TAXATION

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During the war the several states had little need for new revenues as plenty of money rolled in from old sources[1] and few new areas for spending opened up. The result has been that the changes in State taxation have not, on the whole, been as substantial as in the federal field where the pressure of finding new sources of revenue to pay for the war expenditures has resulted in major revisions.

Furthermore developments in state taxation can not be catalogued for all returning veterans but only on a state to state basis. The review of developments in Indiana taxation that follows does not purport to do for Indiana tax law what has been done for returning veterans in the field of federal taxation. The only claim of this review is to discuss some of the legislative, administrative and judicial developments in Indiana since 1940 which the writer believes may be important in pointing the reading and study of a returning Indiana lawyer so that he may refresh himself in Indiana tax law.

Even in the federal tax field the most effective "refresher" will be grappling with an actual tax problem in real practice. Experience may show that many of the problems in Indiana tax law suggested here, do not in fact raise problems for the practitioner. If at all helpful the following com-

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1. Inheritance Taxes:

	1940	1944
Value of resident estates upon which taxes were declared	$58,867,661.78	74,863,557.09
Amount of inheritance tax imposed	1,410,142.00	1,356,803.56
Number of resident estates	3,105	4,176
Valuation of estates of non-residents	1,420,111.12	1,519,663.93
Amount of taxes imposed	20,950.94	43,901.02
Number of non-resident estates	87	106
Amount of additional ("estate tax") imposed	144,474.41	129,315.88
Number of estates subject to tax	14	3

Indiana Year Book (1940) p. 154; Indiana Year Book (1944) p. 732.

Intangibles Tax Collections 1940-1944 were as follows:

July 1 1939-July 1 1940	1,337,824.94
1940- 1941	1,535,034.47
1941- 1942	1,899,331.14
1942- 1943	1,496,981.30
1943- 1944	1,405,090.55

Indiana Year Book (1944) p. 730

ment should set the returning veteran to his own reading and to discussion with other members of the bar in order to discover what changes in fact have occurred in tax practice.

With this limited objective in mind, the material that follows will outline the developments in the tax laws of Indiana as to veteran's benefits, as to inheritance taxes, intangible taxes, gross income taxes, property taxes and certain miscellaneous taxes. The material is not exhaustive either as a catalogue of changes or as a critical analysis of the problems created by the changes.

TAX RELIEF AND BENEFITS TO MEMBERS OF ARMED FORCES AND VETERANS

The several sessions of the General Assembly since 1940 have enacted various reliefs and allowances from tax imposition to members of the armed forces of World War II. In addition the 1943 General Assembly provided, as amended in 1945,[2] that all "persons" who have served, or are now serving, or who may hereafter serve as part of the armed forces of the United States in World War II from September 16, 1940, and the wives, widows and children of such persons are entitled to the same rights and privileges as are now given to "soldiers, sailors, nurses and/or other veterans, their wives, widows and children of the first World War" under

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Intangibles Tax Collections on Banks and Building & Loan Associations:

(year end June 30)	Banks	Building & Loan Associations
1940	$1,543,773.23	$290,616.91
1941	1,637,595.02	316,244.92
1942	2,025,017.04	324,821.25
1943	1,996,246.29	344,349.95
1944	1,633,894.79	363,104.48

Indiana Year Book (1944) p. 730, 731.

Gross Income Tax Collections 1940-1944 were as follows:

1940	$23,648,497.28
1941	26,054,478.48
1942	33,739,322.56
1943	34,236,158.53
1944	40,838,398.04

Indiana Year Book (1944) p. 193.

Property Tax assessments and taxes levied 1940-1944 were as follows:

	Assessed valuation	Tax levied
1940	3,870,120,130	103,014,677.39
1941	3,954,977,650	105,146,724.27
1942	4,167,003,009	99,322,975.91
1943	4,347,960,407	106,672,636.89

Indiana Year Book (1944) p. 709

2. Ind. Acts 1943, Ch. 254, p. 724, Ind. Stat. Ann. (Burns 1943 Replacement) §59-1007a, as amended by Ind. Acts, 1945, Ch. 141, p. 308.

existing or future statutes. To entitle a person to these benefits separation from service must be under conditions other than dishonorable. The Attorney General has ruled[3] that this 1943 act gives the benefits to all "persons" in the armed forces in World War II even though the World War I benefits extended only to enlisted personnel. Thus officers of the present war are entitled to rights and privileges given only to enlisted personnel in World War I.

Property and Poll Taxes

Ch. 2 of the special session of the General Assembly for 1944[4] provided the following rights and privileges to members of the armed forces of the present war:

Exemption from poll taxes[5] from January 1, 1941 until 24 months after termination of hostilities or until six months after discharge, if discharged prior thereto. The exemption extends to persons who "have been, now are or shall hereafter be" members of the armed forces. Provision is made for refund of the poll taxes already paid for the period exempted.

Exemption from Penalties, Fees and Interest on Real or Personal Property Taxes[6] is provided during the same period as the poll tax exemption. The penalties previously imposed are forgiven and the act further provides for refund of penalties and interest already paid. It also provides that there shall be no tax sale of property of members of the armed forces for failure to pay taxes becoming due during the period of military service. This exemption is not applicable if the total assessed valuation of all property owned by the member of the armed forces exceeds $20,000.

Application for Mortgage Exemption[7] may be made by a statement filed by the member of the armed forces or by some relative in his behalf. Previous to this 1944 amendment the application for mortgage exemption had to be filed by the person or another person under a duly executed and recorded power of attorney.[8] The Attorney General ruled[9]

3. Ops, Ind. Att'y Gen. No. 80 (Aug. 2, 1945).
4. Ind. Acts 1944 (Spec. Sess.), Ch. 2, p. 6.
5. Ind. Acts 1944 supra, n. 4, §§ 1-4.
6. Ind. Acts 1944 supra, n. 4, §§ 5, 6.
7. Ind. Acts 1944 supra n. 4 § 6½.
8. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-210.
9. Ops. Ind. Att'y Gen., 1945 p. —— (Jan. 20, 1945).

that this 1944 provision was not retroactive, so that a person could not in 1945 file for a mortgage exemption for 1943, even though that person and his family were out of the state during the time provided for filing in 1943 as a result of service in the armed forces. An emergency act in 1945[10] corrected this by providing that all members of the armed forces who were residents of Indiana during the years 1942, 1943 or 1944 who failed to file applications for mortgage deduction because of the fact that they were away from the county of their residence during the time for filing applications are granted the right to file in a manner specified in the act. Provision is made for refund of any taxes overpaid on account of failure to file for the mortgage exemption. The act is also made applicable in a specified manner to members of the armed forces for the year 1945 and subsequent years.

The 1944 act[11] also provides that requirements in various license applications laws[12] for proof of payment of poll and personal property taxes are waived for members of the armed forces from April 14, 1944 until 24 months after termination of hostilities or until six months after discharge.

The 1944 act[13] further provides that real estate owned by the entireties is considered for the purposes of this act as if owned by the member of the armed forces alone.

None of the provisions of the act are applicable if the person receives a dishonorable discharge.[14]

The Attorney General has pointed out[15] that this law (and presumably all others conferring benefits on members of the armed forces) should be read in connection with the Soldiers and Sailors Civil Relief Act of 1940.[16] Whichever act, the Act of Congress or that of Indiana General Assembly, conferring the most benefits on the member of the armed forces in the particular case is controlling. Thus where the Indiana law exempting members of the armed forces from penalties and interest charges is applicable only if the person

10. Ind. Emergency Acts, 1945, Ch. 26, approved Feb. 17, 1945.
11. Ind. Acts 1944 supra n. 4, § 7½.
12. See Ind. Stat. Ann. (Burns, Supp. 1943) §42-102.
13. Ind. Acts 1944 supra n.4, § 8½.
14. Ind. Acts 1944 supra n. 4, §8.
15. Ops. Ind. Att'y Gen. 1945, p. —— (January 20, 1945).
16. 50 U.S. C. § 560.

owns less than $20,000 worth of property, the federal law is applicable without any limitation in amount so that if a veteran owns property valued at more than $20,000 only a 6% interest charge can be imposed as provided under the federal law.

The Attorney General has ruled[17] that although the veteran does not attempt settlement of his delinquent taxes within six months after discharge, the penalties that would have accrued up to that date are to be excluded in calculating the amount due.

In 1941 the General Assembly allowed a $1000 deduction on taxable property of honorably discharged soldiers, sailors, marines or nurses of World War I, who were disabled with a service connected disability of 10% or more.[18] It further provided that this exemption would not bar the recipient from any other exemption provided for in the tax laws. Accordingly, the Attorney General ruled[19] that receipt of a similar deduction under Burns 64-205 for total disability would not bar receipt of benefits under the act of 1941 if the person met the qualifications of both. The mortgage exemption[20] may also be claimed and presumably the exemption of $1000 for residence of the blind[21] if the individual qualifies under all the provisions. Under Ch. 254 of the Acts of 1943, referred to above,[22] this benefit to veterans of World War I is made applicable to members of the armed forces in the present war, and is extended by the 1943 act to officers of this war retiring for a service connected disability, according to a ruling of the Attorney General in 1945.[23]

Intangibles Taxes.

No specific legislation providing for benefits and allowances for veterans has been passed by the General Assembly with reference to intangibles taxes.

17. Ops. Ind. Att'y Gen., 1945, p. —— (Jan. 20, 1945).
18. Ind. Acts, 1941. Ch. 95, p. 236, Ind. Stat. Ann. (Burns, 1943 Replacement) §64-223.
19. Ops. Ind. Att'y Gen. 1941, p. 73.
20. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-209.
21. Ind. Acts 1943, Ch. 186, p. 558, Ind. Stat. Ann. (Burns, 1943 Replacement) §64-226.
22. supra n. 2.
23. supra n. 3.

Inheritance Taxes.

An emergency act of 1945[24] provides that the inhertance tax shall not apply to the transfer of the first $25,000 of the estate of any decedent who was a member of the armed forces in World War II and who has died while so a member or shall die as the result of injuries received or diseases contracted in service within one year after termination of World War II by presidential proclamation.

Gross Income Tax.

Ch. 282 of the Acts of 1943 amended Section 10[25] of the Gross Income Tax Act to provide that members of the armed forces were exempt from the payment of the gross income tax on compensation received from the military or naval service after December 31, 1941 while in active service in the present war. With respect to other income members of the armed forces were not required to file a return or pay the tax until until six months after termination of hostilities. If a return is filed there will be no penalties or interest if not paid until the six months after the end of the war. If a member of the armed forces dies on or before six months after end of war the tax due on income from other than military compensation is wholly forgiven and waived.

The Attorney General has ruled[26] that this amendment is retroactive as to payments of the tax measured by receipts from active military service and that refunds could be claimed under the general refund provision of the gross income tax act[27] by a claim filed by the taxpayer or an authorized representative. However as to the provisions forgiving taxes on the death of the member of the armed forces the Attorney General has ruled that no refund was authorized for taxes already paid as the act does not exempt such income from taxation but only forgives the amount due. If paid it was paid in discharge of an existing liability.

In 1945[28] the General Assembly excepted from the gross income, taxable under the gross income tax act amounts, received by reason of any law of Indiana or act of Congress, as

24. Ind. Acts 1945, ch. 103, p. 225.
25. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-2610.
26. Ops. Ind. Att'y Gen. (1943) p. 162.
27. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-2614.
28. Ind. Acts 1945, ch. 143, §2, p. 319.

benefits, allotments and/or allowances by any person who has served or is now serving in the armed forces of the U.S. in World War II or any prior war and by any wife, widow or children of such persons if residents of Indiana.

INHERITANCE TAX

Very little of significance, either in legislation or in judicial or administrative interpretation of the Inheritance Tax laws has occurred since 1940.

Legislation. Previous to 1943 Sec. 8[29] of the Inheritance Tax Act made no provision for a determination that an inheritance tax was not due, without an appraisement by the county assessor or a special inheritance tax appraiser in counties of more than 400,000 population. Ch. 176 of the Acts of 1943 amended section 8 to authorize the court to examine the schedule filed by the executor and if the court is satisfied that there will be no tax payable, it may, after notice to the estate and the tax commission, enter a decree finding no inheritance tax payable. The 1943 amendment further provides that in all counties, the county assessor is to be the appraiser for the inheritance tax appraisement.

Ch. 103 of the emergency acts of 1945, effective March 2, 1945, provides a $25,000 exemption for estates of members of the armed forces who die while so a member or who shall die within one year after end of war as a result of injuries received or disease contracted in military service.

Judicial and Administrative Interpretation.

By Ch. 159 of Acts of 1937[30] it was provided that if no proceeding is taken to determine the inheritance tax on the property of any decedent within 10 years after his death it shall be conclusively presumed that no inheritance tax is due. *In re Batt's Estate*[31] decided in 1942 interpreted this provision to apply to estates of decedents who died prior to the effective date of the act. While this interpretation of a statute of limitations clause is not novel, the important point of the case is that it appears to place no duty on the executor or administrator to apply for a determination of the

29. Ind. Stat. Ann. (Burns, 1933) §6-2408.
30. Ind. Stat. Ann. (Burns, 1943 Supp.) §6-2430.
31. 220 Ind. 193, 41 N.E. (2d) 365 (1942), 139 A.L.R. 1391.

tax within the ten year period and the entire burden of collecting the tax now is on the State.

Decedent died in January 1928 in which month the administratrix was appointed. On May 27, 1938 more than 10 years after her appointment she filed a petition in the court administering the estate showing that no proceeding has ever been begun to determine the inheritance tax on the property of the decedent and seeking an order that all the property of the decedent is free and clear of any inheritance tax liability. The State demurred which was overruled and then sought the appointment of an appraiser to appraise the estate for inheritance tax purposes.

The State contended that it was the duty of the administratrix to make application to have the tax determined and that as agent of the state she is estopped from asking the relief prayed. Judge Fansler speaking for the court said that the administratrix is not agent of the state for purpose of collecting the tax and that she is not estopped from asserting the limiting statute until she has made application to have the tax fixed, otherwise the statute is a nullity. The State's contentions that the purpose of the act was to remove the lien but not destroy the tax itself and that it was not to be applied to property of decedents dying before its enactment were also rejected.

The interesting point of the case is that the decision places no duty on the administratrix or executor to have the tax determined and places it entirely upon the state. While Section 7[32] of the Act makes it the duty of executors, administrators and trustees to file a return and imposes a penalty (which the court may waive) for failing to file a return, the executor may now do nothing and the State must take the steps to have a tax determined within 10 years. If the executor has no other reason for speedy settlement of the estate, he may wait 10 years and avoid the tax unless the state takes steps to collect it.

In *Cornet v. Guedelhoefer*,[33] (1941) the Court held that the executor was in error, in absence of agreement or direction in the will, to charge the entire inheritance tax paid to the estate. The proper procedure is to deduct the tax payable by each beneficiary from his distributive share, or where

32. Ind. Stat. Ann. (Burns, 1933) §6-2407.
33. 219 Ind. 200, 37 and 36 N.E. (2d) 681 and 933 (1941).

tangible property is received to collect the tax from the beneficiary.

The Attorney General in 1943[34] made an important ruling as to the liability of the personal representative in case of transfers in contemplation of death. In the situation put to him the decedent left one heir and prior to his death he gave, in contemplation of death, sums of money to various residents and non-residents. The question was whether the administrator of the estate was liable to account for any of the transfer taxes on the transfers in contemplation of death. The attorney general ruled that unless the donee has paid the tax to the administrator he does not need to account for the tax. The attorney general, citing New York and other cases, ruled that the extent of the executor's personal liability is that imposed by bad faith or lack of diligence. He ruled therefore that the representative was not liable for payment of the tax where nothing came into his hands out of which the tax could be made. No receipt is therefore required for payment of a tax which the executor was never in a position to collect.

There is apparently therefore no way in which the State can collect the inheritance tax on inter vivos transactions falling within the scope of the inheritance tax, if the donee is a non-resident and the executor has in his hands, no additional funds to distribute to that donee.

