TAX COMMISSIONERS, STATE BOARD OF: Peter Flinn Estate—Exemption from taxation.

August 6, 1936.

Mr. Albert F. Walsman,
Commissioner, State Board of Tax Commissioners,
231 State House,
Indianapolis, Indiana.

Dear Sir:

This is in response to your recent request for an opinion as to whether or not certain property referred to as the Peter G. Flinn estate is so completely bequeathed for charitable, religious and educational purposes as to come within the purview of the tax law providing for its exemption.

The relevant facts are as follows: Peter G. Flinn of Marion, Indiana, died, having executed a trust deed and also leaving a will which was intended to create a trust, charitable in its nature. These instruments, that is, the deed and the will, were construed by the courts and it was found by the Supreme Court that except for a certain provision in the will, a charitable trust was created.

Reasoner et al. v. Herman, 191 Ind. 642.

Under the will and trust deed as construed, the testator gave a part of his estate to trustees “to be perpetually administered as a trust estate * * * for charitable purposes.” The will provided how the trust should be administered. Five classes of persons were named who were to receive the benefits of the trust fund. One of these classes was relatives of the testator and was held by the court not to be within the charitable trust provision.

Following the opinion of the Supreme Court, the Grant Superior Court entered a judgment which determined the nature of the trust. In this decision it was recited that the will, except the objectionable feature in it, created a valid and enforceable, charitable and public trust involving the real estate and personal property, including the income thereof, of Peter G. Flinn. The classes of beneficiaries were:

1. Men past 30 years of age who by reason of accident or want of health were unable to earn their means of support.
2. Poor widows over the age of 30 years of irreproachable character and who have no certain income.

3. Women whose husbands have left them unprovided for without just cause, who are 30 years of age and of irreproachable character.

4. Boys and girls who are seeking to obtain an education and who are without means to accomplish the same.

As the trust is now administered only the second and fourth classes of beneficiaries have been aided.

The trust is regarded as a perpetual one. The property from which the income is derived consists of real estate on which a theater has been erected and other business and farm property. The question is, Whether or not the theater, the land it occupies and the business and farm property so held and operated as commercial and business enterprises are legally exempt from taxation because the net income from said property goes to charitable purposes under the provisions of the Flinn will.

The following propositions are so firmly settled in Indiana as to require no discussion or citation of authorities:

First: It is the fixed policy of the state to subject all property to taxation.

Second: No property is exempt from taxation unless the legislature by some enactment has made it exempt.

Third: The legislature is limited by the provisions of the Constitution in saying what property may be exempt from taxation. The legislature may provide only for the exemption of property for municipal, educational, literary, scientific, religious or charitable purposes.

Fourth: Statutes providing for exemption from taxation are not favored by the courts. They are to be strictly construed.

Our inquiry then is as to the particular Indiana statute which seems to apply to the facts in this case. Special laws have been enacted from time to time which have the effect of exempting property held and operated under the particular statutes. By the provisions of Chapter 246 of the Acts of 1921, property owned and controlled by a foundation or holding company organized under that Act is exempt from taxation.
Butler University was chartered by a legislative Act which exempted its property from taxation. A question arose as to whether or not the exemption provision in the Butler College Law could be modified by later laws. This office in an opinion held that the exemption provision could not be changed. The opinion was based on the doctrine that the original charter of the college, which exempted the property from taxation, was a contract with the state which could not be impaired. The case of Northwestern University v. People, 99 U. S. 309, and Cooley on Taxation, Section 708 (4th ed.), are cited in that opinion. See Opinions of Attorney General, 1931-32, page 732.

The essential thing in these holding company statutes is the fact that the property claimed to be exempt must be held and operated by a corporation organized under the particular statute. It is not material that the property itself be devoted to educational or charitable purposes if the income is so devoted by the corporation. It cannot be said that the Peter G. Flinn trust was created or comes within the provisions of such special corporation law.

