UNEMPLOYMENT COMPENSATION DIVISION: Whether Sec. 14 (b) of 1936 Act, as amended in 1937, providing method of collection of contributions from employers is valid.

July 28, 1937.

Hon. Clarence A. Jackson,
Director, Unemployment Compensation Division,
Department of Treasury,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion with respect to the validity of subsection (b) of section 14 of chapter 4 of the Acts of the Special Session of the General Assembly of 1936, as amended by section 12 of chapter 125 of the Acts of the General Assembly of 1937.

The subsection referred to has to do with the method of enforcing the collection of contributions due from employers affected by the Unemployment Compensation Act of Indiana of 1936, as amended in 1937. It will be unnecessary to a consideration of the question submitted to set out herein more than the first literary paragraph of said subsection, which provides as follows:

“(b) Collection. (1) The board shall have the right to make assessments against any employer who fails to pay contributions or interest as required by this Act or for additional contributions due and unpaid. The board shall immediately notify the employer of the assessment, in writing, by registered mail in usual course and such assessment shall be final insofar as the board is concerned unless the employer protests such assessment within fifteen days after the mailing of the notice. If the employer protests such assessment he shall have an opportunity to be heard by the board upon written request. After the hearing the board shall immediately notify the employer in writing of its finding; and the assessment, if any, made by the board therein shall be final upon issuance of such notice. Unless an assessment is paid within fifteen days after it becomes final, the board may immediately certify the
amount so due with interest and 10 per centum of the amount due as damages to the circuit court, or a superior court, or other court of competent jurisdiction in any county in which the employer resides, or has his principal place of business. [The court shall immediately render judgment in accordance therewith, and notify the parties. Such judgment shall have effect as though said judgment had been rendered in a suit duly heard and determined by such court.] The clerk shall within five days thereafter enter said amount in the judgment docket as a judgment against the employer which judgment shall thereupon become a lien upon the title to and interest in the property of the employer in the same manner as any judgment except that it shall be a preferred lien. After said judgment has been entered of record, the director, or upon his request, the clerk shall issue a warrant directed to the sheriff of any county in the state commanding him to levy upon and sell sufficient property of the judgment debtor found within his bailiwick for the payment of the judgment and the costs of the proceedings. The sheriff shall forthwith proceed to execute said warrant by making a levy upon sufficient property of the judgment debtor found within his bailiwick and shall make due return of his action thereunder within the time fixed in the warrant which shall not exceed sixty days from the date of its receipt by him. Levy by the sheriff upon any property of the judgment debtor shall be in all other respects with like effect and in the manner prescribed by law in respect to executions issued against property upon judgments in other cases.”


It will be noted that the following language, above quoted, appears in brackets, viz:

“The court shall immediately render judgment in accordance therewith, and notify the parties. Such judgment shall have effect as though said judgment had been rendered in a suit duly heard and determined by such court.”

The certificate of the Secretary of State states that in cases where words are thus included in brackets, they do not appear
in the enrolled Acts but are inserted by the Secretary of State in the printed copies to aid in interpreting the meaning.


It thus appears that the language last quoted does not appear in the enrolled Act. It is, therefore, not a part of the Act and cannot be considered except as bearing on the interpretation of the Act. I think that without the insertion of the language in the brackets the language of the subsection sufficiently indicates some omission, but it is difficult to conclude as a matter of interpretation that the language inserted in brackets is the omitted language except for the explanation given in your letter that such language was in the bill as passed by the General Assembly but was omitted by reason of an error in the enrollment of it. That fact, however, cannot be effective to make the omitted language a part of the Act. I am thus confronted with the question as to whether the subsection without the language in brackets supplies a collection procedure which is valid and this in its last analysis is the question upon which I am requested to pass.

The first part of the subsection gives the Unemployment Compensation Board the right to make assessments against any employer who fails to pay contributions or interest as required by the Act, or for additional contributions due and unpaid. The board is thereupon required immediately to notify the employer of the assessment in writing, by registered mail in usual course. The employer is given fifteen days after the mailing of the notice within which to protest the assessment. Whereupon, upon written request, such employer is given an opportunity to be heard by the board. The board is then required to make a finding and to notify the employer of such finding.

Other portions of the subsection authorizes any employing unit improperly charged or assessed and required to pay such improperly charged or assessed contributions to recover the amount improperly collected or paid, together with interest in any proper action or suit against the board, in which case the circuit court of the county in which is located the principal office and place of business of the employing unit shall have original jurisdiction.

Returning now to the collection procedure provided for in said subsection, after the assessment has been made and the
employer has been notified and has protested, has been given a hearing, and after the board has made a finding upon such hearing and notified the employer of the finding, the subsection then provides as follows (omitting the language in brackets):

"Unless an assessment is paid within fifteen days after it becomes final, the Board may immediately certify the amount so due with interest and 10 per centum of the amount due as damages to the circuit court, or a superior court, or other court of competent jurisdiction in any county in which the employer resides, or has his principal place of business. * * * The clerk shall within five days thereafter enter said amount in the judgment docket as a judgment against the employer which judgment shall thereupon become a lien upon the title to and interest in the property of the employer in the same manner as any judgment except that it shall be a preferred lien."

(NOTE: The asterisks indicate the language in the brackets.)

The subsection further provides:

"After said judgment has been entered of record, the Director, or upon his request, the clerk shall issue a warrant directed to the sheriff of any county in the State commanding him to levy upon and sell sufficient property of the judgment debtor found within his bailiwick for the payment of the judgment and the costs of the proceedings."