In 1943[35] the Attorney General handed down an opinion involving the construction of the phrase "in contemplation of death" and that of "intended to take effect in possession or enjoyment at or after death." The fact situation put to him was as follows:

On September 10, 1938, A executed a warranty deed conveying to her son B a life estate, subject to a reserved life estate in the grantor, A, and gave a contingent remainder in fee to her 4 children subject to defeasance by B dying survived by a child or children in which cases the fee went to B's survivors. Grantor died December 24, 1941 and the deed was recorded on Jan. 2, 1942.

In order to determine whether the two year presumption was applicable it was necessary to determine when delivery of the deed occurred. The Attorney General ruled that the deed was presumed to have been delivered upon the date

34. Ops. Ind. Att'y Gen. (1943), p. 156.
35. Ops. Ind. Att'y Gen. (1943) p. 380.

it bears which in this case was more than two years prior to death and therefore no presumption arose that the transfer was made in contemplation of death. Since the question then depended on the evidence, no answer could be given to whether it was made in contemplation of death. The Attorney General quoted with approval the definition of the phrase "in contemplation of death" in U.S. v. Wells, 283 U.S. 102 which definition generally is followed in both Federal estate and state inheritance tax controversies.

As to the meaning of the phrase "intended to take effect in possession or enjoyment at or after death," the attorney general ruled that the great weight of authority in the states was that the reservation of a life estate postpones possession and enjoyment until death of grantor and is therefore subject to tax. The test approved is "whether the donor reserved to himself any beneficial or economic interest, or any right thereafter to otherwise dispose of any such interest." There are apparently no Indiana cases on this point.

INTANGIBLES TAX LAWS

Chapters 81,[36] 82[37] and 83[38] of the Acts of 1933 contained a comprehensive program for taxation of intangible property classifying it separately from other property and taxing it at a different and lower rate.

Chapters 82 and 83 dealt specifically with the shares of stock and deposits of financial institutions imposing a tax on the shares of stock and the deposits in the financial institutions to the owners thereof but providing that the bank or trust company may elect to pay the taxes imposed and assessed against its shares of stock or its depositors.

Chapter 81 was a general intangible tax act providing for a tax at a specified rate for the right to exercise certain privileges enumerated in Sec. 2 of the Act,[39] such as the privilege of signing, selling, transferring, receiving the income from and possessing intangibles. Sec. 1[40] of the Act contains a comprehensive definition of the intangibles includeded within the act such as the more obvious intangibles:

36. Ind. Stat. Ann. (Burns, 1943 Replacement) §§64-901 to 64-941.
37. Ind. Stat. Ann. (Burns, 1943 Replacement) §§64-822 to 64-835.
38. Ind. Stat. Ann. (Burns, 1943 Replacement) §§64-801 to 64-821.
39. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-902.
40. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-901.

promissory notes, stocks, bonds, judgments and defining the intangibles excluded from the act, among which were the intangibles taxed under Chapter 82 and 83. The act provided that the intangibles tax should be in lieu of all other taxes except estate, inheritance and gross income taxes which might be imposed upon the intangibles within the state. Prior to the passage of these acts in 1933 it was common knowledge and practice that intangibles, such as stocks and bonds, were not reported to the assessor for the general property tax and a substantial amount of property was thus escaping taxation in the state and thereby throwing a greater tax burden on chattels and real property. The purpose of the intangibles tax act was to provide means whereby the state could secure revenue from the intangibles held by citizens of the state. The General Assembly in 1935, 1937, 1939, 1943 and 1945 has amended the act, generally to lessen the rigors of the intangibles tax on certain classes of individuals and classes of intangible property. As a result of these amendments and numerous others proposed but not passed in each session of the Assembly, the 1943 General Assembly, in a concurrent resolution,[41] called for the creation of a commission to inquire whether the provisions of the intangible tax law, its administration and methods of collection were as well adapted as may be to the ends intended. The legislature directed the commission to pay particular attention to the effect of the intangible tax laws and their administration on the necessity of the negotiation and transfer of intangibles by owners thereof and on transacting of business in intangles. This concurrent resolution of the 1943 General Assembly undoubtedly reflects considerable dissatisfaction with the intangibles tax laws and their administration and may foreshadow comprehensive revision. The developments in this field since 1940 have been almost entirely in connection with the general intangible tax, Ch. 81, and only few changes have occurred in the application of the tax to financial institutions under Chapters 82 and 83.

Taxable and Non-Taxable Intangibles

Written instruments. The principal terms requiring interpretation have been those in Subsection 1(a)[42] of Ch. 81,

41. Ind. Acts 1943, Ch. 319, p. 1065.
42. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-901(a).

Acts of 1933 including in the list of intangibles subject to tax "written instruments evidencing and/or securing a debt not otherwise evidenced" and "written contracts for the payment of money" except contracts for personal services or for manufacturing or processing merchandise.

The Attorney General in an opinion in 1943[43] interpreted these terms rather narrowly and limited them by the illustrations which follow in the Act. He was asked to rule whether the intangible tax was payable by an electric company on a written agreement in the following terms.

> The electric company in a written contract with its customers agreed to furnish, erect, make and maintain at its own cost signs which were to remain the property of the electric company. The customer agreed to keep the sign for a period of 36 months and to pay a specified sum for this 36 months monthly in advance during the life of the agreement. The customer further agreed to pay a specific sum on the signing of the agreement which was an advance payment for the last three months of the agreement.

The Attorney General considered that if the intangibles tax was at all applicable it was under one or the other of the provisions quoted above. He ruled that the phrase "written instrument evidencing and/or securing the debt not otherwise evidenced," when considered in connection with the statutory illustrations that are declared to be within the class (mortgages, bills of sale, etc.), was intended to tax contracts as to the payment of debt which might very well have been evidenced by a promissory note or on contracts where goods or property are sold and part of the purchase price remains unpaid. Applying this definition to the contract in question he ruled that it was not within the class covered by the statute. He likewise ruled that, while the contract in question was a written contract for the payment of money, since here the sign remained the property of the electric company there was no sale and that the consideration for the payment in the contract was the rendering of certain personal services in connection with the erection and maintenance of the sign and that therefore the contract of the electric company was a contract for personal services and excepted under Subdivision 1(a) of the Act for the intangible tax.

Mechanics Liens. Construing the same provisions in

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43. Ops. Ind. Att'y Gen.(1943) p. 422.

1940 the attorney general ruled[44] that a mechanics lien was not a written instrument evidencing a debt as contemplated by the Act and that it was based upon an account and was a right given by statute. He construed the language "written instrument" to contemplate a written instrument signed by one to be bound by the instrument.

Loans Made by Pawnbrokers. Prior to 1940 many pawnbrokers apparently misinterpreted the law and paid no intangibles tax upon their loans. In 1940 the Attorney General ruled[45] that assuming a paper is executed by the borrower from the pawnbroker whereby the borrower agrees to repay the amount borrowed, an intangible under the definition in Section 1(a) is created. Since pawnbrokers are not of the type of finance companies such as building and loan associations, banks and trust companies specifically taxed under the financial institutions tax laws, the intangibles of pawnbrokers are taxable under the general intangible act. In view of this misunderstanding the state tax board tentatively agreed in 1941 not to attempt to collect the tax for the period prior to the Attorney General's opinion.[46]

Insurance Contracts. In situations where a policy of insurance becomes a claim and the beneficiary elects to leave the proceeds with the company under one of the options of the policy and the beneficiary retains possession of the original contract, does the law require that this policy have an intangible tax stamp affixed or is the claim for the proceeds still to be excluded as an insurance policy under Section 1*b* of the act? A further question arises if the policy becomes a claim and the beneficiary elects to leave the proceeds with the company and the company takes up the original policy and issues a supplementary contract to the beneficiary, does the law require the stamp on this contract? The attorney general considered[47] that where the beneficiary elected under the option in the insurance contract itself his election is under the terms of the original insurance contract and therefore would not be taxable because Section 1 (b) provides that life insurance policies shall not be considered intangibles. However in the situation where the insurance policy does not

44. Ops. Ind. Att'y Gen. (1940) p. 110.
45. Ops. Ind. Att'y Gen. (1940) p. 203.
46. Indiana Year Book (1941) p. 778.
47. Ops. Ind. Att'y Gen. (1941) p. 404.

provide for installment payments and the company contracts with the beneficiary to pay in installments, that is an entirely new contract in the nature of an investment contract and as such would constitute an intangible taxable under the act.

Judgments. In construing Subsection 1 (a) which includes, as taxable intangibles, "final judgments from their date of finality" the attorney general ruled[48] that a judgment setting up the value of the property rendered in a condemnation proceeding was not such a judgment as is referred to in the Intangibles Act. "Final judgment" is restricted to those final judgments which entitle the holder thereof to an ascertained and express amount of money or to designated property. In the case in question the judgment was in the nature of a judicial ascertainment of the value of the utility property which valuation is available to the municipality if action is taken within the period designated by the statute. It is not a judgment against the city for money.

While Subsection 1 (b) excludes obligations of the State of Indiana and its political subdivisions, the tax has been construed to apply to judgments on Barrett law bonds and judgments procured in the enforcement and collection of any tax exempt intangibles.[49] The legislature was excepting obligations "issued" by the state or its political subdivisions and a judgment obtained in the enforcement of those obligations is not to be considered as an obligation "issued" by the state or its political subdivisions.

In 1942 the question arose whether a written instrument evidencing a debt was to be excluded because the conditions imposed in the written instrument were such that the instrumnt had only a problematical value. In the situation in question a rural electric membership corporation had issued certificates of indebtedness in which the corporation agreed to pay subject to certain conditions.[50] The attorney

48. Ops. Ind. Att'y Gen. (1941) p. 323.
49. Ops. Ind. Att'y Gen. (1940) p. 151.
50. (1) that the corporation is not obligated to pay principal or interest unless the corporation has established and maintained reserves required by the provisions of mortgages to the U.S. government; (2) that no part of the principal or interest is payable at any time when the corporation is in default under the provisions of the mortgage; (3) that there is no obligation to pay if the board of directors believe payment would cause a default in the mortgage or reduce the reserves required by the mortgage or reduce the working capital of the corporation, all of which decisions were in the sole discretion of the board of directors.

general ruled[51] that these conditions did not go to the question whether the property was or was not covered by the act but rather to the question of the computation of the tax and the fixing of the value. He ruled that while the value is problematical the instrument does meet the requirements of the statute and that therefore the instrument is a taxable intangible.

Bank Stocks. While Section 1 (b) specifically excludes "the shares of stock in any national bank" and "the shares of stock in any bank," the Act also provides that the term "bank" shall mean any bank organized under the laws of this state or under the law of the United States. The Attorney General therefore ruled in 1942[52] that the shares of stock held by Indiana citizens in non-Indiana state banks are taxable but as to shares of stock of national banks located outside of the State of Indiana the Intangibles Tax Act does not apply. Section 548 of Title 12, U. S. Code, shows that Congress has approved the taxation of national bank stock only at the domicile of the bank.

Compensating Balances. As a result of the ruling of the attorney general in 1942[53] that "compensating balances" retained in connection with loans made by banks were taxable as intangibles to the owners of such deposit, the Assembly in 1943, Ch. 134,[54] provided that the term "intangible" should not include such compensating balances.

Accounts Receivable. The Attorney General ruled in 1944[55] that accounts receivable, evidenced by a book of accounts was not subject to the intangibles tax. He pointed out that Section 1 (a) of the act expressly covers two types of accounts—brokerage accounts and accounts arising out of transactions involving depositis or loan of money. This is some weight in concluding that the great mass of accounts receivable of merchants are not covered. The term "written instrument evidencing . . . a debt" does cover accounts

51. Ops. Ind. Att'y Gen. (1942) p. 227.
52. Ops. Ind. Att'y Gen. (1942) p. 223.
53. Ops. Ind. Att'y Gen. (1942) p. 154.
54. Ind. Stat. Ann. (Burns 1943 Replacement) 64-901(b).
55. Ops. Ind. Att'y Gen. 1944 (p. 41). The State Board of Tax Commissioners has recommended that the term "intangibles" in the definition of property covered by the act should be amended to include all intangible personal property. See Indiana Year Book (1944) p. 699. Presumably such a definition would include accounts receivable.

receivable. While accounts receivable do evidence a debt, they are not "written instruments" within meaning of Section 1(a). The examples following the term in the statute limit it to the type of written instruments. This ruling leaves a sizeable amount of intangible property in Indiana tax free.

On Whom the Tax Falls

Transactions or privileges taxed. The Supreme Count in *Zoercher v. The Indiana Associated Telephone Corporation,*[56] in 1937 held the intangibles tax to be a tax against the owners of an intangible as distinguished from the issuer although Section 2(a) of the Act of 1933 provides that the tax is on the right to "sign, execute and issue intangibles." Judge Fansler concurred on the ground that Sec. 2 provides for a tax to be paid by every person residing or domiciled in the state who signs, executies and issues an intangible but the amount of the tax to be paid by such person must be measured by such intangibles owned or controlled within the state.

In 1943 the Attorney General was called upon to further interpret Sec. 2 in considering whether the tax may be imposed upon the "issuer" of an intangible where the intangible was issued to non-residents of Indiana. In the situation put to the Attorney General a corporation organized in and domiciled in Indiana had authorized the issuance of bonds in exchange for preferred stock of the corporation had been deposited with it under a re-organization plan. The transfer agent, the trustees under the mortgage, and the property mortgaged were all located in Indiana. The mortgagor was required by the agreement to deposit annually with the trustees the amount of the intangibles tax which was due from the holders of the bonds and the trustee was required to file a report and pay the tax. Of the one hundred thousand dollars worth of bonds issued sixteen thousand three hundred dollars were to be issued to non-residents of Indiana and the question was whether these bonds were subject to the intangibles tax. It was ruled that the bonds to be issued to non-residents were not subject to the tax either under the theory of the majority in the Indiana Associated Telephone Company case or that of Judge Fansler in the concurring opinion unless such bonds had a business situs within the

56. 211 Ind. 447 (1937) 7 N.E. (2d) 282.

state.[57] The Attorney General ruled that the registering of the bonds on the books of the registrar in Indiana and mortgaging of real estate in Indiana to a trustee resident of Indiana as security for the bonds would not bring these bonds within the clause of Sec. 2 of Ch. 81 which taxed intangibles "controlled by any person and/or fiduciary and having a business situs in this state and in the possession of or under the control and/or management of any such person and/or fiduciary." This ruling raises again the question left unanswered in the Associated Telephone Company case and mentioned by Judge Fansler in his concurring opinion that the effect of the above interpretation of Section 2 is that persons signing, executing and issuing intangibles to owners or holders within Indiana are taxed and those signing, executing and issuing intangibles to owners or holders outside of the state are not taxed, resulting in a "discrimination" in favor of the latter group. Judge Fansler reserved consideration of whether this discrimination was constitutional but commented that it "may well be doubted" whether there is a reasonable basis for the discrimination.[58]

A question involving securities issued under a plan of reorganization under Ch. 10 of the Bankruptcy Act[59] was presented to the Attorney General in the light of Sec. 667 of Title 11 U.S. Code which excepts the issuance, transfer or exchange of securities or making or delivering of instruments of transfer under any reorganization plan under Ch. 10 of the Bankruptcy Act from state and U. S. stamp tax laws. The Attorney General ruled[60] that the intangibles tax could not be imposed on the securities delivered to creditors or stockholders under the plan, as that was prohibited by Sec. 667 of Title 11 U.S. Code. He said however that this section of the U.S. Code did not affect the taxability after issuance under the plan: nor does it purport to affect an excise tax which otherwise may be legally assessed. He ruled therefore that if the person to whom the instrument is issued is a resident of Indiana such person is required to pay an

57. Ops. Ind. Att'y Gen. (1943) p. 462.

58. 211 Ind. 447, 463, 7 N.E. (2d) 282, 289. See recommendation of State Board of Tax Commissioners, infra note 65.

59. 11 U.S.C. § 501 et seq.

60. Ops. Ind. Att'y Gen. (1943) p. 287.

intangibles tax on the particular security after it has been issued to him.

A question of interest to banks and insurance companies was considered by the Attorney General as to the taxability of an intangible to a mortgage loan correspondent of a number of life insurance companies who made loans in the following manner:

> When the mortgage loan correspondent makes the loan the loan and mortgage is taken payable to it and so recorded. Immediately thereafter the mortgage loan correspondent assigns the mortgage to a local bank which advances an amount equal to the principal of the mortgage to a title company in escrow and the title company disburses the amount for the bank when the title is approved. After the title's approval all mortgage papers together with an assignment were sent at the discretion of the mortgage loan correspondent to a life insurance company which paid to the bank the proceeds of the mortgage. The mortgage loan correspondent obtained a commission out of the transaction.