Turning now to the general tax law of 1919, Chapter 59, and amendments found in Burns Indiana Statutes Annotated, 1933, Section 64-201, which defines the separate classes of property declared by the legislature to be exempt, the only clauses of the twenty-six which might apply to the problem at hand are the fifth and fourteenth. Before discussing these, it is helpful to note certain decisions of the Supreme and Appellate Courts in construing these tax exemption provisions.

In Orr v. Baker, 4 Ind. 86, the question was submitted to the court as to whether or not church property consisting of land and buildings used for religious purposes and also other lands and buildings owned by the church, but used for business purposes, was exempt. The Supreme Court held that the statute on exemption extended only to the property which was actually used for religious purposes and did not cover the business property, although the income of it was used by the church for religious purposes.

This decision was followed later in the case of City of Indianapolis v. Grand Master, etc., 25 Ind. 518. The question there was as to the exemption of a Masonic hall and other property. The statute being construed reads:
“Every building erected for the use of any charitable institution”,
is to be relieved from taxes. The court held that so much of
the property as was used for a theater and for business pur-
poses, although the income of it might go for charitable pur-
poses, was not exempt under the statute.

In the case of United Brethren, etc., Establishment Co. v.
Shaffer, 74 Ind. App. 178, the facts were that a church pub-
lishing establishment was operated to further religious work
at a profit, and the profits were devoted to charitable or re-
ligious work. The court rules that the establishment, al-
though operated within the control of the church, was not en-
titled to be exempt from taxes.
The court said:

“* * * it is not enough that the proceeds of the busi-
ness conducted by the appellant is used for charitable
purposes; the institution itself must be used for such
purposes and must itself be a charitable institution,
and not one organized for the purpose of profit, not-
withstanding the fact that the proceeds or profits of
the business are devoted to a most worthy charitable
purpose.”

U. B. Pub. Establishment v. Shaffer, Treas., 74
Ind. App. 178, 182.

From these decisions it is fair to conclude that when the
statute refers to property as being devoted to or used for or
set apart for educational, religious or charitable purposes, it
means that the property is so used and does not mean that
business property, the income of which goes to those public
purposes, is exempt from taxation.

The case of Barr et al. v. Geary, 82 Ind. App. 5, is more
nearly applicable to the Flinn trust because the question of
exemption in that case arose with relation to the property
of a certain charitable trust which had been created by a will.
The remainder of a large estate had been willed to trustees
with directions that the trustees should, as soon as possible
after the death of the testatrix, establish and maintain “a
memorial home.” The purposes of the home were described
in the will. The court found that the trust was a valid one,
and that the memorial home was a charitable public trust. The question then arose as to the taxation of the property included in the trust. The property consisted of 2,800 acres of land and the home itself, which occupied three acres of the land. The memorial home and the land it occupied were found to be “set apart” for charitable purposes and exempt under the fifth clause of the tax law. This clause is as follows:

“Fifth. Every building used and set apart for educational, literary, scientific or charitable purposes by any institution or by any individual or individuals, associations or incorporations, or used for the same purpose by any town, township, city or county, and the tract of land on which such building is situated, including the campus and athletic grounds of any educational institution not exceeding fifty (50) acres; also the lands purchased with the bona fide intention of erecting buildings for such use thereon, not exceeding forty (40) acres; also the personal property endowment funds, and interest thereon, belonging to any institution, town, township, city or county and connected with, used or set apart for any of the purposes aforesaid.”

Fifth clause of Section 64-201, Burns Indiana Statutes Annotated, 1933, page 503.

As to the remainder of the 2,800 acres, the court found that it was occupied by tenants on a business basis and the income went partly to maintain the memorial home, but some of the income under the terms of the will was applied by the trustees to the payment of certain annuities not charitable. The Supreme Court found that the income from the farm might under certain conditions be absorbed in the payment of the annuity and that little or nothing would then go to the memorial home. The decision was that the farm property was not exempt.

The court referred to clause 14 of the tax law, but the decision seems to have turned on the provision in the will which diverted part of the income from the farm land toward non-charitable purposes.

It does not appear in the case of the Peter J. Flinn estate that the property, as it now exists, passed to the trustees
under the terms of the will. The theater has been erected and is now being operated as a commercial enterprise under some contract with the trustees.

