

“The defendant was under no compulsion to take a permit. He could do so or not, as he chose. If he had refused, doubtless he would have been discriminated against by the board. Balancing advantages against disadvantages, it was for him to decide whether he would take a permit or stand upon his rights without one. He took one and made the agreement here in suit. It was his voluntary act. * * * The defendant has had the benefit of the agreement, and I think he should be held to the burden of it.”

In conclusion, I think the above cases show very clearly the situation of the licensee in the assumed case. We do not have here a case involving the question as to whether a statute has extraterritorial effect. The case we have here is whether a person, or corporation as in this case, may receive a license issued by the State of Indiana to do a certain type of business and may obtain the fruits and benefits of that license without complying with the burdens imposed thereby.

In my opinion, the licensee cannot receive and retain the privileges conferred by the license without the acceptance of the burdens imposed by it. The remedy in the case of violation of the terms of the license would be its revocation.

TAX COMMISSIONERS, STATE BOARD OF: Tax ferret contracts, whether valid or not. Contracts for collection of dropped taxes, whether valid or not.

Hon. Philip Zoercher, February 8, 1937.
Chairman, State Board of Tax Commissioners,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter as follows:

“This board has been asked to secure an official opinion from your department as to whether the county commissioners have authority to contract with unofficial individuals to locate sequestered taxable property and to collect the delinquent taxes thereon; a percentage of such collected delinquent taxes to be retained as compensation. Such individuals being generally designated as tax ferrets.”

In the consideration of your question, I think it is desirable at the outset to determine whether there is any statute of the state expressly authorizing such a contract as you describe. The following provisions seem, at first blush, to have some relation to the subject, viz.:

“The board of county commissioners shall, unless in cases of indispensable public necessity, to be found and entered of record as part of its orders, make no allowance not specifically required by law to any county auditor, clerk, sheriff, assessor or treasurer, either directly or indirectly, or to any clerk, deputy, bailiff or any employee of such officer; nor shall they, except in cases above provided, employ any person to perform any duty required by law of any officer, or for any duty to be paid by commission or percentage. For a violation of these provisions, each member of such board favoring the same shall be guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than double nor more than five (5) times the amount of such allowance, to which may be added imprisonment in the county jail for any period not more than sixty (60) days, and the office of such commissioner shall be declared forfeited. If it be found necessary, and so entered of record, to employ any person to render any service as contemplated in this section, as a public necessity, the contract for such employment shall be spread of record in said court; and, for such services rendered, the claimant shall file his account in said court ten (10) days before the beginning of the term, and any taxpayer shall have the right to contest the claim. (Acts 1879 (Spec. Sess.), Ch. 51, Sec. 39, p. 130.)”

Burns Indiana Statutes, Annotated, 1933, Sec. 26-808.

“Where boards of county commissioners in this state have made or may hereafter make contracts for the discovery of, and report for assessment and taxation, omitted property and cause the taxes to be collected upon the same, there shall be deducted from the gross amount of said taxes so collected the total cost and

expense of such investigation and collection and the remainder shall be distributed pro rata among all the funds entitled to receive the same: Provided, that the provisions of this act shall not be construed for the purpose of affecting any settlement heretofore made between the auditor of state and the county treasurers of the state. (Acts of 1905. Ch. 15, Sec. 1, p. 15.)”

Burns Indiana Statutes, Annotated, 1933, Sec. 64-2830.

Section 64-1331. Note: This is a long section. All of it is omitted except the last literary paragraph, which is as follows:

“This Act shall not in any way limit or affect any right of the officer, or officers, of any municipal corporation to make an appropriation, or appropriations, which does not affect the tax levy of such corporation, for the purpose of authorizing or making possible contracts for the discovery of and report for assessment and taxation of omitted property, and for the causing of the taxes on the same to be collected, which contract provides the payment for the service performed or results obtained thereunder shall be made from the taxes or penalties so collected. (Acts 1919, Ch. 59, Sec. 200, p. 198; 1920 (Spec. Sess.), Ch. 49, Sec. 3, p. 164; 1921, Ch. 222, Sec. 3, p. 638; 1927, Ch. 95, Sec. 1, p. 247.)”

Note: The section reference, *supra*, is to Burns Indiana Statutes, Annotated (1933).