The Attorney General ruled[61] that Sec. 1(a) was applicable prior to the assignment and that therefore the tax for the current year in which the note and mortgage were executed must be paid by the mortgage loan correspondent. After assignment however the mortgage and notes are exempt under the provisions of Sec. 1(b) if they have been assigned to a bank or life insurance company. The Attorney General pointed out that this ruling was based on the supposition that the mortgage was recorded prior to its assignment to any bank or life insurance company.

Situs of Property Subject to Tax. The Attorney General has been called upon several times[62] to pass upon the term "actual business situs" outside of the state of Indiana in which case the intangible is not taxable to a resident owner, and the provision taxing an intangible "having a business situs in this state" when controlled by a person and/or fiduciary. The test applied in a 1941 ruling[63] is that for an intangible to have a

61. Ops. Ind. Att'y Gen. (1943) p. 123.
62. See Ops. Ind. Atty. Gen. 1940, page 203; 1941, pp. 241, 301, 395; 1944, p. 453.
63. Ops. Ind. Atty. Gen. (1941) p. 395. In 1944, the Attorney General ruled (Ops. Ind. Atty. Gen. (1944) page 453), that an Illinois corporation with its home office in Chicago but with its manufacturing plant in Indiana and its corporate ledgers kept in Indiana might be taxable in Indiana on its notes and trade acceptances taken in sales transactions from its customers.

business situs away from the owner's domicile it must be shown that possession and control of the property has been localized in some independent business or investment so that its substantial use and value primarily attach to and become an asset of the out-of-state business.

The extent of the use in an out-of-state business or investment required to exclude the property from the intangibles tax in Indiana may be seen by the Attorney General's answers to the fact situation put to him:

> (1) Would an Indiana corporation having its principal place of business within the state be liable for taxes on deposits in an out-of-state bank of a branch of the corporation operating outside of Indiana as a semi-independent unit where such deposits were composed of funds received and utilized by the out-of-state branch in its operations?
> *Answer*: No.
>
> (2) Would an Indiana corporation having its home office outside of Indiana and its principal place of business outside be liable for deposits in out-of-state banks where such deposits represented funds received and utilized as an integral part of its outside business?
> *Answer*: No.
>
> (3) Would an Indiana corporation having its principal place of business in Indiana be liable for a tax on deposits in an out-of-state bank when such deposits represent receipts of an established sales outlet from sales of commodities outside of Indiana and which deposits were periodically placed to the credit of the Indiana corporation?
>
> The Attorney General answered that these facts were insufficient to give the deposits an out-of-state situs as there was no utilization of the deposits in the out-of-state transactions and the deposits were merely for safe-keeping.
>
> (4) Would the determination of taxability of the situation in Question (3) be affected by whether or not the operating expenses were met by checks drawn against the deposits and the subsequent periodical transfers represented net receipts?
>
> The Attorney General ruled that the fact that the deposits were used in part to pay operating expenses of the out-of-state office would not necessarily affect the question so long as the deposits were under the control of the Indiana corporation and

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The intangibles generally came to its Indiana office where they were recorded in the company banks and then forwarded to an Illinois bank for collection. More than one-half of the intangibles are from Illinois customers.

The Attorney General held that the mere fact that the intangibles were not physically located in the state was not material. Insufficient facts were available to establish whether the intangibles had a business situs in the state. The company in its argument relied entirely on physical location as the test.

the checks upon the deposits were drawn by such a corporation. In such a case possession or control has not been localized in an independent business or investment away from the domicil of the owner.

(5) Would an Indiana corporation be taxable on deposits in out-of-state banks when such deposits represented funds of the corporation deposited by the home office in the out-of-state banks to be utilized by the corporation in purchasing materials and meeting out of state payrolls?

The Attorney General stated that the mere establishing of deposits in out-of-state banks upon which checks could be drawn by the home office to pay salesman or to pay for material which was bought in such out-of-state community would not be sufficient to meet the requirement that possession and control must be localized in some dependent business or investment.

(6) A foreign corporation authorized to do business in Indiana and having its offices and principal place of business including factories located within Indiana makes out-of-state deposits. Is it taxable on this deposit?

The Attorney General stated that upon the bare statements of facts presented the deposit would be taxable.

Since under the *Associated Telephone Company* case, the tax is imposed on the owner of the intangible and not on the issuer, the attorney general has ruled that it is immaterial that finance contracts for sale of good were made outside of the state, or that the contract is made to finance a purchase by a non-resident from a non-resident dealer.[64] If the finance company does business in the state and holds and controls the intangible in its Indiana office, the intangible is taxable in Indiana. Likewise the finance contract is not taxable if held outside of Indiana by a non-resident firm even though it finances sales of goods in Indiana and the conditional sales contract is entered into in Indiana.[65] At time of execution the

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64. Ops. Ind. Atty. Gen. (1940) p. 203.

65. Ops. Ind. Atty. Gen. (1941) p. 301, 241 In 1944 the State Board of Tax Commissioners recommended that the provision of the statute that excludes intangibles having an actual business situs outside of Indiana be deleted. The Board argues that if mortgages, conditional sale contracts and other forms of intagible property are actually executed within Indiana and secured by Indiana property, there is no good reason why the intangible tax should not be collected on such transactions although the instruments are kept at some business situs located outside of Indiana. See, Indiana Year Book (1944) p. 699. It is also recommended that Section 2 (Ind. Stat. Ann. § 64-902 (Burns, 1943 Replacement Volume)), defining the transactions covered by the Act, be amended to cover all transactions that take place in the State. The provision making the tax payable only by persons residing in or domiciled in the state would be eliminated by this proposal.

proper stamps must be fixed but after shipment of contract to office of non-resident, the intangibles tax stamps are not due on the contract on the anniversary date.

Exemption of Charitable Owners. Chapter 170 of the Acts of 1945, effective March 6, 1945, provides that the intangible tax shall not be imposed or collected on any intangibles after February 27, 1944 owned or held for the use and benefit of any corporation, institution, trust or association operating exclusively for religious, charitable, educational, hospital, scientific, fraternal, civic or cemetery purposes and not for private profit. Chapter 170 further sets up a procedure for refund to these institutions for any tax paid since February 27, 1944.[66] The statute provides that no interest shall be paid upon these refunds.

Computation of the Tax

Chapter 51, the Acts of 1945, an emergency act effective February 26, 1945 sets up a new method of valuing judgments subject to the intangibles tax. The act provides that except where specifically valued by the commission at its instance and upon notice and hearing no judgment or balance due upon a judgment shall be considered to be of any value whatsoever unless and until a payment is received in discharge or partial discharge. The effect of this provision is to provide that the intangible tax will generally not apply to judgments except on each payment of money on the judgment and that the value will be therefore equal only to the amount of the payment.

Administration and Enforcement

In 1943 the attorney general interpreted the intangibles tax acts to contain no effective procedure for a refund of the intangibles tax erroneously paid. The Attorney General ruled[67] that Sections 5, 6 and 7, of the Intangibles Tax Law

66. Under Regulation 16 adopted by the State Board of Tax Commissioners on June 30, 1937, intangibles held by religious, charitable, fraternal or educational organizations as owners were not taxable. This rule continued until an opinion of the attorney general on Jan. 29, 1944 (1944 Op. Ind. Att'y Gen. p. 27) stated that the board had no power to make this rule. The rule was changed and the 1945 act permits refund of taxes paid after Feb. 27, 1944.

67. Op. Ind. Att'y Gen. (1943) p. 519. The State Board of Tax Commissioners has recommended that the intangible tax act be changed so as to provide that the State Board of Tax Commissioners can order refunds for taxes erroneously paid or stamps erroneously purchased. See Indiana Year Book (1944) p. 700.

providing a procedure for fixing the valuation by the commission and providing that after payment of the tax on the value so fixed an aggrieved person had a right of appeal to the courts were the only provisions authorizing a refund in the intangible tax act and that therefore in order for the state tax board to authorize a refund under Sec. 7, the procedure prescribed in the two preceding sections must be strictly followed and a judgment rendered by a court of competent jurisdiction ordering the refund. He therefore ruled that where a charitable organization erroneously paid the intangible tax without protest there was no provision in the statute providing for refund. Since the statute as interpreted contains no provision for refund except in the very limited situation where the value of the intangible is contested the question arises whether the common law doctrine permitting recovery of payments made under duress is available to taxpayers who do not contest the value of the intangible but contest its taxability.[68] In any event taxpayers under the Intangibles Act are given no effective refund procedure as they have been in the Gross Income Tax Act.[69]

Penalties. Chapter 51 of the Act of 1945, an emengency act effective February 26, 1945, changes substantially the penalty for failing to pay the tax imposed by the act. As originally provided the penalty was equal to four times the amount of the tax and the unpaid tax and penalty should draw interest at the rate of 10%.[70] The 1945 amendment provides that the penalty for non-payment of the tax shall be 10% of the amount of the tax with interest upon the tax at a rate of 6% per year except where failure to pay was due to fraudulent intent to evade the tax, in which case the taxpayer shall pay in addition to the penalty a further penalty of four times the amount of the tax.

Recording of Instruments. The original intangible tax act of 1933 provided that no instrument securing the payment of any debt evidenced by any intangible subject to the tax

68. Cf. Board of County Commissioners v. Millikan, 207 Ind. 142, 190 N.E. 185 (1934), Culbertson v. Board of County Commissioners, 208 Ind. 22, 194 N.E. 638 (1935) suggesting §64-2819 (Burns 1943 Replacement), a very limited refund provision for property taxes, is the exclusive refund procedure and eliminates any right to the common law remedy.

69. Ind. Stat. Ann. (Burns 1943 Replacement) §64-2614.

70. Ind. Stat. Ann. (Burns 1943 Replacement) §64-916.

should be admitted to record until all the tax then due had been paid.[71] Section 3 of Chapter 51, an emergency act of 1945 amends this provision to provide that not only should the instrument securing the payment of any debt evidenced by any intangible subject to the tax not be recorded until the tax had been paid but also that any judgment defined as an intangible and any release satisfaction or assignment of such instrument or judgment should not be recorded until the tax had been paid unless satisfactory proof is made in accordance with the rules established by the commission that no tax is due upon the intangible or judgment.

The 1933 Act originally provided that no intangible subject to tax should be valid or enforceable until all taxes had been paid.[72] There was considerable uncertainty as to whether this made the instrument invalid in the sense that a subsequent payment of the tax could not restore the validity or enforceability of the instrument. In Gradeless v. Gradeless,[73] in an action on a promissory note, defendant answered the complaint in bar, pleading, inter alia, illegal consideration in that no intangible tax had been paid and that such tax with penalty was unpaid. The notes not bearing the intangible tax stamps were admitted as evidence over the defendant's objection. Both notes were executed prior to the passage of the 1933 act and were valid and existing obligations at that time. The Appellate Court held that there was no error in admitting the un-stamped notes as evidence as the act provided several methods of payment, enforcement and collection so that the absence of stamps was not prima facie proof that the tax had not been paid. The court further held that the legislature did not intend to impair the validity of existing obligations but to suspend their effectiveness until the tax was paid and that no right of action existed on an intangible until the requirements of the act are satisfied. The Appellate Court said that a document on which the tax had not been paid is not rendered for ever unenforceable and that an action on such intangible was an action prematurely brought. The court said that from the record of the case it could not ascertain whether the tax had been paid or not and that such

71. Ind. Acts, 1933 Ch. 81, §29, p. 523, Ind. Stat. Ann (Burns 1943, Replacement) §64-929.

72. Ind. Acts, 1933, Ch. 81, p. 523.

73. 114 Ind. App. 10, 49 N.E. (2d) 398 (1943).

matters go to the abatement of the action and not to the defense and that by failing to plead in abatement instead of in bar defendant waived his right to raise the question. The court concluded that if a tax was due the state, the plaintiff, would be required to pay it.

In 1943 the Assembly clarified this provision of the intangible tax by providing,[74] that a valid judgment may be rendered in any action on any such intangible if at the trial of said action it is shown that all such taxes and penalties are then paid in full.

Ch. 51, of the 1945 emergency Acts, gave further powers to the tax commission in the enforcement and collection of the taxes by providing that the commission should have powers to make rules and regulations as may be necessary for its interpretation and proper enforcement.

Financial Institutions. Chapter 83, The Acts of 1933, imposing an intangible tax on banks determined the value of deposits in any bank or trust company by deducting the amount of any public and non-resident deposits, and deposits of other banks from the total deposits in such bank.[75] Chapter 32 of the Acts of 1943,[76] the only amendment to the acts relating to financial institutions, provided an additional deduction from the total deposits by authorizing a deduction of an amount equalling the sum total of obligations of the U.S. government and its instrumentalities and of the State of Indiana and its instrumentalities and political subdivisions owned by the bank if the principal of such obligations were excepted from property taxes by any law of the U.S. or of the State of Indiana. It provided, however, that such deduction should not exceed an amount equal to 50% of the difference between the total deposits and the aggregate of public deposits, non-resident deposits and deposits of other banks.

In 1944 the Attorney General gave an opinion[77] on the

74. Ind. Acts 1943 Ch. 63, §1, p. 161, Ind. Stat. Ann. (Burns 1943 Replacement) §64-930.

75. Ind. Acts 1933 Ch. 83 §6, p. 545 as amended 1935, Ch. 298, §2, p. 1459.

76. Ind. Stat. Ann. (Burns 1943 Replacement) §64-805.

77. Op. Ind. Att'y Gen. (1944) p. 390.
The State Board of Tax Commissioners has recommended that Industrial Loan and Investment Companies be made subject to the tax. The Board points out that small loan companies pay the tax upon their loans and there is no reason why

liability of industrial loan and investment companies organized under the Indiana Industrial Loan and Investment Act for the payment of the intangible tax upon their loans. He ruled that the companies were not liable for the payment of the intangible tax upon loans made by the companies. It was pointed out that under section 18-3123 Burns, Ann. Stat. 1933 industrial loan and investment companies are to be taxed the same as banks and trust companies pursuant to Ch. 83, Acts of 1933.[78] The attorney general pointed out that it was not necessary to decide whether certificates of indebtedness issued by such institutions were to be considered deposits under Ch. 83. If they are deposits then they are taxed to the owner with the company given the option to elect to pay the tax. If they are not deposits, they are investments on which the owner would be required to place intangible stamps.[79] In either event the state would get its money. Since Ch. 83 provides that taxes imposed on banks and trust companies are in lieu of other taxes and since these industrial loan and investment companies must be taxed as banks, they are not liable for the intangible tax under Ch. 81.

GROSS INCOME TAX

The Indiana Gross Income Tax was first enacted in 1933[80] and it has been periodically amended in each session of the general Assembly since 1937.

Legislation

1941 Amendments. Subsection (p) of Section 1, of the Gross Income Tax Act, was amended to make it clear that

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companies organized under the Industrial Loan Act should not also pay the tax. This ruling, the State Board pointed out, gives a special privilege to these companies over that enjoyed by individual lenders and small loan companies who must pay the tax. See Indiana Year Book (1944) p. 699.

78. Ind. Stat. Ann. (Burns 1943 Replacement) §§64-801—64-821.

79. Cf. Erwin v. Erwin, 111 Ind. App. 448, 41 N.E. (2d) 644 (1942) stating that a certificate of deposit executed by a private bank in 1883 was not a taxable intangible under section 64-901(b) in the absence of a showing that the bank no longer existed or any other fact which might remove the instrument from the class specifically exempted by law. P filed his claim on the deposit against the administrator who answered alleging that the intangible tax had never been affixed to the instrument. Held demurrer to answer properly sustained.

80. Ind. Acts 1933, Ch. 50 p. 388.

domestic casualty and fire insurance carriers must compute and report as part of their gross income each tax year the gross earnings from the sale during that year of assets in the business conducted by such carrier.[81] These insurance carriers need consider as gross income only so much of their gross earnings as does not become or is not used to maintain a reserve or other policy liability required by the laws of Indiana. The taxable portion of the gross income according to the new amendment is to be determined by dividing the year's average of all admitted assets and multiplying the percentage figure thus obtained times the gross income. This provision presumably also applies to domestic mutual insurance companies since they are included in Sec. 1(o)[82] and by inference may be considered included in the related Sec. 1(p).

