over the property of the state and that it has such general authority has never elsewhere been asserted

to our knowledge. The management of the State's property is an executive function. The General Assembly may legislate concerning the State's property, the courts may adjudicate concerning it, but the Governor, vested with the executive power, must manage the State's property."

(At page 295.)

I have quoted at length from the above decision because the language of the Court is so clear, so direct, and so applicable to the problem at hand that no legal analysis or construction is required. It plainly appears that the legislative effort to designate the Lieutenant Governor as the Commissioner of Agriculture and to confer upon him appointive powers, as well as broad executive powers to control and manage some of the State's property, is a nullity. The Legislature had the right to abolish the Division of Agriculture and to transfer to a new office, that is, Commissioner of Agriculture, certain powers, duties and functions formerly belonging to the Indiana Board of Agriculture and/or the Division of Agriculture. So it is my opinion that Chapter 126, Acts of 1941 is invalid insofar as it purports to designate the Lieutenant Governor as Commissioner of Agriculture; insofar as it places the Lieutenant Governor in charge and management of the Indiana State Fair grounds and buildings together with the power to appoint employees; insofar as it confers any of the rights, powers and duties formerly held by the Division of Agriculture upon the Lieutenant Governor; and insofar as it makes the holding of State Fairs subject to the approval of the Lieutenant Governor as well as the Governor. With the invalidities thus outlined deleted from this chapter, enough remains to make it a workable and valid statute. The Indiana State Fair Board is continued in practically the same capacity and with the same functions as it has enjoyed since 1933, while the other powers and duties relating to the management of the State Fair grounds and agriculture, generally, are centralized in a new office, namely, the Commissioner of Agriculture, who must be held to be appointive by the Governor. It should be pointed out at the same time that the Indiana State Fair Board, with the approval of the Governor, has power to hold State Fairs and since said Board has entire control of the same, may employ such persons as are needed

to carry out its functions. Although the 1941 Act, unlike the 1933 Act, does not contain a provision that the Indiana State Fair Board shall possess such other powers and duties as may be conferred upon it by law or any order of the Executive Department, it is probable that the Governor may confer upon it such duties as he sees fit since he controls the appointment of the Commissioner of Agriculture and the two bodies must function together.

I now turn to the question of bond issues and the alleged abridgement of the rights and powers of the old State Fair Board to issue bonds upon the State Fair property. Until 1933 there could be no question but that the bonds issued on State Fair property were not only issued in the name of the Indiana Board of Agriculture, but that said Board was the sole issuing agency. However, in 1933, with the creation of the Division of Agriculture and the consequent withdrawal from the Board of Agriculture of certain of its powers and duties, it was felt necessary, in the issuance of bonds, to use both authorities. For example, I refer to the issue of some \$600,000 worth of bonds in 1939 by the Board of Agriculture. The first step in securing this issue was an Executive Order of the then Governor M. Clifford Townsend, authorizing the borrowing of money, the issuance of bonds, and the execution of a mortgage on the property of the State Fair grounds and further conferring upon the Indiana Board of Agriculture and the Division of Agriculture, under the Department of Commerce and Industries, the authority to execute said bond issue and for both agencies to act as the agent of the State of Indiana in the transaction. The Governor's Executive Order (see transcript of bond issue) directed that the Board of Agriculture should act in its capacity as a non-executive advisory Board and in its own right and that the Division of Agriculture should act in pursuance of the powers and duties imposed upon it by statute and in aid of the Indiana Board of Agriculture in carrying out the duties conferred upon both agencies by the said Executive Order.

Under date of November, 1938, the law firm of Matson, Ross, McCord and Clifford issued a final opinion to the syndicate of underwriters which purchased the issue, holding the bonds to be valid and legal obligations of the Indiana Board of Agriculture covering real estate and property under the management and control of the Indiana Board of Agriculture

and the Division of Agriculture as the active agent of the State of Indiana. I may say that the law firm referred to has a particularly eminent position in Indiana in the field of opinions on securities.

I have not discussed the question of the legality of the bond issues of the Board of Agriculture in the light of the Constitutional prohibition that the State may not incur a debt, because that question has long since been answered in favor of the legality of the issues. In 1921 the then Attorney General, U. S. Lesh, held that the contemplated issue, not being direct obligations of the sovereign, did not fall afoul the constitutional provision referred to above. Although the Supreme Court in the case of *Scott v. Indiana Board of Agriculture*, *supra*, took a contrary view, the curative and remedial provisions of Chapter 6 of the Acts of 1923, clearly removed the objections which forced the Supreme Court to hold certain sections of the 1921 Act invalid. Not only have the Attorneys General of this State since that time acquiesced in the view that the legality and constitutionality of such issues was no longer in doubt, but as I have adverted to earlier, reputable private counsel in the State have entertained the same view.

In summary, it is my opinion that Chapter 126 of the Acts of 1941 is unconstitutional and void, not in its entirety, but insofar as it attempts to repose in the Lieutenant Governor the office of Commissioner of Agriculture and any attendant duties; but that Chapter 126, with its invalid parts deleted, can stand and, as such, must be construed as providing that the powers, functions and duties formerly held by the Division of Agriculture under the Acts of 1933, are now transferred to a Commissioner of Agriculture, which office must be appointive by the Governor. It is also my view that the Indiana State Fair Board, its membership and manner of election unchanged, remains as a non-executive advisory board to the Commissioner of Agriculture with full power to hold and entire control over the State Fairs. As a corollary, I think it is fair to say that the Chief Executive may confer such other powers as he sees fit upon the said Indiana State Fair Board and that said Board may, in carrying out its duties in holding a State Fair, exercise all necessary powers thereto, including the employment of a secretary or manager. In view of what I have said concerning the functions of the Indiana State Fair Board and the powers of the newly created office

of Commissioner of Agriculture, it follows that with respect to further bond issues, the authority to borrow money, mortgage the State's property and issue bonds, must first be authorized by the Governor, after which the execution of the instruments and the issuing agency may be placed jointly in the Commissioner of Agriculture and the Indiana State Fair Board.

INDIANA TAX BOARD: Construction of Chapter 91 of the Acts of 1941 with reference to exemption of highways, etc., from assessment to adjacent property owner.

February 2, 1942.

Hon. Henry S. Murray,
Chairman, Indiana Tax Board,
State House,
Indianapolis, Indiana.

Dear Mr. Murray:

I have before me your letter requesting an official opinion in answer to the following questions:

"1. Do the provisions of Chapter 91, Acts of 1941, apply to land last assessed at the regular assessment made in 1932?

2. The law in effect on March 1, 1932, (Section 64-1010, Burns' 1933) provided that 'All officers engaged in the assessment of property for taxation are prohibited from assessing for taxation, as against any adjacent property holder, the real estate occupied by any railroad or public highway, etc.' When does this provision apply?

3. To what properties should the attached form No. 91 be applicable?"

Rather than take up each one of the several questions separately, I think it is desirable in this case to first examine Chapter 91 of the Acts of 1941 as an entirety and to consider the history of the legislation.