Clause fourteen is as follows:

"Fourteenth. Any money or property given by will, or otherwise, to any executor or other trustee to be by him used and applied for the use and benefit of any municipal, educational, literary, scientific, religious or charitable purpose within the state of Indiana: Provided, Such executor or trustee shall diligently and in good faith carry out the provisions of the will or other trust arrangement, and use and apply such money or property to the purpose for which the same is donated."

Clause fourteen, Section 64-201, Burns Indiana Statutes Annotated, 1933, page 504.

Clause fourteen of Section 5 of the general tax law of 1919 was taken from Chapter 31 of the Acts of 1913. The 1913 provision, however, contained the following sentence after the first clause ending with the words "State of Indiana,"

"And the money or property, if it had been given directly for any such purpose, would not be subject to taxation under existing laws, then and in all such cases, such money or property shall be exempt from all taxation while in the hands of such executor or other trustee: Provided" etc.

In discussing clauses five and fourteen in the case referred to above, Barr v. Geary, 82 Ind. App. 5, the court said on page 34:

"It was clearly the intention of the legislature that the property must be exclusive and wholly used and applied for some of the purposes named, in order to be exempt from taxation."

* * * * * * * * * * * *

"Exemption from taxation must positively appear, and no implication will arise that any species of property, or subject of taxation was intended to be ex-
cluded if it comes within the fair purview of the statute imposing the tax.”

The exemption contemplated by clause fourteen in my opinion, applies to the particular money or property given by will or otherwise to an executor or trustee, and the provision of the law was not intended by the legislature to be extended to real estate used for a business or commercial enterprise, although the purchase money that went into the property came directly or indirectly by will. This was the interpretation of clause fourteen suggested in a former opinion from this office to the Tax Board. (Opinions of Attorney General, 1934, pages 197, 200).

In the various clauses of the tax statute which exempt property of educational, charitable or religious organizations, there is no provision for relieving the property of such institution from taxes unless the property, as distinguished from its income, is devoted to one of the exempted purposes. This is the law as declared in the following decisions heretofore cited:

Orr v. Baker, 4 Ind. 86;
City of Indianapolis v. Grand Master, etc., 25 Ind. 518;
United Brethren, etc., v. Shaffer, Treas., 74 Ind. App. 178.

That is, the test of exemption goes to the use of such property rather than the application of its income.

See also: Greenbush Cemetery Assn. v. VanNatta, 49 Ind. App. 192, 200.

I do not think the legislature intended that property would be taxable where it was donated directly to a church or to a charitable institution, but exempt from taxes if donated for the same purpose through an executor or trustee. It seems to me also that the last sentence in clause fourteen, which requires an executor or trustee to use diligence in carrying out the provisions of the will or trust arrangements, lends color to the interpretation that the purpose of this clause fourteen was to exempt property while in the hands of an executor or trustee which was to be passed on by them presently to the charitable institution or purposes named in the will, and that
the clause does not contemplate a perpetual trust to be managed by an executor or trustee, only the income of which is to be devoted to charitable purposes.

My opinion, therefore, is that the property referred to in your request is not exempt from taxes.

HEALTH, DIVISION OF PUBLIC: Voluntary contributions—Whether counties have authority to accept same to aid in various health services.

August 12, 1936.

Mr. W. H. Frazier,
Assistant Director,
State Board of Health,
State House Annex,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of August 3, 1936, in part as follows:

"In contacting counties we find that various private health organizations such as local tuberculosis associations are willing to assist the county in this work. While the counties are quite anxious to receive the support of these private organizations, the question has arisen as to whether or not it is legal for the county treasurer to accept contributions from such organizations, make such contributions a part of the fund established by the county appropriation, and to disburse such funds in the usual manner through the county auditor."

You request an opinion as to whether a county treasurer may legally accept such contributions and disburse the same in the usual manner upon warrants drawn by the county auditor.

I do not think there is any express statutory authority authorizing the county treasurer to accept contributions such as are described in your letter. I think, however, that there is no prohibition which would prevent the county from accepting voluntary contributions to its general fund, but I do not