A substantial relief was given to retail merchants in 1941 by reduction from the flat levy of 1% of their gross income over $3000.00 to ½ of 1%.[83] This special rate is limited to that portion of the retail merchant's income received from "selling at retail" as defined in Section 1 (k) of the Act.[84]

The 1941 amendments abolished the ruling in *Charles Laundry and Dry Cleaning Co. v. Department of Treasury* that laundries and dry cleaning companies were taxable at 1% on the ground that they were selling service and therefore under Section 3 (g); the amendment[85] imposed a special rate of ½ of 1% for gross income received from the business of dry cleaning and laundering. However, since these establishments do not receive income derived by a "retail merchant" from "selling at retail," laundries and dry cleaners are entitled to only $1000.00 deduction under Section 5(b)[86] as compared with the $3000.00 deduction for retail merchants.

The Circuit Court of Appeals had ruled in 1940 in *Ingram-Richardson Mfg. Co. v. Department of Treasury*[87] that

81. Ind. Acts 1941, Ch. 140, Ind. Stat. Ann. (Burns 1943 Replacement) §64-2601(p).
82. Ind. Stat. Ann. (Burns 1943 Replacement) §64-2601(o).
83. Ind. Acts 1941, Ch. 140, Ind. Stat. Ann. (Burns 1943 Replacement) §64-2603(c).
84. Ind. Stat. Ann. (Burns 1943 Replacement) §64-2601(k).
85. Ind. Acts 1941, Ch. 140, Ind. Stat. Ann. (Burns 1943 Replacement) §64-2603(d).
86. Ind. Stat. Ann. (Burns 1943 Replacement) §64-2606(b).
87. (CCA 7th) 114 F. (2d) 889 1940.

servicing by enameling stove and refrigerator parts belonging to taxpayer's customers was not a sale within clause 3(a) of the 1937 Act[88] but that as title did not pass, the transaction was a bailment and therefore within the "catch-all" clause and subject to the 1% rate. In 1941 the general assembly amended the provision to include among the items taxable at ¼ of 1%, income from the business of industrial processing, enameling, plating or the servicing of goods which are to be sold by the person for whom the work is done.[89] The Supreme Court intimated in 1942 in *Oster v. Department of Treasury*[90] that this amendment was merely declaratory of the original act and it sustained a claim for refund for taxes paid from 1933 to 1935 under the 1933 act on transactions clearly under this provision of the 1941 act.

The 1941 General Assembly further clarified the Act by providing that all sales not covered by the definition of "wholesale sales" in Section 3(a) of the Act or selling "at retail" under Section 1(k) of the Act are to be defined as "retail sales."[91] The 1941 amendments specifically included receipts from outdoor poster and painting display advertising with the meaning of "display advertising" under the provision in Section 3(b) of the Act and therefore taxable at ¼ of 1%[92] Previously the gross income tax division had considered the term as including only the gross receipts derived from advertising in a newspaper, magazine or periodical.[93]

Of general interest to taxpayers is the 1941 amendment to Section 10 of the Act deleting the requirement of verification of gross income tax returns by oath.[94]

1943 Amendments. The only changes of importance enacted by the 1943 General Assembly were: a rearrangement of the provisions concerning gross income of fraternal benefit societies, order, unions, hospitals, and religious and educational institutions, deleting Section 1(q) and insertion of provision for such societies in Section 6(i) as to exemp-

88. Ind. Acts 1937, Ch. 117.
89. Ind. Acts 1941, Ch. 140, Ind. Stat. Ann. (Burns 1943 Replacement) §64-2603(a)(4).
90. 219 Ind. 313, 37 N.E. (2d) 528 (1941).
91. Ind. Acts 1941, Ch. 140, Ind. Stat. Ann. (Burns 1943 Replacement) §64-2603(g).
92. Ind. Acts 1941, Ch. 140, Ind. Stat. Ann. (Burns 1943 Replacement) §64-2603(b).
93. Gross Income Tax Regulations, Series IV, (1940), Reg. 3400.
94. Ind. Acts 1941, Ch. 22, Ind. Stat. Ann. (Burns 1943 Replacement) §64-2610(a).

tions[95]; and an amendment of Section 10 to grant certain exemptions to members of the armed forces.[96]

1945 Amendments. Chapter 143 of the Emergency Acts of 1945, effective March 5, 1945, amended Section 1(m)[97] of the Act by providing that the face amount of promissory notes on retail installment contracts except so much as represents insurance premiums or finance charges as defined in Section 1 of the Retail Installment Sales Act[98] of Indiana derived from certain enumerated types of sales shall be included in gross income and returned under the applicable classification of Section 3. It further provides that amounts received in payment of or from the sale of such promissory notes or retail installment contracts shall not be included in gross income except as that part of the receipts which represents a finance charge which shall then be included in gross income when collected. This provision makes clear that notes or retail installment contracts accepted in payment for sale of personal property are taxable as gross income at the time of the acceptance of the notes or the contracts but that amounts received subsequently in payment on such contracts are not to be included as gross income.

Section 3 classifying gross income for the rate of tax was amended by 1945 legislation[99] to tax persons purchasing and selling grain and soy beans in a capacity of a public terminal grain handler at 1% of their gross earnings which is construed to mean gross receipts from the sales of such grain and soy beans less the cost of the grain and soy beans sold during the period. The Act further provides that if the income is received from the purchase and sale of whole grain or soy beans when the U. S. Government has prescribed both a purchase price and a sales price the tax shall then be equal to 1% of the specific margin.

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95. Ind. Acts 1943, Ch. 144 §§1, 2 Ind. Stat. Ann. (Burns 1943 Replacement) §64-2606(i).
96. Ind. Acts 1943, Ch. 282, Ind. Stat. Ann. (Burns 1943 Replacement) §64-2610. For discussion of this change see supra, page 118.
97. Ind. Stat. Ann. (Burns 1943 Replacement) §64-2601(m). Previously under the Regulations conditional sales notes were not reported for taxation but payments on the notes were. Gross Income Tax Regulations, series VI (1943) Reg. 1207.
98. Ind. Acts 1935, Ch. 231, Ind. Stat. Ann. (Burns 1943 Replacement) §§58-901—58-934.
99. Ind. Acts, 1945, Ch. 310, p. 1380.

A 1945 Act[100] adds two additional exemption provisions to Section 6 of the Act. A new section 6(1) provides that certain amounts received as benefits, allotsments and allowances by members of the armed forces and their dependents are excepted from taxable gross income.[101] A new Section 6(m) exempts from the taxable gross income the amounts of retailers excise taxes imposed by the United States from the sale at retail of tangible personal property and collected by a retail merchant from the buyer as a separate item in addition to the price of the property sold and which the retail merchant remits to the taxing authority.

The 1945 Act[102] amended Section 12 as to the procedure in the case of an improper return. The new provision provides that if the department discovers that the tax has not been properly assessed it may within three years after filing of a return issue to the taxpayer a notice of proposed assessment by registered mail. If no protest is made by the taxpayer within thirty days or if after hearing, his protest and objections are denied, the department shall assess the gross income tax on the taxpayer and shall make demand for the amount of the tax and interest and penalties if any. The provision further provides that the amount shall be due within ten days from the date of mailing of the demand. The provision as to the three year statute of limitations is clarified by making clear that the statute begins to run from the last day for filing returns and not from the day on which it was filed. It provides that annual returns filed on or before the last day for filing shall be considered as having been filed on the last day. This amendment clarifies the assessment procedure as to notice and distinguishes between a notice of proposed assessment, to which the taxpayer may file objections within thirty days, and the "assessment and demand for payment" after which no further hearing is provided for the taxpayer and the amount is due within ten days.

The 1945 Act[103] amends Section 13 providing for remedies for failure to pay the tax, by adding the remedy of "proceedings supplementary" to that by garnishment. It

100. Ind. Acts, 1945, Ch. 143, p. 311.
101. See supra p. 118.
102. Ind. Acts, 1945, Ch. 143, sec. 4.
103. Ind. Acts, 1945, Ch. 143, sec. 5.

further specifies a method of levy by the sheriff on choses in action by providing that the sheriff shall serve notice of such levy upon the debtor of such taxpayer and that any payment made by the debtor to the sheriff shall constitute a discharge of the chose in action to the extent of payment. The provision assures the debtor of indemnification against claims and damages of any taxpayer for amounts so paid to the sheriff or for damages arising from such payment.

The 1945 amendments clarify the provision of suits for refund.[104] Previously, refund suits could be brought in "any court of competent jurisdiction" and the circuit or superior court of the county in which the taxpayer resides or is located was given original jurisdiction of the action to recover any amount improperly collected.[105] The 1945 amendment provides that the suit must be brought in the circuit or superior court of the county of residence or business location and if the taxpayer has no such residence or business location then in the Marion Circuit or Superior Court. This amendment makes clear the result in *Ford Motor Company v. Department of Treasury*[106] in which the United States Supreme Court held in 1945 that the previous provisions of the Act did not authorize suit in the federal courts. The 1945 amendment provides that the State consents to suit in the courts of the county of residence or business location or in the Marion Circuit or Superior Court and in no other courts and that these courts have exclusive jurisdiction.

The previous Acts have provided that it was the duty of the attorney general to represent the department and/or State of Indiana in all legal matters arising under the Act "upon the order and under the direction of the Department."[107] The 1945 amendments eliminate the quoted phrase, thus giving the attorney general complete and final power on matters of litigation enforcement, construction, application and administration of the Act.[108]

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104. Ind. Acts, 1945, Ch. 143, sec. 6.
105. Ind. Stat. Ann. (Burns 1943 Replacement) §64-2614.
106. 323 U.S. 459, 65 Sup. Ct. Rep. 347, 89 L. Ed. 372 (1945).
107. Ind. Stat. Ann. (Burns 1943 Replacement) §64-2614(c). Other provisions of the Act made it mandatory on the attorney general to act. See e.g. §64-2630 where in case a witness fails to obey a subpoena to appear before the department, the attorney general "shall" institute proceedings. A 1945 amendment provides that the attorney general "may" institute proceedings.
108. Ind. Acts 1945, Ch. 143, Sec. 6.

Of interest to taxpayers who keep their books upon an accrual basis is an amendment in 1945 to Section 18 of the Act authorizing the department to grant the taxpayer the privilege of reporting his receipts upon an accrual basis.[109]

Court Decisions

The court decisions involving the gross income tax act since 1940 have generally fallen under the following headings: the applicability of the tax to receipts from transactions involving interstate commerce; items includable within taxable gross receipts; and the applicable rate of tax.

Gross Receipts from Transactions Involving Interstate Commerce. By providing for an exemption from gross income of income derived from business conducted in commerce between Indiana and other states or foreign countries only to the extent to which Indiana is prohibited from taxing such gross income,[110] the Gross Income Tax Act has thrown into the state and federal courts the question of what income from interstate commerce transactions may be included in the taxable gross income.

The general trend in recent years has been toward requiring interstate commerce to bear a greater portion of the tax burden of supporting state governments. Since not all state taxes on interstate commerce are now considered as prohibited by the commerce clause of the U.S. Constitution, the United States Supreme Court has been forced to consider state taxes on transactions in interstate commerce on a

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109. Ind. Acts, 1945, Ch. 143, sec. 7. Previous to the passage of this amendment the Regulations provided that the taxpayer could be granted the privilege of reporting on the accrual basis. This amendment merely confirms the gross income tax division's authority for its regulation. See Gross Income Tax Regulations, Series VI, (1943) Reg. No. 901.

110. Ind. Stat. Ann. (Burns 1943 Replacement) §64-2606(a). §64-2602 provides that the tax is imposed on the receipt of gross income of all persons resident and domiciled in the state, except as otherwise provided and upon the receipt of gross income "derived from activities or business or any other source with the state of Indiana," of non-residents. The Regulations have likewise not attempted to define what receipts from business conducted in interstate commerce are taxable. Regulations, Series VI, (1943) Reg. 3900. The regulations provide that each question involving interstate commerce must be submitted to the Department and will be considered on its individual merits.

The Regulations provide that all taxpayers who are required to file gross income tax return must include thereon all receipts derived from interstate transactions and then claim deductions for the non-taxable receipts.

case to case basis. After the Indiana gross income tax was held in *J. D. Adams Mfg. Co. v. Storen*[111] in 1938 to be inapplicable to gross receipts from an interstate sale by an Indiana manufacturer, the Supreme Court in a series of cases culminating in *McGoldrick v. Berwind-White Coal Mining Co.*[112] in 1940 upheld sales[113] and use[114] taxes when imposed by the state where the product was marketed. These opinions all emphasized the question whether the transaction could be subjected to multiple taxation, although in many of them the court did not indicate why the seller state could not also impose the tax. Some writers have suggested that the results of the cases indicated that the Supreme Court was favoring taxes by the consuming state rather than those imposed by the producing state.[115] The cases involving the Indiana gross income tax on transactions involving interstate commerce will therefore be divided into consideration of the taxability of gross receipts from sales made in the Indiana market by non-resident sellers and the taxability of gross receipts from transactions by an Indiana seller in an out-of-state market.

Gross Receipts from Transactions in the Indiana Market by Non-Resident Sellers. In *Holland Furnace Co. v. Department of Treasury* the Circuit Court of Appeals (7th) held[116] in cases involving corporations qualified to do business in Indiana that receipts from the sale and installation of furnaces in Indiana, from the sale and installation of asphalt shingles and from furnishing materials for harbors and light-

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111. 304 U.S. 307 (1938).

112. 309 U.S. 33 (1940).

113. Cf. Graybar Electric Co. v. Curry, 308 U.S. 513 (1939); McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940).

114. Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); J. Bacon & Sons v. Martin, 305 U.S. 380 (1939); Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941).

115. Cf. Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909; Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617.

116. 133 F. (2d) 212, cert. denied sub nom: Holland Furance Co. v. Department of Treasury, 320 U.S. 746; Interstate Roofing Supply Co. v. Department of Treasury, 320 U.S. 746; Great Lakes Dredge & Dock Co. v. Department of Treasury, 320 U.S. 747.
In view of Ford Motor Company v. Department of Treasury, 323 U.S. 459, 65 S. Ct. 347, (1945) holding that the Circuit Court of Appeals had no jurisdiction to entertain suits for refund of Indiana gross income taxes, the question arises whether these decisions are res judicata so as to preclude suit in the state courts on the same claim for refund.

houses were taxable under the gross income tax act even though payment was to be made outside of Indiana and the materials and employees to install them were sent into Indiana for the purpose of the installation. This result seems to be in accord with the Supreme Court decisions upholding sales and use taxes by the state of the market of products, particularly in the situation where the seller is qualified to do business in the state, solicits orders for contracts in the state and performs the work and delivers the materials in the State.

In *Ford Motor Co.* v. *Department of Treasury*[117] (1944) the Circuit Court of Appeals for the Seventh Circuit upheld the gross receipts tax on transactions having on the facts even less relation with Indiana. The tax imposed on receipts from sales where car, trucks or parts were shipped direct from plaintiff's factories at Dearborn or other out-of-state plants to dealers in Indiana and (1) where products were paid for by Indiana dealers in cash on delivery to employees of the convoy companies bringing the cars into Indiana and (2) where the products were paid for by Indiana dealers with finance papers or a combination of finance papers and cash at the dealer's place of business in Indiana, payment being made to the convoy companies who in both instances delivered the receipts to the respective out-of-state branches of the Ford Motor Co. where they were there deposited in their regular depository. It did not appear that the seller was qualified to do business in the State or solicited orders in the State. The Circuit Court of Appeals affirmed the decision of the district court that the receipts were received by the plaintiff while engaged in business in Indiana and derived from sources therein.

