ing upon the legality of the appointment of the present school trustees who were appointed by a "city council." I do not think this question is of any vital importance. Delphi is operating as a city of the fifth class, and, at least, has a de facto government as such. The prevailing rule in such a case, upon the basis of the public policy involved, would sustain the Acts of such de facto government to the same extent as if it were de jure.

See Opinions of Attorney General of Indiana 1929-1930, page 14, for a full discussion of this subject, including a review of numerous authorities.

Your question as to the amount of money that can be raised by a bond issue cannot be answered upon the basis of the facts as submitted.

As to whether the township owes the Delphi school corporation anything for the use of buildings owned by Delphi upon the basis of the facts as submitted, the answer is that it does. See Sections 6 and 7 of the 1925 Acts, Acts of 1925, page 333. The period of time to be used in figuring such amounts would, in my opinion, begin with the effective date of the 1925 Act.

As to whether the Township Advisory Board must approve the bond issue payable out of taxation upon the property of the township outside of the city before the same is legal, I think it must so approve.

Quick et al. v. Smith et al. supra.

TAX COMMISSIONERS, STATE BOARD OF: Mortgage exemptions not allowable to holders of executory contracts.

Hon. Philip Zoercher,
Chairman, State Board of
Tax Commissioners,
State House,
Indianapolis, Indiana.

September 22, 1936.

Dear Sir:

This is in response to your request for an opinion construing the Indiana "Mortgage Exemption Law." That law is as follows:
“Any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding one thousand dollars, existing and unpaid upon the first day of March of any year, deducted from the assessed valuation of mortgage premises for that year, the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year, Provided,” etc.

“Any person desiring to avail himself, or herself of the provisions of this Act shall, between the first day of March and the first Monday of May, inclusive, of each year, file with the auditor of the county wherein said real estate is situate a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagor, and shall also give the name and residence of the assignee or bona fide owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.”

Acts of 1919, Chapter 59, Sections 57 and 58; Burns 1933, Sections 64-209 and 210.

The particular problem is to ascertain the meaning of the word “owner” as used in the above Section 57. The statement and the questions submitted by you are as follows:

“The United States owns a tract of land at Decatur Homesteads near Decatur, Indiana, with about 48 houses built thereon and occupied by low income families. The project was initiated to furnish such families with decent housing at rentals which they can afford to pay, and it is now managed by the Resettlement Administration, a Federal agency established by Executive Order No. 7027, dated April 30, 1935.

“The Resettlement Administration contemplates transferring title to that property to a Homestead As-
sociation to be incorporated under the laws of Indiana, of which Association the homesteaders will be members. The Association will execute a note and mortgage to the United States for the amount of the purchase price. The Association in turn will sell individual parcels with improvements thereon to the homesteaders in accordance with 'Agreement to Purchase Land' being RA Tenure Form A (Rev. 6-19-36), of which a copy is attached hereto. The homesteaders will pay the purchase price of the respective homesteads to the Homestead Association over a period of 40 years, the unpaid balance bearing 3% interest. At the end of said period the homesteaders will receive deeds from the Homestead Association. During that period they will pay taxes, assessments, insurance, maintenance and management charges. In the event of a violation of the terms and conditions of the agreement on the part of a homesteader, the Homestead Association will have the power to terminate his rights upon 30 days' notice (Paragraph 15 of the Agreement). On the basis of those facts, we should like to submit two questions for your consideration:

"1. Will the individual homesteads be assessed for the purpose of taxation to the homesteaders while in their possession under the agreements to purchase, or will they be assessed to the Homestead Association?

"2. If the tracts will be assessed to the homesteaders, will each homesteader be entitled to the mortgage deduction provided for by Section 64-209 of Burns Indiana Statutes Annotated, 1933?"

In my opinion, the real estate should be assessed in the name of the Homestead Association, the actual owner and the holder of the legal title, and the homesteaders are not entitled to avail themselves of the deduction privilege. My reasons for this conclusion are as follows:

The underlying theory of taxation laws is that the owner of property pays the taxes, and only the owner.

61 C. J., p. 20;  
Foresman v. Chase, 68 Ind. 500.
The Indiana law provides that real property shall be taxed "to the owner, if known; if not, then to the occupant, if any; * * *"

Acts 1919, Chapter 59, Section 20; Burns 1933, Section 64-501.

This is true, although when the lien for taxes attaches to land, the land will be subject to the lien in the hands of whomsoever the title may pass because the liability for taxes ends only with payment.

Miller v. Vollner, 153 Ind. 26;
See also, Darnell v. State, 174 Ind. 143.

In Mullikan v. Reeves, 71 Ind. 281, a well-considered case, the Supreme Court held that the owner of real estate as the holder of the title was liable for taxes, although he had put another party in actual possession of the land and had given him the property by a parole gift.

The decisions deal with many agreements involving the title or possession of real estate, where the parties among themselves have agreed as to the payment of the taxes. There is to be a provision in the proposed homesteader contracts whereby the homesteader pays the taxes. This is a privilege of contract, and is binding as between the parties, but does not affect the rights of the state in the enforcement of its tax laws.