The language last above quoted first appeared in the amendment of 1927 of chapter 200 of the Tax Act of 1919 and was carried forward with the further amendment of said section in 1935. I think, however, that consideration of this provision makes it very evident that it does not contain authority for the making of a contract such as you describe, but is limited to the authorization of an *appropriation* as the basis of such a contract notwithstanding the prohibitions of the earlier portions of the section. I say *section* because the Act of 1927 contained only the one section so that with respect to it the term “section” and “act” includes the same subject matter.

The language of section 64-2830, *supra*, clearly does not authorize the making of such a contract as you describe, although apparently based upon the assumption that boards of county commissioners under some circumstances may make contracts for the discovery of, and report for assessment and taxation of omitted property. The conditions of the exercise of such power, if it exists, and the limitations thereon are not set out. For that reason, section 64-2830 adds but little, if any, light upon the subject under consideration.

The first of the above quoted provisions, section 26-808, *supra*, remains for consideration. This section provides in terms that the board of county commissioners shall *not* employ any person to perform any duty required by law of any officer *unless* in cases of indispensable public necessity to be found and entered of record as part of its orders. While stated negatively, the above language would seem to be sufficient to authorize such a construction of its terms as would permit the employment by the board of commissioners of a person to perform a duty required of an officer in case of indispensable public necessity; but I do not think such a finding is beyond attack and that it must be accepted without question. Especially is this true in view of the decisions upon the subject.

Since it discusses sufficiently the earlier cases on the subject and points out the effect of the holdings therein, I think that I may safely begin by referring to the case of State, ex rel. v. Goldthait, 172 Ind. 210. In that case, the contract involved was a contract of employment to search in Grant and other counties in Indiana and in other states for, and report to the proper officers, omitted, unassessed taxable property. The board of commissioners had found that an indispensable public necessity existed for relator's employment. The action was to mandate the auditor to issue a warrant in payment of a claim which had been allowed by the commissioners for service under the contract. The auditor answered setting up various matters, among which was the fact that the services rendered were the same as were required by statute of county assessors. The question arose upon the overruling of a demurrer to the answer. The second point upon which the relator sought to support the demurrer was that "the contract was valid under the independent powers conferred by section 6016," which is section 26-808, *supra*. In the consideration of this contention the court said on page 216:

“While they (meaning the board) have extensive administrative functions with respect to which they may have implied and discretionary powers, they have no such powers in their governmental *contractual* relations. They are limited governmental agents, and must find their powers in their governmental *contractual* relations and capacity, by virtue of some statute.” (Our italics.)

Later on the court continues with the following language, beginning on page 221:

“The answer in question sets out in detail the services performed by relators, and discloses that they consisted of the same services required by statute of county assessors. Sec. 10277, Burns 1908, Acts 1891, p. 199, Sec. 113. Relators claim that the county assessor is not charged with the duty of searching for omitted or sequestered property. In support of this contention, they cite the cases of *City of Richmond v. Dickinson* (1900), 155 Ind. 345, *Board, etc., v. Dickinson* (1900), 153 Ind. 682, and *Fleener v. Litsey* (1903) 30 Ind. App. 399.

“An examination of the statute discloses that, in addition to the same powers conferred upon county auditors and treasurers, as to putting on the tax duplicates omitted or sequestered property when brought to their attention, county assessors are required to examine the records and papers of the various county offices and the returns, etc., and list and assess all omitted property. Secs. 10277, 10310, 10353, Burns 1908, Acts 1891, p. 199, Secs. 113, 182, Acts 1897, p. 141, Sec. 1.

“But relators contend that the assessor is not required to search for years other than the then current year. This court has held that he has the right to go back of the current year, though it is not there held to be his duty (*Saint v. Welsh* (1895), 141 Ind. 332); and that when the tax is put upon the duplicate it is current tax (*Gallup v. Schmidt* (1900), 154 Ind. 196). If, therefore, the assessor has the right to go back of the current year to search for omitted property, and if when taxed and put upon the duplicate it is current

tax, or under the theory of the cases is for the first time a tax, it must follow, and we hold, that it is the statutory duty of the county assessor to go back of the current year, and search for omitted property, which, when assessed, he assesses as the current year's taxes and this was the manifest intention of the statute in imposing upon county assessors entirely different duties from those imposed on auditors and treasurers.