The court distinguished the *Adams* case on the ground that the tax was on receipts of an Indiana corporation on sales outside of Indiana and that here the income was derived from sales in which all transactions excepting placing of some orders and the shipment of the goods took place in Indiana. The court emphasized that the sales were completed

117. 141 F. (2d) 24. Reversed on other grounds, Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945) see n. 116 supra. By raising the jurisdictional question in the Supreme Court for the first time, the State "won" the particular refund suit in question but left open the question whether it can tax this type of transaction.

in Indiana and that therefore the fact that merchandise arrived in Indiana in interstate commerce was immaterial. It concluded that the transaction was so identified with Indiana that the possibility of multiple taxation was eliminated. This latter conclusion would seem correct only if the United States Supreme Court compels it to be so. The state in which the receipts are received is physically able to impose a tax upon them if it so desires. Perhaps *J. D. Adams Co. v. Storen,* if followed, would hold that the selling state could not impose the tax on the gross receipts from situations similar to those involved in the Ford Motor Co. case. If so then the court correctly concluded that the possibility of multiple taxation was eliminated.

In *Department of Treasury v. International Harvester Co.,* the Supreme Court of Indiana[118] and the United States Supreme Court[119] upheld the gross income tax on receipts from the following type of transactions:

> Class C: sales by branches of International Harvester located outside of Indiana to dealers and users in Indiana where the orders were solicited in Indiana but accepted outside of Indiana, the customers took delivery of the goods at factories in Indiana, but made payments to branches outside of Indiana
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> Class E: sales by branches of International Harvester located in Indiana where the orders or contracts were accepted and payments were made to dealers and users residing in In-

118. 221 Ind. 416, 47 N.E. (2d) 150 (1943). The Indiana Supreme Court held the gross income tax could not be imposed on the Class A sales. Class A sales were sales by branches located outside of Indiana to dealers and users located in Indiana. The sales were made on orders solicited in Indiana by representatives of out-of-state branches or upon mail orders. The orders were accepted by the out-of-state branches and the money paid there. The imposition of the tax on this type of transaction was refused by the Supreme Court on the ground that it was not income "derived from sources within the State of Indiana" within the meaning of Section 2, Ch. 50, Acts of 1933. The court pointed out that the wording had been changed in 1937 (Acts of 1937, Ch. 117, sec. 2 p. 604). Perhaps the court was suggesting that the tax could be imposed on this type of transaction under the 1937 and present act (Burns 1943 Replacement §64-2602). At any event because the decision was put on a state statutory ground the decision as to this type of sale could not be taken to the U.S. Supreme Court for decision.
    If the tax can be imposed on this type of transaction it would seem that the gross income tax is co-extensive with a "use" tax. Cf. Department of Treasury v. Allied Mills, Inc., 220 Ind. 340 (1942), 42 N.E. (2d) 34, aff'd per curiam, 318 U.S. 740 (1943).

119. 322 U.S. 340 (1944).

diana, in which the goods were manufactured and shipped from points outside of Indiana to customers in Indiana pursuant to the contract.

International Harvester was qualified to do business in Indiana and had manufacturing establishments at Richmond and Fort Wayne and selling agencies at Indianapolis, Terre Haute, Fort Wayne and Evansville. The company also had manufacturing plants and sales branches in adjoining states. Each branch had an assigned territory and in some instances parts of Indiana were within the exclusive jurisdiction of branch offices which were located outside the state. It appeared that shipments to Indiana dealers or users from the out-of-state factories rather than from the factories within the state at least as to the Class E sales arose where the quantities could not be economically carried in stock within Indiana or where there was a cheaper freight rate which could be obtained from outside of Indiana.

The Supreme Court said that the fact that the sales in Class C are made by an out-of-state seller and that the contracts were made outside of the state was not controlling. Delivery of the goods in Indiana was an adequate taxable event. It further emphasized that the Class C sales were sales of Indiana goods to Indiana purchasers.

The validity of the tax on receipts from the Class E sales would seem to follow a fortiori, the court said, from *Department of Treasury v. Allied Mills*[120] where in 1942 the Indiana gross income tax act was upheld as applied to receipts from sales by a corporation qualified to do business in Indiana to resident customers in Indiana to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois.

Valid taxation of both Class C and E would seem to follow a fortiori from *McGoldrick v. Berwind-White Coal*

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120. 220 Ind. 340, 42 N.E. (2d) 34 (1942). Allied Mills, an Indiana corporation had one factory in Indiana and two in Illinois, all three of which served designated territory in Indiana. The gross income in question was derived from sales to Indiana buyers to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois.
The Indiana Supreme Court upheld the imposition of the tax and the decision was affirmed per curiam by the U.S. Supreme Court, 318 U.S. 740 (1943) citing McGoldrick v. Felt & T. Co., 309 U.S. 70 (1940) (N.Y. City sales tax) and Felt & T. Co. v. Gallegher, 306 U.S. 62 (1939) (California use tax).

Mining Co.[121] (1940) involving the constitutionality of a New York City sales tax as applied to purchases from out of state sellers. In their effect on interstate commerce there appears to be no difference between a sales tax or use tax and a gross receipts tax.

In *McCleod v. Dilworth Co.*[122] decided the same day as the *International Harvester* case, however, the majority[123] of the Supreme Court seemed to recede somewhat from the position taken in the *Berwind-White* case and held that an Arkansas sales tax was not applicable in the following situation:

> A Tennessee corporation not qualified to do business in Arkansas and not having a sales office, branch or any other place of business in that state, solicited orders for goods in Arkansas to be shipped from the Tennessee plant. The orders solicited were in a form that acceptance by the Tennessee office was required before the contracts were approved. The title passed to the Arkansas purchaser upon delivery of the goods to the carrier in Tennessee. Payment was made in Tennessee.

A majority of the Supreme Court distinguished the *Berwind-White* case pointing out that in that case the corporation maintained a sales office in New York City took its contracts in New York City and made actual delivery there. This decision seems to emphasize the law of sales in determining the taxability of the transaction under a sales tax act. If under the law of sales title passes in the buyer state the buyer state can impose a sales tax; if title passes in another state it cannot as it is then taxing an out-of-state sale. This analysis by Mr. Justice Frankfurter would seem to be directed more to "jurisdiction" to tax under due process clause than to interstate commerce clause. The court seems to imply in the *Dilworth* case that if the "sale" is completed in the state of the seller that that state can impose a sales tax. It would seem that the gross receipts tax or the sales tax by the consuming state affects interstate commerce no more if the goods come in after the sale is completed than if they come in before. The *Dilworth* case, it is believed, is a very

121. 309 U.S. 33 (1940).
122. 322 U.S. 327 (1944).
123. Opinion by Frankfurter, J. Stone, C. J. Roberts, J. Reed, J. Jackson, J. concurring. Dissenting opinion with Douglas, J. with Black, J. and Murphy, J. concurring. Rutledge, J. dissented in separate opinion.

narrow holding as far as the state of market is concerned. It is undoubtedly applicable only to "sales" tax cases and in its narrowest sense it is only a decision approving the decision of the Arkansas Supreme Court that the Arkansas "sales" tax statute is not applicable to an out-of-state sale. This distinction as to the place of making the sale is quite unimportant to states that have a use tax as the Supreme Court in *General Trading Co. v. State Tax Commission of Iowa*[124] decided on the same day as the Arkansas sales tax case and the Indiana gross income tax case, upheld the imposition of the use tax in a situation almost identical with the *Dilworth* case. The "use" tax case also casts doubt on the "multiple burden" test used by some states and courts, for the implication of the *Dilworth* case is that the state of seller can impose a sales tax if the "sale" is completed in the State, yet it is clear the state of buyer can impose a "use" tax thus subjecting the transaction to two taxes.

The important question still undecided is whether a gross income tax is so like a use tax that it can be imposed in the state of the buyer on all transactions in which the goods come to rest in the state. While the cases referred to above involving the Indiana gross income tax seem to follow logically from prior decisions of the United States Supreme Court, the emphasis in these more recent sales tax cases on the law of sales and on the number of contacts the state has with the transaction in deciding whether the buyer state may tax has important implications on the question whether Indiana can impose its gross receipts tax on transactions by an Indiana seller in an out-of-state market if the "sale" is consummated within Indiana or if sufficient elements of the transaction occur in Indiana. While a decision by the Supreme Court that the state of market may tax, does not necessarily imply that the state of origin cannot, a decision that the state of market may not impose a sales tax, implies that the state where the sale was consummated can, unless of course the court reverts to the outmoded theory that neither state can tax interstate commerce.

Gross Receipts Derived from Transactions by Indiana Sellers in the Out-of-State Market.

The touchstone of Indiana sellers in resisting the gross

124. 322 U.S. 335 (1944), Justices Jackson and Roberts dissenting.

income tax on receipts from transactions in interstate commerce has been *J. D. Adams Mfg. Co. v. Storen*[125] which held invalid the tax on receipts derived from sales in other states of goods manufactured in Indiana. The touchstone of the taxing authorities in both the buyer state and the seller state has been *Western Livestock Co. v. Bureau of Revenue*[126] in which Mr. Justice Stone stated that state taxes measured by gross receipts from interstate commerce have been and should be sustained when not involving danger of "cumulative burdens not imposed on local commerce." We will consider whether the *Adams* case has been limited or extended as the risk of a double tax burden is or is not found in the transaction.

A case of far-reaching application for sellers who sell to transportation companies even though for ultimate use by those companies outside of Indiana is *Department of Treasury v. Wood Preserving Co.* in the United States Supreme Court in 1941.[127] The facts were as follows:

> The taxpayer, a foreign corporation with its principal place of business in Pennsylvania, was qualified to do business in Indiana but had only an agent within the state. The taxpayer was engaged in the business of treating railroad ties by creosoting them and also in the business of purchasing and selling ties to those with whom it has a contract for treatment. The taxpayer itself produced no ties in Indiana. On requisition for ties by the railroad company from its out-of-state office and acceptance by the taxpayer in its out-of-state office the taxpayer then procured ties from local producers in Indiana through communications by telephone or mail from its out-of-state office. The Indiana vendors delivered the ties at loading points on the railroad in Indiana. Here an inspector for the railroad and the taxpayer's agent met and inspected the ties. On acceptance by the railroad inspector the ties were loaded on freight-cars furnished by the railroad company and were shipped with the railroad company's Chief Engineer of Maintenance at Finney, Ohio, as consignee. The taxpayer paid the Indiana producers only for ties which were thus acceptable and mailed weekly from its Ohio office invoices to the

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125. 304 U.S. 307 (1938).

126. 303 U.S. 250 (1938). In 1940 the Indiana Supreme Court upheld the gross income tax as applied to an almost identical transaction with that involved in the Western Livestock case. See Indiana Farmers Guide Publishing Co. v. Department of Treasury, 217 Ind. 627, 29 N.E. (2d) 781 (1940). The tax was imposed on receipts by an Indiana publisher from non-resident advertisers. As in the Western Livestock case, the Department of Treasury did not attempt to tax the receipts from subscriptions to the magazine by non-resident subscribers.

127. 313 U.S. 62 (1940).

railroad company office in Maryland for the ties sold and delivered to the railroad company. Payments were made to the taxpayer's Pittsburg office and were there deposited in a bank. The taxes in question were laid by the Indiana authorities on the receipts which the taxpayer derived from the sales to the railroad company of the untreated ties.

The court unanimously upheld the tax. Chief Justice Hughes in his opinion emphasized the following Indiana "dealings": receipt by the taxpayer in Indiana of the ties as purchased from local producers; sale and delivery of these ties in Indiana to the railroad company; the presence of the taxpayer in Indiana acting through its agent at the delivery point on the railroad line. The Chief Justice concluded that these were local transactions of sales and delivery of particular ties by the taxpayers to the railroad company in Indiana. He pointed out that the tax could not be escaped on these "intrastate" transactions by the taxpayer arranging to have the proceeds paid to it in another state. He likewise said that the fact that the ties thus sold and delivered were loaded on railroad cars to go to Ohio for treatment was not material. However, the out of state "dealings" were also considerable: non-resident seller and buyer; negotiations for the contract; negotiations for the purchase of ties by the taxpayer; further processing of the ties by the taxpayer in another state; office and accounting work concerning the transactions done in taxpayer's out-of-state offices; payment and deposit from the office of the out-of-state buyer to the out-of-state seller. It is difficult to see how there was any greater "burden" on interstate commerce in the *Adams* case. Chief Justice Hughes apparently considered that delivery to the buyer and completion of the sale in Indiana were the most significant factors in the entire transaction and warranted the imposition by Indiana of the tax on the gross receipts from this transaction.

This decision is of particular importance to Indiana coal producers who deliver coal to railroad companies in Indiana for use in their out-of-state yards. It may also be important to manufacturers of parts for railroad equipment where delivery is made to the railroad in Indiana and subsequently shipped by the railroad for use in its out of state yards. In this opinion by Chief Justice Hughes no mention was made of the possibility that Ohio or any other state where the ties ultimately came to rest could impose a use tax on the same transaction.[128]

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128. Cf. So. Pac. Co. v. Gallagher, 306 U.S. 167 (1939).

A case of significance for Indiana processors of products manufactured and sold in out-of-state markets is *Department of Treasury v. Ingram-Richardson Manufacturing Co.*[129] also decided by unanimous court in 1941. The facts were as follows:

> The taxpayer, an Indiana corporation with a factory at Frankfort, Indiana, manufactured enamel for fusing with metal articles. The enamel was fused with metal parts used in stoves and refrigerators manufactured by the taxpayer's customers in various states. The taxpayer's traveling salesmen solicited orders from such customers pursuant to which the taxpayer transported by its trucks the stove and refrigerator parts belonging to its customers from their plants to its own plants for enamelling. After the enamelling process was completed the taxpayer hauled the enamelled parts back to its customer's factories whereupon the customers were billed for the enamelling and remittances were made to taxpayer in Indiana by mail. The gross income tax was imposed on the receipts from this type of transaction.

Chief Justice Hughes citing the *Wood Preserving* case, supra, said that the enamelling process was an activity performed at the taxpayer's plant in Indiana and that the gross receipts therefrom were taxable by Indiana. He stated that the fact that the orders were solicited and the contracts executed outside of Indiana would not make the enamelling process other than an "intrastate transaction." He refused to pass on the question whether the taxpayer could claim a deduction for the receipts from the transportation to and from taxpayer's plant, pointing out that the taxpayer had made no claim for a refund on this part of its gross receipts and that since the state authorities had not passed on this question the Supreme Court was not called upon to decide the case. No substantial difference is perceived between an enameling process such as this and manufacturing process in *Adams* case as far as interstate commerce is concerned. Here a service was performed in Indiana for which payment was received in Indiana. There sales were made out-of-state of products manufactured in the state.

A third case of major significance is *Department of Treasury v. International Harvester Company, supra,* as to the Class D sales which were as follows:

> Sales by branches of the taxpayer located in Indiana to dealers and users residing outside of Indiana in which the customers came to Indiana

129. 313 U.S. 252 (1941).

and accepted delivery to themselves in this state. The orders or contracts were accepted and the proceeds were received by taxpayer's branches located in Indiana.

The court speaking through Mr. Justice Douglas upheld the tax on gross receipts upon these Class D sales. In his opinion he emphasized the following Indiana "dealings": sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another state; agreement to sell and deliver goods in Indiana. In this case the taxpayer argued that it would in all probability be subjected to the Illinois retailers occupation tax for some of these sales since the tax was said to be exacted from those doing a retail business in Illinois even though the orders for the sales are accepted outside of Illinois and the property is transferred in another state. The Supreme Court dodged this question by stating that "it will be time to cross that bridge when we come to it." This decision on the same day as the *Dilworth* case supra seems to support the contention that if the sale is consummated in seller state, whether by F.O.B. shipment or delivery to buyer in person, the seller state can impose the tax.

A point possibly foreshadowing an even more severe limitation on the *Adams Mfg.* case is the distinction of that case made by Justice Douglas where he said in the *International Harvester* case "nor is the problem like that of an attempted tax on the *gross proceeds* of an interstate sale by *both* the state of the buyer and the state of the seller. *Cf. J. D. Adams Mfg. Co. v. Storen.*"[130] If this statement is the view of the *Adams* case now taken by the majority[131]

130. 322 U.S. 340, 348. In McGoldrick v. Berwind-White Coal Co., 309 U.S. 33, 57, 58 Mr. Chief Justice Stone (then Mr. Justice) distinguished the Adams case by pointing out that the tax was held invalid because "the court *found* the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment." (italics supplied) Mr. Justice Stone went on to reaffirm American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919) by pointing out that if the tax in the Adams case had been conditioned upon the exercise of the taxpayer's privilege of manufacturing in the state the tax could have been measured by the sales price of the goods.