In Robertson v. Puffer Manufacturing Company, 112 Miss. 890, 73 So. 804, the court used the following language, applicable to such a situation:

"For purposes of taxation the state is not required to adjust the equities between the contracting parties; the taxing board seeks the legal owner, and when he is found, the property is assessed to him. Any other rule, it seems to us, would place upon the taxing authorities an intolerable burden and lead to complications and entanglements which would be impossible of solution, and from which the most learned chancellor might shrink."

The recent decision of Stark v. Kreyling, 207 Ind. 128, is called to my attention. In that case, it was held that the taxes
should be assessed to Kreyling who, though he was not the holder of the legal title, had possession and use of the property. That case grew out of a wrong interpretation of a Section in the tax law which provided that where real estate is exempt from taxes and "is contracted to be sold," the amount paid and the value of improvements is to be assessed as such where the land is located.

Acts of 1919, Chapter 59, Section 21; Burns 1933, Section 64-502.

The court in effect held that this provision was inapplicable to the situation where there was no contract for the land "to be sold." The court stressed the words, in the Kreyling instrument, "has this day sold" and "has this day purchased." Therefore, the land was not "contracted to be sold" within the meaning of the Section relied upon. The property had belonged to a library and had not been taxable. The court was taking property out of the tax exempted class, because it was devoted by Kreyling to his private purposes. It was not devoted to literary or other tax exempted uses and automatically became taxable.

City of Indianapolis v. Grand Master, 25 Ind. 518; Travelers Insurance Company v. Kemp, 151 Ind. 349.

The court in the Kreyling case did not refer to or overrule the earlier Indiana cases, such as Mullikan v. Reeves supra, and I do not believe it should be extended beyond the limits of the exact situation stated by the court. The theory of the Kreyling ruling is that the contract had been fully executed. This fact is noted in the dissenting opinion. Kreyling was assumed to be the actual owner of the land and upon that basis he was made responsible for the taxes.

The Kreyling decision does not deal with the "Mortgage Exemption" statute.

It will be noted from the statement of facts in the fore part of this opinion that no mortgage from the homesteader to the Association is contemplated.

It is suggested, however, that the security of the vendor who holds the title to the land is equivalent to a mortgage within the meaning of the exemption statute. Nevertheless,
the security is not a mortgage and we have to do with a statute which requires certain conditions and a certain procedure before the deduction provided for is available. The words "mortgage" and "mortgage indebtedness" in the statute must be taken in their ordinary legal signification. Some estate must be held by the mortgagor which can be the subject of a mortgage and the right of redemption must be provided for.

When the Mortgage Deduction Law was enacted, mortgage notes were taxed to the holder as personal property. It may have been in the minds of the legislators that the Deduction Law would have the effect of disclosing who the holders of the mortgage notes were so that the tax could more readily be collected from them. The provisions of the Act which require certain information to be furnished about the mortgage note holder by one proposing to secure a deduction seems to indicate such purpose.

The law providing for a deduction on account of mortgage indebtedness was first enacted in 1899. (Acts 1899, p. 422). This office in 1913, through the Honorable Thomas M. Honan, Attorney General, gave an opinion in answer to an inquiry, whether a person who held a bond for a deed, or contract of purchase, could have said real estate transferred for taxation purposes and then be allowed a mortgage exemption. In answer, the Attorney General said:

"In reply I would say that Section 10318 Burns Revised Statutes, 1908, provides that the auditor shall enter a description upon the transfer book for the purpose of taxation of all lands that have been conveyed by deed or partition, with the date of the conveyance, names of the parties, etc.

"By consulting the enclosed agreement I find that Item 4 of the agreement states that when said purchase has been paid in full, said sellers shall execute to the buyer their warranty deed conveying said real estate. I further find in Item 8 of said agreement that if said monthly installments shall be more than three months delinquent the sellers may, at their option, declare the entire remainder of the purchase price due and collectible, or may rescind the agreement to convey said real estate and take possession of the same without
becoming trespassers, etc. It is very evident that under such an agreement for the sale of real estate the auditor would have no authority to transfer said property for taxation on the transfer book to the person who had thus agreed to purchase said real estate in order to allow said purchaser a mortgage exemption on the same."

Attorney General's opinion, 1913-1914, page 176.

Following this opinion, the State Board of Tax Commissioners has ruled that the holder of an executory contract to purchase real estate, although he may be in possession of the land, is not entitled to a deduction from taxes on account of payments made or due on the purchase price. This administrative ruling, followed for many years, construing the Sections of the tax law, has never been questioned in any court proceedings and is entitled to considerable weight.

The situation which arises in connection with the homestead project may call for some legislation in connection with the Mortgage Exemption Act, but construing the present law, my opinion is as expressed above.

FINANCIAL INSTITUTIONS, DEPARTMENT OF: Trust investments by banks—Whether bonds of Indiana University are eligible.

September 22, 1936.

Mr. E. H. DeHority,
Bank Supervisor,
Department of Financial Institutions,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter asking for an official opinion in answer to the question whether general obligation bonds of the Trustees of Indiana University and issued, I assume, pursuant to the authority conferred on said trustees by Chapter 53 of the Acts of 1935 are legal investments for trusts as provided by Section 29 of Chapter 5 of the Acts of 1935. Section 29 of Chapter 5 of the Acts of 1935 is amended Section