"It cannot be presumed that the legislature intended a useless and meaningless thing when it defined the duties of county assessors, and specially committed to them the duty of searching for omitted taxes. That duty is a retrospective one, for we have seen that it is held that they may go back of the current year in that search, and, if they may do so, then in the public interest that amounts to a mandate that they shall do so. It would be an anomaly to say that they may do so, but are not obliged to do so. *Mechem, Public Officers, Sec. 593. City of Logansport v. Wright (1865), 25 Ind. 512.* Or, take another case: Suppose the officer in his examination discovers that there has been property omitted in former years, will it be contended that he has any choice in the matter? Is it not perfectly clear that he is bound to assess it, and put it upon the duplicate? He can have no choice as against his plain duty. His duty is mandatory, and he can waive nothing of that duty, as against the public interest, and against public policy. *State, ex rel., v. Haworth (1890), 122 Ind. 462, 7 L. R. A. 240; City of Indianapolis v. McAvoy (1882), 86 Ind. 587; Board, etc., v. Benson (1882), 83 Ind. 469; City of Logansport v. Wright, supra; 29 Cyc, 1432.*

"It is urged that the work requires peculiar knowledge and skill. We are not prepared to assent to that proposition, but even so, it only argues the selection of qualified officers, or the abolition of this duty on the part of county assessors and the imposition of it elsewhere. Nor do we mean to be understood as holding that there may not be cases where, by reason of being out of his jurisdiction, or for other reasons, a county assessor would not be required to make examinations,

where his duty would not require him to go, and this seems to be implied by the statute as a limitation to the records, papers, maps, returns, etc., of the county. But what we do hold is that the examination for and assessing of omitted property is committed to and is the duty of the county assessor. The answer discloses that the same services, setting them out in detail, were performed by relators as are required of the county as assessors, and it is settled that this may not be contracted to be done by third persons, as a matter of public policy, and that such contract is *ultra vires*."

The court thereupon proceeds to show that the earlier cases of Board, etc., v. Dickinson, 153 Ind. 682, City of Richmond v. Dickinson, 155 Ind. 345, Garrigus v. Board, etc., 157 Ind. 103, and Fleener v. Litsey, 30 Ind. App. 399, are not in conflict with its views. I shall simply refer you to the opinion of the court for this discussion, which I think presents an accurate analysis of the opinions in the above cases.

Without going further in the discussion of the Goldthait case, it will suffice to say that it is made very plain that, notwithstanding the above statute (Section 26-808, *supra*), the Board is without power to contract with a third person for the performance of service required by law of a public officer. The court, however, made the following reservation, quoting from page 225.

"We are not prepared to say that there may not be cases in which a contract for the listing and assessing of taxes upon omitted property may not be made, which would involve services other than those any of the county officers are required to perform, and there is, therefore, that reason for holding that said Sec. 6016 is in force."

State, ex rel., v. Goldthait, 172 Ind. 210, at p. 225.

This case has not been overruled, so far as I have been able to find. The decision in the case of City of Richmond v. Clifford, 182 Ind. 17, is not in conflict with the decision in the above case. There are some statements in Clark v. State, ex rel., 187 Ind. 276, which would seem to be somewhat in conflict with the decision in State, ex rel., v. Goldthait, *supra*; but

the Clark case was not a case like the Goldthait case where the contract was for the discovery of *omitted property*, a duty definitely placed by statute upon the county assessor. In the Clark case, the decision was based upon the conclusion of the court that no duty rested upon the treasurer to do anything further with respect to so-called "*dropped taxes*" until he received information that they could be collected whereupon it became the duty of the treasurer to report that fact to the auditor who was required to restore them to the current duplicate. In other words, the court concluded that there was no duty resting upon an officer to collect so-called "*dropped taxes*" until informed of their collectibility and sustained the contract; but the decision does not, in fact, depart from the principle announced in the Goldthait case. Note the language of the court on page 283, quoting from the Clark case:

"The alleged contract was valid, therefore, unless it was the duty, under the law, of the county treasurer to search for information of the character contracted for."

From the foregoing, it would follow, I think, that the court was of the opinion that the contract would be *invalid* if there *was* such a duty upon the treasurer, which is the principle underlying the decision in the Goldthait case.

In view of the foregoing, I think contracts, generally speaking, of the character to which you refer would be invalid because they are contracts for the performance of a service which rests upon a country officer by statute, particularly the county assessor. As to individual contracts, I cannot pass upon them in the absence of such contracts; but I think it is clear that, unless the service contracted for in contracts such as you refer to, is a service the performance of which does not devolve upon an officer by virtue of statute, the contract would be invalid. In arriving at this conclusion, I have considered the question without relation to whether there was a prior appropriation. It should be remembered, however, that in any event a prior appropriation would be necessary to support a contract.