131. Including Mr. Chief Justice Stone who was with the majority in the Adams case. See Mr. Chief Justice Stone's comments on the Adams case in McGoldrick v. Berwind-White Coal Co., 309 U.S. 33, 57 (1940), supra note 130.

of the court it would appear that the *Adams* case is now authority only in the situation where on the record it appears that two states have attempted to tax the *gross proceeds* of the same "sale" and that in the absence of a showing that the same type of tax has been imposed on the same transaction the case is not an authority for restricting the seller state from imposing a tax. The *Wood Preserving* case and the *International Harvester* case limited the *Adams* case to receipts from sales in which delivery took place out of Indiana. The *Ingram-Richardson* case seems to limit the *Adams* case even further in the situation where there is no sale.

A case of no new constitutional significance but of interest in showing the extent to which Indiana may impose a tax on Indiana businesses who sell in the out-of-state market is *Department of Treasury v. Globe-Bosse-World Furniture Co.*[132] decided in 1943 by the Indiana Supreme Court. The court upheld the tax where the taxpayer manufactured furniture in Indiana for a mail-order house outside of Indiana, billed the mail-order house for the furniture; but held the furniture in the taxpayer's warehouses subject to orders of the mail-order house. On receipt of such orders in propor form the taxpayer shipped the furniture to the customers of the mail-order house both within and without Indiana. The court pointed out that there was a completed sale, delivery, transfer of title and payment in Indiana and that the mere fact that the owner subsequently chose to resell the furniture outside of Indiana would not make the transaction a sale in interstate commerce.

While these decisions of the United States Supreme Court in both the case involving the state of market and that involving the state of origin may seem confusing, the Supreme Court in *Western Livestock v. Bureau of Revenue* in 1938 served notice on taxpayers, tax-collectors and readers of the Supreme Court opinions that it was prepared to reexamine the entire question of taxing interstate commerce by intimating that it was seeking to require interstate commerce to pay its way when this can be accomplished without danger of unequal or discriminatory burders upon interstate commerce.

132. 221 Ind. 201, 46 N.E. (2d) 830 (1943).

In the absence of a showing that the tax discriminates against interstate commerce the Supreme Court seems to be prepared to uphold either a gross receipts tax, sales tax or a use tax on transactions involving interstate commerce either in the state of the market or in the state of the seller, providing a local transaction is made the taxable event and the type of tax imposed can be applied to that event.

What is a sufficiently significant local transaction? In the state of market, apparently delivery must be taken in the state, if the seller has no place of business in the state and the tax is a sales tax;[133] if a "use tax" receipt and use is sufficient.[134] Delivery of the goods plus either payment or solicitation of contract[135] or place of business[136] seems to be sufficient if the tax is a gross receipts tax although the circuit court of appeals opinion in the *Ford Motor* case if it is accepted would seem to permit a state with a gross income tax to impose the tax if the goods come to rest in the state regardless of the fact whether any other incidents of sale occur in the state.[137]

The tax has been upheld in the state of the seller where delivery was made to the buyer in the seller state and the orders and contracts were made there;[138] where the delivery was made and the contract consummated in the seller state[139] even though all the negotiations for the contract and the delivery of the products were made in the buyer state.[140] Where the tax is levied on the privilege of doing businss in the state, the seller state may measure the tax by the gross income from sales in the out-of-state market, even though the sale itself will be subjected to a sales tax in that stato

133. Compare McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70 with McLeod v. Dilworth Co., 322 U.S. 327 (1944).

134. Cf. Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941); Nelson v. Sears Roebuck & Co., 312 U.S. 359 (1941); General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944).

135. International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944) (Class C and E sales).

136. Allied Mills v. Department of Treasury, 318 U.S. 740 (1943).

137. See Ford Motor Co. v. Department of Treasury, 141 F. (2d) 24 (1944). If the Class A sales in the International Harvester case 221 Ind. 416, 419 are taxable the same result will be reached.

138. International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944) (Class D sales).

139. Department of Treasury v. Wood Preserving Co., 313 U.S. 62 (1941).

140. Department of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252 (1941).

and even though all the incidents of the sale except shipment and acceptance of orders took place out of the state of the seller.[141] These cases would seem to leave very little left of the *J.D. Adams* case, particularly in the light of the interpretation of it given by Justice Douglas in the *International Harvester* case.

A case which will further define the limits of the *Adams* case is now pending in the United States Supreme Court, is *Hewitt v. Freeman*.[142] In 1943 in that case the Indiana Supreme Court upheld the imposition of the gross income tax on the receipts from the following transaction:

> The taxpayer, a trustee, under the will and of the estate of decedent, sold during the year 1940 certain corporate stocks and bonds. The taxpayer placed the orders to sell with a broker of Richmond, Indiana, who was not a member of the New York Steck Exchange. The broker had a telegraphic wire service with a brokerage office in New York who was a member of the New York Stock exchange. The broker wired the sales orders to the New York brokerage who offered the stocks according to the sales orders on the N.Y. Stock Exchange, at the prices specified by the taxpayer. Upon acceptance of the stocks offered, by some other broker representing the purchaser, the N.Y. brokerage notified the Richmond, Indiana, broker over the telegraphic wire service who in turn notified the taxpayer of the sale. Thereupon the taxpayer delivered the stock certificates and bonds to the Richmond broker who mailed them to the N.Y. brokerage. Upon receipt the New York brokerage delivered the stock certificates and bonds to the broker representing the purchaser who in turn paid the purchase price. The N.Y. brokerage transmitted the proceeds by check less their commission, cost of revenue stamps, postage and other expenses of sale by mail to the Richmond broker who delivered the proceeds to the taxpayer less the deduction of his own broker's commission. It was stipulated that neither broker acted as principal in any of the sales and neither of them took any title in or to the stocks and bonds. It was further stipulated that

141. Aponaug Mfg. Co. v. Stone, 190 Miss. 805, 1 So. (2d) 763 (1941), affirmed per curiam, 314 U.S. 577 (1941) on authority of American Mfg. Co. v. St. Louis, 250 U.S. 459 and Department of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252 (1941) (Indiana gross income tax).

The taxpayer operated cotton mills in Mississippi and sold its cotton goods in other states, about two-thirds of which are shipped to and sold in New York City where it was said to be subject to the sales tax. The State Supreme Court upheld the tax as a privilege tax levied on the privilege of manufacturing and measured by the volume of business done as determined by "values, or gross income, or gross proceeds of sales . . ." relying on American Mfg. Co. v. St. Louis supra.

In sustaining the tax the U.S. Supreme Court cited an Indiana Gross Income tax case subsequent to the J. D. Adams case.

142. 221 Ind. 675 (1943), 51 N.E. (2d) 6.

all purchasers of these intangibles were not residents of Indiana although this was not a condition of the sale.

Judge Shake, writing for the unanimous court, upheld the gross income tax on the receipts from this transaction. He said that the situs of the securities was at the place of the taxpayer's domicil in Indiana and ownership passed to the purchaser and that the activities of the taxpayer's agent in making the sale did not change the situs of the securities or the taxpayer's domicil. He concluded that the facts disclosed a sufficient basis for imposing upon the taxpayer a tax measured by the gross income from the sales described above.

The opinion of the Indiana Supreme Court is interesting from the standpoint that the Court appeared to treat the case as if this were a property or transfer tax. Emphasis was placed on the situs of the stocks and the domicil of the taxpayer and reference was made to several United States Supreme Court decisions sustaining property or transfer taxes by the state of the domicile on owners of intangibles. Since the gross income tax is a tax on receipts from transactions it would appear that the situs of the property was immaterial and that the major question is whether the tax may be imposed on receipts from the "transaction" of this type in interstate commerce.

An appeal was taken to the United States Supreme Court and the case was argued November 8, 1944.[143] Apparently the Supreme Court was unable to reach an agreement on the case during the 1944 term and it ordered re-argument in the 1945 term.[144] On October 8, 1945, the Supreme Court directed counsel in the case to address themselves in their brief and in oral argument to three questions:[145]

"1. Were the sales of securities as made in the circumstances of this case, including the transactions on the New York Stock Exchange, interstate sales within the meaning and application of *Adams Mfg. Co. v. Storen*, 304 U.S. 307; cf. *McGoldrick v. Berwin-White Coal Mining Co.* 309 U.S. 33, 58?"

"2. Does the commerce clause forbid Indiana to levy a gross receipts tax upon the transactions in question, in the absence of any showing that a similar or substantial tax is, or may be, in fact laid upon them by any other state?"

143. Probable jurisdiction noted April 3, 1943, 12 U.S. L. Week 3324, 3326.

144. 325 U.S. ——, 89 L.Ed. 1549 (1945), 13 U.S. L. Week 3485.

145. 14 U.S. L. Week 3125. (No. 4, 1945 term).

"3. To what extent, if any, is Indiana's power to tax the gross receipts from these transactions affected, under the commerce clause, by the facts that domicil of the seller or situs of the securities prior to conclusion of the sales was in Indiana?"

These questions may indicate that the court is not certain whether the transactions involved in this case, which are isolated and not part of a regular business in dealing in securities, are comparable to the transactions involved in the *Adams Mfg. Co.* case where a corporation was regularly engaged in manufacturing and selling its products in interstate commerce. The second question to which the court asked the counsel to address itself appears to be addressed to a problem similar to that not considered in the *International Harvester* case by Mr. Justice Douglas.[146] It should be noted that Mr. Justice Douglas treated the *Adams* case as if it were a case in which a gross receipts tax upon the same sales was in fact laid by both the state of the buyer and the state of the seller. The court therefore appears to be considering the question whether a gross receipts tax is to be struck down on the mere possibility of the other state or states involved in the transaction imposing a similar tax or whether in fact the other state or states must be shown to have imposed a similar tax upon this same transaction. It is not clear from the question whether the words "similar or substantial tax" laid upon gross receipts means that the court will ignore a tax by the other state that purports to be a stamp tax, sales tax or use tax even though measured by the gross proceeds if the tax is not labeled a gross receipts tax.

The third question appears to direct counsel's attention to the fact that this is not a property or transfer tax and that the situs of the securities and domicil of the owner is immaterial unless counsel can show that these factors are significant to a commerce clause question.

This case is to be argued sometime during the 1945 term.

Since most of the cases in the United States Supreme Court have been sales or use tax cases the scope of the gross income tax and its relation to interstate commerce has not yet been defined. The following are only a few of the major questions which may require a decision:

If Indiana is the state of market:

May Indiana impose a gross receipts tax if the product pur-

146. 322 U.S. 340; 348 (1944).

chased is received in fact by an Indiana buyer and used in Indiana regardless of the fact that the seller has or has not a place of business in Indiana, is or is not a domestic corporation and has or has not a sales office in the state, or regardless of the fact that order is made on an out-of-state seller and payment made there.[147]

If Indiana is state of the seller:

May the gross receipts tax be imposed if a domestic or foreign corporation sells goods for an out-of-state delivery if the sale is made F.O.B. an Indiana point or otherwise so that sale is substantially completed to buyer in Indiana.[148].

Tax Liability of Non-Residents on income derived from sources in Indiana.

The 1940 regulations issued by the Gross Income Tax Division provided that non-resident officers of corporations located in Indiana were to be considered to have received their "income" from sources within Indiana.[149] The 1942 Regulations clarified this provision by making it clear that it is only applicable to salaries received as corporate officers.

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147. e.g. Corporation A does business in Indiana but has factories in other states, may Indiana impose the gross income tax on the following type of transactions:
   a. An Indiana buyer orders merchandise from Corporation A, which the corporation directs for its own purposes to be shipped direct to the buyer from the factory in state X.
   b. Agents of the Indiana factory solicit orders from Indiana buyers which are accepted at the Indiana factory but the goods are shipped from the factory in state X.
   c. An Indiana buyer orders merchandise from the factory in State X where the orders are accepted but are shipped from Indiana factory to the buyer. Payment is made to factory in state X.
   d. same as c except the goods are shipped from the factory in state X.
   e. same as d except agents from the factory in stato X solicit orders in Indiana from the Indiana buyer.

   Is it a material fact that the corporation is or is not a domestic corporation?
148. e.g. Corporation B with its only manufacturing plant in Indiana. May Indiana impose a gross income tax on the following transactions:
   a. Sales to buyers in State Y but priced FOB factory in Indiana?
   b. Sales to a RR Co., consigned to the RR Co. office in state Y but shipped without freight charges by the RR Co. on its own lines to its office in state Y.
   c. Sales to buyers in state Y pursuant to orders received from the buyer but accepted in Indiana by corporation B?
   d. Sales to a buyer in State Y under a total output contract in which buyer buys entire output of factory in Indiana?
   e. Same as d except the goods are held at factory subject to further order of buyer and then shipped to buyer's customers?
149. Gross Income Tax Regulations, Series IV (1940) Reg. 3603(3).

The Regulation now provides (Reg. 3603(3))[150] that non-residents who are officers of domestic corporations which maintain their principal place of business in Indiana, and non-residents who are officers of foreign corporations with their principal place of business in Indiana will be considered to have received their salaries as corporate officers from a source within Indiana. The salaries are therefore subject to tax.

So a corporation whose main office is in Indiana but whose directors and officers live in New Jersey, will be required, under this regulation to withhold the gross income tax from payments of salaries to the directors. Questions may arise as to a corporation maintaining branches in other states but with its principal place of business in Indiana, whether any salaries paid to the corporate officials may be allocated to the non-Indiana branches so that they will not be taxable in Indiana.

What Constitutes Gross Income.

In 1941 the Supreme Court overruled the *Department of Treasury v. Crowder*[151] decided in 1938 in which it said that, under the Act as it read prior to 1937, the receipt of invested capital by a final distribution to shareholders was taxable. In 1941 case of *Dept. of Treasury of Indiana v. Muessel,*[152] the Supreme Court held that the term in section 1(f) of the then Act "receipts by reason of investment of capital including . . ." should be construed, contrary to the decision in the *Crowder* case, to be limited by the word "including." It attached significance to the amendment of 1937 inserting after the word "including" "but not in limitation thereof." It would appear therefore that since the 1937 amendment return of invested capital by a distribution to the shareholders was taxable if not before 1937.[153]

Two cases in 1940 and in 1943 in the Appellate Court involved the question whether the receipts by wholesalers or manufacturers from their customers, representing the amount of state and federal liquor taxes passed on to their customers

150. Gross Income Tax Regulations, Series VI (1943) Reg. 3603(3).
151. 214 Ind. 252, 15 N.E. (2d) 89 (1938).
152. 218 Ind. 250, 32 N.E. (2d) 596 (1941).
153. See Gross Income Tax Regulations, Series VI (1943), Reg. 1505.

were receipts by the wholesaler or manufacturer or whether the receipts were obtained as agents of the state or federal government. In both cases the Appellate Court held that there was no evidence to show that the taxpayers were agents required by law or contract to collect the tax from their purchasers and that therefore the receipts represented by the tax so passed on where includable in reporting gross income.[154]

In *Dept. of Treasury v. Ice Service Inc.*[155] the Supreme Court in 1942 decided no significant point of law but the case turned on the evidence of whether the taxpayer was an agent and so received his receipts or whether he should include those receipts as income received by him.[156]

In 1941 in *Dept. of Treasury v. Jackson*,[157] the Appellate Court held that in determining the "gross earnings" of a building and loan association in liquidation it was proper to look beyond the bookkeeping entries and to consider the substance of the transaction. In this case during the process of liquidation the trustees of the building and loan association, with the approval of the Dept. of Financial Institutions, compromised many loans secured by mortgages in which the securing property had depreciated in value below the principal sum owing. Debtors had, in lieu of cash, surrendered stock which they held in the association and which the liquidating association accepted at par value in full settlement and satisfaction of the indebtedness including principal and interest. The Treasury demanded that the taxpayer pay the gross income tax on the entire amounts credited on their books to interest as a result of these transactions. During the years in question the market value of the stock averaged 63c on the dollar in 1935 and 50c in 1936. The court held that the actual value of the stocks and certificates was controlling and that there was ample evidence that no income in the form of interest on the loans was actually received by the trustees and that the crediting of part of

154. Gross Income Tax Division v. Indianapolis Brewing Co., 108 Ind. App. 259, 25 N.E. (2d) 653 (1940)); Department of Treasury v. Midwest Liquor Dealers, 113 Ind. App. 569, 48 N.E. (2d) 71 (1943), 19 Ind. L.J. 204.