The subsection still further provides:

"The sheriff shall forthwith proceed to execute said warrant by making a levy upon sufficient property of the judgment debtor found within his bailiwick and shall make due return of his action thereunder within the time fixed in the warrant which shall not exceed sixty days from the date of its receipt by him. Levy by the sheriff upon any property of the judgment debtor shall be in all other respects with like effect and in the manner prescribed by law in respect to executions issued against property upon judgments in other cases."
As already pointed out, the language of subsection (b) *supra*, indicates an omission at the point of the insertion of the language in brackets appearing in the language first quoted, but I do not think the omission is fatal even though, as I view the case, the language in brackets which, as stated by the Secretary of State, was inserted in his certificate to aid in its interpretation, cannot, after all, be considered. It is clear that the clerk of the court would not be authorized to act judicially for the court, but I think he can legally perform a ministerial duty of entering the amount of assessment certified to the court in the judgment docket so that further proceedings as provided in the Act may be taken. The entry of the amount in the judgment docket is not a judgment in the strict legal sense of the word. It amounts to nothing more, I think, than the making of a record in a proper book or docket of what the Unemployment Compensation Board has found to be due so as to give proper notice of a lien and to furnish the basis for the issuance of a warrant for collection and the service of that warrant by the sheriff. Such a provision does not, in my opinion, deny due process of law to the employing unit affected by it, especially when considered in connection with other provisions of the subsection. It is well settled that due process of law is not necessarily judicial process. Citing Reetz v. Michigan, 188 U. S. 505 at pp. 506, 507; Public Clearing House v. Coyne, 194 U. S. 497, at p. 508, et seq.

In the first case above cited, which involved the actions of a board of registration in medicine, the court said on page 507,

“It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the applicant had been ‘legally registered under act No. 167 of 1883.’ That, it is contended, is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. The decision of the State Supreme Court is conclusive that the act does not conflict with the state constitution, and we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal,
whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process."

Later on the court in citing from *People v. Hasbrouck*, 11 Utah, 291, used the following language:

"The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise "judicial power," as that phrase is commonly used, and as it is used in the organic act, in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are nowise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government."

In the last case cited, *Public Clearing House v. Coyne*, *supra*, the court on page 508:

"It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong
presumption of its correctness. *Bates & Guild Co. v. Payne*, 194 U. S. 106. That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations."

After citing authorities the court proceeds to say:

"As was said by Judge Cooley, in *Weimer v. Bungury*, 30 *Michigan*, 201: "There is nothing in these words, ("due process of law,"') however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative.'"

The above principle has a very apparent application to the collection of taxes or other contributions, such as the contributions referred to in this case. As was said by the court in the case of *Turpin v. Lemon*, 187 U. S. 51, at page 57:

"Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential."

After citing authorities, the court proceeds:

"But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary."

Again in the case of *Glidden v. Harrington*, 189 U. S. 255, which was a case involving the question of whether certain proceedings taken to enforce a tax assessed against Glidden deprived him of his property without due process of law, I need not go into all of the details of this particular case but the
opinion of the court is sufficiently indicated by the following language (quoting from page 258):

"This was not a special assessment, but the ordinary annual tax upon personal property. The act requires that all personal estate, within or without the Commonwealth, shall be assessed to the owner; that personal property held in trust, the income of which is payable to another person, shall be assessed to the trustee in the city or town in which such other person resides, if within the Commonwealth; and if he resides out of the Commonwealth shall be assessed in the place where the trustee resides. Before making the assessment the assessors shall give notice by posting in some public place or places; that in case the taxpayer shall fail to make return, they shall ascertain, as nearly as possible, the particulars of the estate and estimate its just value, which shall be conclusive upon the owner, unless he can show a reasonable excuse for omitting to make his return. Provision is also made for an application to the assessors for an abatement of taxes, and for an appeal to the county commissioners in case of a refusal of the assessors to abate the tax."

The court said with respect to the above stated facts (quoting from page 258):

"These proceedings are amply sufficient to constitute due process of law. Although, with respect to this class of taxes, we have never had occasion to determine exactly what the Fourteenth Amendment required, we have held that the proceedings should be construed with the utmost liberality, and while a notice may be required at some stage of the proceedings such notice need not be personal, but may be given by publication or by posting notices in public places. It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law."

I think the above cases abundantly show that due process of law is provided by subsection (b), supra. However, I am not advised as to what other objection to the validity of said
subsection may be made. Perhaps it may be contended that it confers judicial power upon a non-judicial officer, the clerk of the court, but as already pointed out, that is not the effect of the provision.

It is true that the clerk is required to enter the amount certified by the board in the judgment docket as a judgment against the employer, but, after all, he is not required to exercise judicial power; all that he does is to record the amount certified; he has nothing to do with determining the legality of the certification by the board; what he does is purely ministerial and while referred to in the Act as entering the amount as a judgment, in compliance with well recognized rules of construction, which requires statutes to be construed so as to make them constitutional instead of unconstitutional, where that can be reasonably done, the word “judgment” will not be construed in its strict literal sense but in a more general sense, as the entering of the amount in the judgment docket as judgments are entered, the purpose of entering being to furnish a record which will supply notice of the lien which the statute seeks to give.

In my opinion, the proceedings as provided in said subsection (b) for the collection of the board’s assessments are valid, notwithstanding the omission from the enrolled Act of the language appearing in brackets, supra.

ACCOUNTS, STATE BOARD OF: Teachers’ Retirement Fund, right to pay interest on withdrawals; right to trade and exchange securities.

July 28, 1937.

Hon. W. P. Cosgrove,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of July 26 in which you submit the following questions:

“1. Is the board of trustees of the Indiana state teachers’ retirement fund authorized to pay interest on the amount withdrawn by a teacher in addition to