155. 220 Ind. 64, 41 N.E. (2d) 201 (1942).

156. See Gross Income Tax Regulations, Series VI, (1943) Reg. 1612.

157. 110 Ind. App. 36, 37 N.E. (2d) 31 (1941).

the par value of the stock to interest was a pure book-keeping entry.

Department of Treasury v. Advance Paint Co.[158] decided by the Supreme Court in 1944 is of interest to taxpayers who accept negotiable paper in payment for their products and then assign the paper to banks under an arrangement which is in effect a loan by the bank to the company. In this case the taxpayer accepted as payment for its products its customers' negotiable promissory notes which it reported upon its gross income tax return as though cash had been received. On taking of the notes the taxpayer endorsed the notes to the bank which immediately credited the company's checking account with principal and accrued interest under an oral agreement that the company would be liable for the payment. The amount of the credits to the checking account by reason of the endorsement and delivery of these notes formed the basis of the assessment of the tax. The Treasury contended that the notes were sold to the bank and that the amounts credited were income received from the sale. The Supreme Court held that there was in fact no sale of the notes, that the transaction was simply a delivery to the bank under an agreement by which the proceeds when and if paid to the bank at maturity were to be applied to the extinguishment of the company's obligation to the bank arising out of the extention of credit upon its checking account. The court therefore held that the credit to the checking account was income arising out of receipts of borrowed money which is not taxable under Subsection (m) of Burns 64-2601.

In *Department of Treasury v. Spindler*,[159] decided by the Supreme Court in 1943 the taxpayer had paid the tax on commissions it had received for acting as agent of Sears Roebuck in sale of merchandise at retail in stores owned and operated in the state by the taxpayer. The merchandise handled for Sears was delivered to the taxpayer for sale under a written contract which provided that the merchandise was delivered "on consignment for sale . . . in the name and on the account" of Sears. The purchase price was to be deposited to the account of Sears and the contract provided that Sears was to pay a commission on the sales made. Sears paid a tax on the gross receipts on the sales of the merchandise

158. 222 Ind. 294, 53 N.E. (2d) 59 (1944).
159. 222 Ind. 53, 51 N.E. (2d) 363 (1943).

and pursuant to a provision in the contract the taxpayer reimbursed Sears for the amount of the gross income tax paid by the latter "through a reduction in net proceeds." The taxpayer contended that because of the provision in Subsection 1(m)[160] of the Act of 1937 which defines gross income to include the gross receipts from the sale of goods on consignment and that the tax should be paid by the consignee it was therefore exempt from the payment of the gross income tax upon its own income consisting of commissions. The Supreme Court rejected this contention pointing out that whether under the contract the taxpayer was bound to reimburse Sears Roebuck & Co. for its gross income taxes was immaterial and that nothing in the law showed that the legislature intended to exempt receipts received from sales commissions when the goods are consigned to them but not to exempt the income when there is no consignment; it construed the provision in Subsection (m) of Section 1 of the Act to be a convenient means of insuring the collection of the tax from income from the sale of the goods within the state by a non-resident consignor. It therefore concluded that the consignee, as the taxpayer was in this case, was chargeable with the gross income tax upon its own income from sales commissions even though under the gross income tax act and the contract with Sears it also paid a tax on the receipts from the sales themselves.

Applicable Rate of Tax.

The Gross Income Tax Act since January 1, 1942 provides for three rates of tax, ¼ of 1%, ½ of 1% and 1%.[161] In applying the rates of ¼ of 1% and 1% the source of the income determines the rate and not the occupation of the taxpayer. This is not true of the rate of ½ of 1% which was added in 1941 in which case the occupation of the taxpayer as well as the nature of the income is controlling.[162]

While indicating a desirable purpose to avoid unneccessary pyramiding of the tax, Sec. 3(a)[163] defining the whole-

160. Ind. Stat. Ann. (Burns 1943 Replacement) § 64-2601(m). See Gross Income Tax Regulations, Series VI (1943) Reg. 3404.

161. Ind. Stat. Ann. (Burns 1943 Replacement) § 64-2603. Gross Income Tax Regulations, Series VI (1943) Article 2.

162. The taxpayer must be a retail merchant. Ind. Stat. Ann. (Burns 1943 Replacement, §64-2603(c).

163. Ind. Stat. Ann. (Burns 1943 Replacement) § 64-2603(a).

sale sales to which the rate of ¼ of 1% is applicable has created perplexing problems because the definition of wholesale sales there used disregards the meaning commonly given in business usage. In commerce wholesale generally means sales of large quantities in unbroken packages or at a price less than usually charged by retailers. Sec. 3(a) disregards the price and the quantity and places the emphasis on whether the purchaser contemplates a direct and immediate resale of the tangible property in its unchanged or original form; or on whether the product is ultimately resold as a part of or as a contributing factor in a completed article; or on whether the receipts are from industrial processing of tangible property owned by another person in the business of manufacturing, assembling or constructing such product; or on whether the sales are of specifically enumerated products to certain enumerated classes of purchasers. Considerable difficulty has been experienced in applying the terms of the statute, mainly on the question whether the purchaser from the taxpayer "contemplated a direct and immediate resale" and on the term "directly consumed" in "direct production" by the purchaser in the business of producing tangible property.

In *Gross Income Tax Department v. Harbison-Walker Refractories Co.*[164] (1943) the Appellate Court had the question whether the sale of silica refractory material to steel manufacturers, who used the material for lining open-hearth furnaces devoted to the refining of steel was taxable at the rate of 1% or at the rate of ¼ of 1%. The material involved was exposed to terrific heat and its usefulness was limited frequently to a period of less than two weeks but in no case more than four to six months. The only use to which the material was devoted was that for lining the open hearth furnaces and after being exposed to the heat for the time indicated above it was completely useless. The tax division contended that the refractory material was not "consumed" within the meaning of the statute and further asserted that the material constituted "equipment" within the meaning of the fifth proviso of Sec. 3(a), and that therefore its destruction was by obsolescence, depreciation or wearing out and not by consuming. The tax division did not contend that the material was not directly used in direct production by

164. 113 Ind. App. 695, 48 N.E. (2d) 834 (1943).

the steel manufacturer but contended that it was not "consumed."

The Appellate Court ruled that in the situation involved there was "dissipation or expenditure by use" within the definition of consumed in the statute, and that if the sale did not come within the definition of the statute it was because of the requirement that it be "immediately" dissipated or expended. The Appellate Court pointed out that the tax division by its own regulations classified coal and lubricating oils as materials "immediately dissipated or expended" even though there is an appreciable lapse of time between the purchase and the consumption. The test of the term "immediate" might be both temporal and causal. The Court said that the test as to time was whether the consumption was accomplished within such convenient time as is reasonably requisite. It therefore ruled that the "consumption" here was immediate as within a reasonable time. The test as to "immediate" when considered as "causation" is whether the process of dissipation followed as a part of the act of use not after use had been completed. Here the process of dissipation was set in motion by the first step in the manufacturing process and that from thence forward its dissipation continues until it is useless for all purposes.

The Appellate Court then considered the fifth proviso of Sec. 3(a) which stated that consumption should not mean obsolescence, discarding, depreciation, damage of tools, dies and equipment. The court conceded that it might be possible to classify this material as equipment and that its disintegration might be attributed to damage or wear. Adopting the rule that tax statutes should be construed most favorable to the taxpayer it concluded that the product here involved should be considered as consumed by dissipation or expenditure and that the receipts from its sale should be taxable at ¼ of 1%.

In *Department of Treasury v. Fairmont Glass Works*[165] (1943) the Appellate Court considered whether receipts from the sale of glass bottles to persons engaged in the production of beer were receipts from a purchase in which the purchaser contemplated a direct and immediate resale. The facts of the case were as follows:

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165. 113 Ind. App. 684, 48 N.E. (2d) 841 (1943).

The taxpayer's customers, the breweries, sold the bottled beer to wholesalers for a price which included a stipulated amount which the breweries in accordance with the trade practice would refund to the wholesalers upon return of the bottles. It was stipulated that most of the wholesalers returned the bottles to taxpayer's customers an average of 17 times. The wholesalers passed the bottles on to the retailers and the retailers to the consumers, under substantially similar arrangements. The question turned on whether the breweries purchased the bottles for resale within the meaning of Sec. 3(a) or whether the brewers bought the bottles for use by themselves.

The tax division contended that the brewer did not purchase the bottles for resale and that in fact it does not sell the bottles to its customers because there is no mutual agreement between the parties and no transfer of title. The tax division further argued that the brewer's principal business is that of making and selling beer and that it refills the bottles an average of 17 times and that it makes no profit on the bottles. It was argued that this demonstrated that the brewers purchased the bottles for use and not for resale. The Appellate Court concluded that the ultimate purchasers of the bottled beverages under the arrangements mentioned universally feel that they are the owners of the bottles and can keep or dispose of them unless they choose to return them to the vendor. The court relied on a New York case involving the violation of a criminal statute prohibiting the refilling and use of certain marked containers without written consent of the person in whose name they were registered. It also relied on two federal income tax cases in which the taxpayer sought to claim deductions for depreciation on items disposed of under similar arrangements on the ground that they still owned the items. In the cases cited it was held that the transactions between manufacturer and ultimate consumer constituted a sale of the bottles and that, therefore, the criminal prosecution could not be maintained nor the depreciation claimed. The Appellate Court ruled that the taxpayer was entitled to the rate of ¼ of 1% in this case on the ground that the brewer "sold" the bottles to the ultimate consumers.

This case is of considerable importance to manufacturers of packaging materials such as milk bottles, cement bags, biscuit and cracker cans in which the purchaser passes the packaging items on to its customers under an arrangement to return them at a stated sum. It would seem also to follow that the manufacturers of other packaging materials such as paper cartons and wooden boxes, under the theory of the Appellate Court, could claim the ¼ of 1% rate either on the theory that the purchaser contemplated an immediate resale or on the theory that it was ultimately resold as a part of or as a contributing factor in the items contained therein.

A further perplexing problem was before the Appellate Court in *Department of Treasury v. Ranger-Cook, Inc.*[166] (1943) involving a trade practice in the printing trade. The facts of the case were as follows:

> The taxpayer was engaged in the business of type-setting. After receiving manuscripts the taxpayer set the type either by hand or with a typesetting machine, resulting in a single slug of type composition. After corrections the slug was delivered to the printer who used it in his presses to run off the required impressions. After its use it has no value except its salvage value as lead. The type composition was sold to the printer as a completed article, the price including the cost of materials and the labor performed.

The tax division contended that these "slugs of type" were tools and equipment and that they were not sold as a material which is directly consumed in direct production. Using Webster's definition of a "tool" as an instrument of manual operation, the Appellate Court held that these slugs did not come within the commonly understood meaning of the word "tool." This definition of the word "tool" seems to be too narrow even within the "commonly understood meaning of the word" as in modern industry large presses and dies are considered as "machine tools." It is probably true, however, that receipts from sales of machine tools such as lathes, presses, drills, etc. would be classified as receipts from the sale of equipment and would not be, therefore, entitled to the ¼ of 1% rate.

The Appellate Court in the instant case concluded that these slugs were not equipment but were more readily identifiable as material. It concluded that the taxpayer was entitled to the rate of ¼ of 1% because the slugs were consumed by use or application in the preparation of a completed article for sale.

Oster v. Department of Treasury,[167] decided by the Su-

166. 114 Ind. App. 107, 49 N.E. (2d) 548 (1943).
167. 219 Ind. 313, 37 N.E. (2d) 528 (1941).

preme Court in 1941, is clearly within the 1941 amendment inserting Sec. 3(a) (4), covering receipts from industrial processing, enamelling, plating and servicing. The facts of the case were as follows:

> The taxpayer manufactured, from cloth furnished by Hirsch Brothers of Chicago, pursuant to a contract, the cloth into ladies' coats. The question was whether the rate was applicable at 1% or ¼ of 1%.

The tax division contended that the 1% rate was applicable as the receipts in question (prior to 1941 amendment) were gross income from personal services or from the performance of contracts. The Supreme Court upheld the taxpayer's contention that the ¼ of 1% rate was applicable. The court stated that looking at the Act as a whole the lower rate was applicable to income from business activities which result in making available for use in the first instance articles, substances or commodities and that the higher rate was applicable to ultimate sales to consumers. The court stated that while *Ingram-Richardson Mfg. Co. v. Department of Treasury*, decided by the Circuit Court of Appeals of the 7th Circuit in 1940,[168] held that the servicing was not a sale so as to come within Clause 3 of the 1937 Act, the court was of the opinion that the original act, even prior to the 1941 amendment to cover the situation involved in the *Ingram-Richardson case*, showed an intent to tax the type of transaction here involved at the lower rate. The significance of this case is the intimation by the court that the *Ingram-Richardson* case was not a correct interpretation of the act prior to the 1941 amendment and that the 1941 amendment was merely declaratory of the original act.

In 1941 the attorney general ruled that a regulation of the gross income tax division which assessed subcontractors at a rate of ¼ of 1% was not legal as the income was derived from the performance of a contract. Thus both contractors and sub-contractors are taxable at the rate of 1%[169]

Exemptions

The decisions on exemptions are not of particular sig-

168. 141 F. (2d) 24 (1940).

169. Op. Ind. Atty Gen. (1941) p. 431. See Gross Income Tax Regulations, Series VI, Reg. 2502. Previous to this opinion the Gross Income Tax Division had applied the ¼ of 1% rate, Gross Income Tax Regulations, Series IV (1940) Reg. 302, 2501.

nificance as they have largely turned on the facts of a particular case.[170] Two cases in 1945, *Department of Treasury v. City of Linton*[171] and *Department of Treasury v. City of Evansville,*[172] illustrate the problem of determining when a municipal corporation or any other political subdivision of this state is engaged in private or proprietary activities or business.[173] While the two cases largely turned on the facts they appear to be an attempt on the part of the Supreme Court to consider the entire problem of taxable proprietary activities of political subdivisions. In the *City of Linton* case the question was the imposition of the tax upon revenue of the city from its sales of water, gas and electricity. The Supreme Court held that the operation of water, electric and gas utilities by the city with service to its citizens was a private proprietary activity. The court pointed out that while it is true that the police power, the power of eminent domain and the taxing power may be only exercised for public uses it does not follow that such use is not in the exercise of a private and proprietary function for other purposes. The Evansville case should be examined for a rather complete list of the different types of receipts of a municipality which are subject to the gross income tax. In that case the court held that receipts from the operation of city markets, public wharfs, leases of city land and equipment for farming and other purposes, fees from the municipal golf course, concession fees from concessions in the city park, sale and lease of park and airport land; sale of miscellaneous, obsolete or worn-out equipment; receipts from granting permits to persons desiring to cut into the city streets for utility connections; receipts from sales of gas and oil and rental of facilities at the municipal airport, receipts from the sale of lots and graves in the municipally-owned cemetery and receipts from the sale of by-products of a rendering plant

170. See e.g. Diekmann, Sheriff et al v. Evansville Producers Commission Association, 219 Ind. 636, 40 N.E. (2d) 327 (1942) involving an agricultural marketing cooperative.

171. Dept. of Treasury v. City of Linton, —— Ind. ——, 60 N.E. (2d) 948 (1945).

172. Dept. of Treasury v. City of Evansville, —— Ind. ——, 60 N.E. (2d) 952 (1945).

173. Section 1(a) of the Act (§ 64-2601(a) Burns 1943 Replacement) includes within definition of persons subject to tax, the political subdivisions of the state "engaged in private or proprietary activities."

were all taxable. Some of the property used in these activities was given to the city and some was purchased by money raised by taxation or the sale of bonds. Some of the activities had resulted in a net loss which had been paid from funds derived from taxation. The court, speaking through Judge Young, set up several tests in determining whether the receipts were from a proprietary activity. One test was whether the activity is primarily for the advantage of the state as a whole or for the special local benefit of the compact community. Another test used was whether the activity is of a business nature which is generally engaged in by private persons or corporations. Another consideration is whether the activity is in performance of a duty imposed upon the municipality by the sovereign power or is in the exercise of a permissive privilege given by the sovereign power. The court conceded that there is a great deal of confusion and lack of uniformity in the application of these rules. The court concluded in the instant case that receipts from all of the activities mentioned above were proprietary in nature and therefore taxable.

Perhaps the most significant aspect of the decision was that part, holding receipts from persons obtaining permits to cut the city streets as taxable. The court relied on tort cases which have used this concept of proprietary activity in order to hold municipalities liable for torts as a basis for its decision that the receipts from granting a permit to cut the city streets were taxable. The court also stressed that the revenue came from citizens desiring for their own personal benefit to cut the streets and pavement and since the permits were granted for this private personal purpose the receipts were of a private and proprietary activity rather than the exercise of a public or governmental function. This decision seems rather startling since the stipulated facts show that the purpose of the charge was to receive a sum sufficient to pay the cost of replacing the cut pavement in the streets. If anything is a governmental purpose as distinguished from a proprietary activity, it would seem that maintenance of the city streets is such a purpose. Since in modern society most of the utilities are placed under the streets and the only way that a citizen can have the necessary utilities is to hook onto the street connections, it is difficult to see how the granting of these permits was to satisfy a "private, personal desire" of certain individuals.

The effect of the Evansville decision, particularly as to the receipts last discussed would seem to indicate that with the exception of receipts from taxes all receipts of a municipality are now taxable under the gross income tax act. The decision of the Attorney General in 1940[174] that municipal corporations did not have to pay the gross income tax on receipts derived as fees from the operation of a sewage disposal plant and from the use of parking meters would seem to be in question in view of the Evansville decision. It could be argued with equal plausibility that the operation of the sewage disposal plants was to gratify the personal desire of certain individuals and that the receipts from use of the parking meters were receipts from the desire of individuals to park in the streets. A decision of the attorney general in 1942[175] which appears in accord with the expressed legislative policy but which conflicts with some of the tests set forth in the Evansville case is, the decision that income received from public housing authorities established pursuant to Ch. 207 of the Acts of 1937[176] were not taxable as they were receipts from the execution of an "essential and public governmental function." The attorney general placed particular reliance on the terms of the statute which declared that these authorities were exercising public and essential governmental functions.

Administration.

The most important decision in the administration of the gross income tax act is that of *Ford Motor Co. v. Department of Treasury,*[177] now confirmed by express statute[178] that the refund provisions of the gross income tax act do not authorize suit in the federal courts.

The Indiana Appellate Court in *Department of Treasury v. Reinking,*[179] in interpreting Subsection (h) of Sec 8,[180] held that the clause giving a preferred status to claims for

174. Op. Ind. Att'y Gen. (1940) p. 50.
175. Op. Ind. Att'y Gen. (1942) p. 15.
176. Ind. Stat. Ann. (Burns 1943 Supp.) § 48-8101 et seq.
177. 323 U.S. 459, 89 L.Ed. 372 (1945) See n. 116 supra.
178. See page 142 supra.
179. 109 Ind. App. 63, 32 N.E. (2d) 741 (1941).
180. Ind. Stat. Ann. (Burns 1943 Replacement) § 64-2608(h).

the gross income tax include taxes received from the debtor prior to the receivership as well as to taxes imposed subsequent to the appointment of the receiver.

The attorney general ruled in 1943[181] that the sheriff in acting under a warrant issued pursuant to Sec. 13(a)[182] of the gross income tax act may levy upon intangible items such as open accounts, judgments, rents and wages in the same manner as levy on those items may be had under the general execution laws of the state providing for sales of personal property and certain choses of action upon execution.

The 1942 Regulations (Regulations 4100 to 4110) of the Gross Income Tax Division set forth for the first time the procedure and rules for a hearing on a refund or an objection to an assessment by the division. The regulations provide that a request for a hearing must be in the nature of a petition presenting the tax matters for determination, a concise statement of the facts, a specification of the relief sought and a memorandum of legal authorities in support of the taxpayer's contentions.

The regulations provide that hearings shall be conducted in a manner combatible with usual and ordinary rules of procedure and as far as practical in an informal manner.

The regulations provide that the mailing of any notices orders and decisions with respect to any hearings under the Act shall be held sufficient serving of such orders, notices or decisions.

PROPERTY TAXES

The basic property tax structure is contained in Chapter 59 of the Acts of 1919.[183] In 1931 the inheritance tax provisions were revised.[184] In 1933 five major tax laws were added to the Indiana tax structure: the general intangibles tax,[185] taxation of banks and trust companies,[186]

181. Op. Ind. Att'y Gen. (1943) p. 743.
182. Ind. Stat. Ann. (Burns 1943 Replacement) § 64-2613(a).
183. Ind. Stat. Ann. §64-101 et seq. (Burns 1943 Replacement Volume).
184. Ind. Acts 1931, Ch. 75, Ind. Stat. Ann. §6-2401 et seq. (Burns 1933).
185. Ind. Acts 1933, Ch. 81 p. 523, Ind. Stat. Ann. §64-901 et seq. Burns 1943 Replacement).
186. Ind. Acts 1933, Ch. 83 p. 545, Ind. Stat. Ann. §64-801 et seq. (Burns 1943 Replacement).

taxation of building and loan associations,[187] the gross income tax,[188] and the act limiting levies imposed on tangible property.[189] Before 1933 and in an accelerated manner since 1933 the General Assembly has amended and changed various provisions of the property tax law of 1919. Some of these amendments have expressly repealed provisions of the 1919 act, others have been superimposed on the 1919 act without ostensibly amending that act. Many of these later changes have been interpreted and will be interpreted to have been substitutions for provisions of the 1919 act. A quick reading therefore of the Annotated Statutes will not necessarily reveal the omissions and changes that have been made in the 1919 act. Even comparing the laws of each session of the Assembly against the basic 1919 law cannot with certainty show that a section of the 1919 act has or has not been changed or superceded.[190] Many of the changes which have not specifically repealed provisions of the 1919 act are in fact inconsistent with the provisions of the original act and will undoubtedly be interpreted to repeal the older provisions. The material that follows will consider some of these problems resulting from amendments to the property tax structure since 1940.

Assessment Procedure and Problems

Basis And Rate of Assessment. Prior to 1943, Section 64-103 (Burns 1943 Replacement), the general provisions of the property tax act as to basis and rate of assessment, provided that all property should be assessed and valued at "true cash value" and it was provided that the rate should be "equal". An amendment in 1943[191] set up three require-

187. Ind. Acts 1933, Ch. 82, p. 541, Ind. Stat. Ann. §64-822 et seq. (Burns 1943 Replacement).
188. Ind. Acts 1933, Ch. 50, p. 388, Ind. Stat. Ann. §64-2601 et seq.
189. Ind. Acts 1933, Ch. 120, p. 727, repealed by Acts of 1937, Ch. 119, page 646, Ind. Stat. Ann. §64-307 et seq.
190. Compare, for example, Acts of 1933, Ch. 81, 731, p. 523, Ind. Stat. Ann. §64-931 (Burns 1943 Replacement) providing that the intangible tax shall be in lieu of all other taxes with, Acts of 1919, Ch. 59, §63, Ind. Stat. Ann. §64-603 (Burns 1943 Replacement) requiring intangibles to be listed for personal property taxation. This latter provision was not expressly repealed by Ch. 81 of Acts of 1933. See Op. Atty. Gen. (1944) p. 41. See discussion infra page 178. See also discussion of 1941 Tax Sale Act, 224, Acts of 1941, infra page 201.
191. Ind. Acts 1943, Ch. 111 §1, p. 353.

ments by providing that property should be assessed and valued:

> (1) At a rate which is uniform and equal, (2) on a just valuation basis and (3) at the true cash value as determined by cost price; book value; the earning capacity of such property; replacement cost; depreciation, if any, and all other facts and circumstances giving information concerning value as of the first day of March of the assessment year.[192]

While the amendment to Section 64-103 (Burns 1943 Replacement) expresses the general policy of assessment for all property it is not completely in accord with other sections of the tax act relating to assessment of particular kinds of property. As indicated above all property under this act is to be assessed at a "true cash value" as determined by certain factors. Section 64-601 (Burns 1943 Replacement), relating to personal property, also amended in 1943[193] does not mention "true cash value" but speaks only of a "just, uniform and equal valuation" as determined by certain factors, which are the same as those in Section 64-103 except that "replacement cost" is not specifically included as a factor in the assessment of personal property while it is a factor to be considered in Section 64-103.

Section 64-1009 (Burns 1943 Replacement), on the other hand, dealing with assessment of real property unlike Sections 64-103 and 64-601 has not been amended since 1919[194] and this section requires assessment of real property at "full true cash value" as determined by market price. But Section 64-1019b (Burns 1943 Replacement) inserted in 1937[195]

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192. In the report of the State Board of Tax Commissioners for 1944, the Board recommended that the date of assessment of real and personal property be changed from March 1 to January 1. One of the reasons assigned for this recommendation was that individuals and corporations engaged in business make their inventories and computations for federal net income and state gross income taxes on the calendar year basis and it would, therefore, be advantageous to such corporations and individuals if they could use their annual inventories and their annual sale sheets in listing their property for taxes. See Indiana Year Book, (1944) p. 696.

193. Ind. Acts 1943, Ch. 111 §2, p. 353.

194. Ind. Acts 1919, Ch. 59 §142, p. 198.

195. Ind. Acts 1937, Ch. 19 §3, p. 58. While §3 of Ch. 19 is part of an act providing for a reassessment procedure, it is not in its terms limited to reassessments. Thus it provides that all property shall be assessed at a "just valuation" and directs all

as a part of an act concerning reassessment procedure provides for a basis of reassessment of real property, when ordered, different from any of the sections mentioned above. Like Section 64-601 (Burns 1943 Replacement) as to the original assessment of personal property it requires "just valuation" but the elements in determining the just valuation are different from the general provision in Section 64-103 and the specific provisions as to the original assessment of personal property under section 64-601 or the provision as to original assessment of real property in Section 64-1009. Thus if a reassessment is ordered under Section 64-1019 different factors can be considered than are considered in an original assessment of the same property.

There has been no general assessment of real property since 1932 and this apparent lack of consistency in basis of assessment is probably due to the fact that the general assembly has amended only sections applicable to current problems—annual assessment of personal property and reassessment of real property. It would seem probable that the general provision in Section 64-103 as amended in 1943, has in effect modified the provision as to the original assessment of real property in Section 64-1009 or its reassessment under Section 64-1019b.

The Attorney General ruled in 1943[196] that in determining valuation of liquors owned by wholesaler or retailer on March 1 of the year of assessment, the amount of the Federal and State excise taxes paid prior to purchase should not be deducted from the cost in making an assessment. He pointed out that nothing in the above sections appeared to admit such taxes as a deductible item. This ruling would appear to be applicable to assessment of all property in which an excise tax is included in the cost and has been passed on to the taxpayer even as a separate item except perhaps where the taxpayer is legally the collection agent of the State or the United States.

Section 64-103 further provides that all property within

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officials whose duty it is to "assess or review assessments" of property to take certain factors into consideration insofar as they shall be applicable. It is arguable, therefore that §3, Ch. 19, Acts of 1937, §64-1019b, (Burns 1943 Replacement) repealed §142, Ch. 59, Acts of 1919 (§64-1009, Burns 1943 Replacement) and has itself been modified by §1 of Ch. 111, Acts of 1943 (§64-103, Burns 1943 Replacement).

196. Ops. Ind. Atty. Gen. (1943) p. 486.

the jurisdiction of the state not expressly exempted shall be subject to taxation. A problem has arisen with respect to personal property of individuals living on U. S. government owned property in government houses and who work for the U. S. government. The Attorney General ruled in opinions in 1945[197] and 1943[198] with reference to the Wabash Ordinance Works at Newport and certain war housing projects that the question turns on whether the property had been so ceded to the United States under 40 USC §255 and Section 62-1001 (Burns 1943 Replacement) that the property had passed "out of the jurisdiction of the state". In the two cases in question he ruled that the United State government had not given notice as required by the Federal statutes and that therefore jurisdiction had not been ceded and that personal property of the individuals residing on the government land was within the jurisdiction of the state and subject to tax.[199]

Assessment Procedure. Valuation by the assessor and person reporting the tax. As indicated above, Section 64-601 was amended in 1943 to provide that the owner of personal property shall fix what he deems a "just value" instead of "true cash value" for the guidance of the assessor who shall determine the just valuation for taxation of each item after examination. The 1943 amendment directs the assesor to be governed by what is a "just, uniform, and equal valuation." The term "market or usual selling price" was deleted as a factor in determining such values by the 1943 amendment and "cost price," "book value" and "depreciation" may now be considered.

The tax form for reporting property was amended in 1943[200] by providing an additional interrogatory to those described in Section 64-602 which should be answered by the person reporting the tax. This new interrogatory requires

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197. Ops. Ind. Atty. Gen. (1945) p. —— (March 1, 1945).

198. Ops. Ind. Atty. Gen. (1943) p. 609.

199. Assessors might, however, be faced with certain practical difficulties in obtaining access to the U.S. Government reservations. If so the personal property might be assessed as omitted property §§64-1025, 64-1103, 64-1201, 64-1402, 64-2102) and placed on the tax duplicate in this manner. Additional difficulties might be faced in enforcing the tax. Quaere could a personal action for collection of the tax be brought in the Federal Courts. See Ops. Atty. Gen. (1944) p. 313 and see discussion infra p. 198.

200. Ind. Acts. 1943, Ch. 275 §1, p. 777.

information with respect to members of his household in the armed forces.

Assessors. Chapter 291 of the Acts of 1943[201] authorized employment by the township assessors of deputies and clerks and fixed their compensation. It was also provided in 1943 for additional compensation for the township trustee while performing the duty of township assessor of townships of 5,000 population or less in amount as determined by the advisory board of township and to be paid from the township fund.[202] A 1945 amendment[203] extended this provision for additional compensation for the township trustee while acting as assessor until 1947 but provided that the amount of compensation was to be determined by the Board of County Commissioners and paid out of county funds.

A 1943 amendment [204] makes it the duty of the township assessor to make a list of veterans which shall be filed with the county auditor and made available to local chapters of certain national veterans organizations and to state and county historical societies. It is made unlawful for the county officials to furnish this list to anyone else and for the veterans organizations to give the list to other persons or associations.

Rules As To Assessment of Property: As to Quantity. Chapter 91 of Acts of 1941[205] added real estate occupied by public drainage ditches to the list of rights of way such as railways, highways, and levees which are not to be assessed against the adjacent property holder. The 1941 act further transferred the duty of making a survey, in case disagreement between the land owner and the assessor as to the

201. Ind. Stat. Ann. §64-1005b (Burns 1943 Replacement).

202. Ind. Acts 1943, Ch. 157, p. 468, Ind. Stat. Ann. § 64-1031 (Burns 1943 Replacement). Section 2 of the Act provided that it was to expire at midnight on March 31, 1945.

Section 64-1003 and § 64-1006 control compensations of assessors in townships of larger populations. The latter section classifies salaries as to population of the township, the former as to population and the assessed valuation of the township. The attorney general has ruled that the population requirement controls unless the township has an assessed valuation that meets the requirement in § 64-1003 in which case the assessed valuation classification controls. See Ops. Ind. Atty. Gen. (1943) p. 546, 582.

203. Ind. Acts 1945 Ch. 266 p. 1199.

204. Ind. Acts 1943 Ch. 276 p. 778, Ind. Stat. Ann. §64-1023 (Burns 1943 Replacement).

205. Ind. Stat. Ann. §64-1010 (Burns 1943 Replacement).

quantity of the right of way, from the property holder to the assessor and county surveyor and provides that the costs of the survey are to be paid by the county rather than the tax payer as formerly. The Attorney General has ruled that the duty to make the additional deductions is on the assessor.[206] Since no general reassessment has been had since 1932 the question arose under what conditions should deductions for this additional class of rights of way be made. The Attorney General has further stated that the provision as to the duty of the assessors apply only when reassessments are ordered except as to the categories of rights of way which were added since the 1932 assessment.[207] A form[208] has been prescribed by the State Board to enable property owners to take advantage of the deductions permitted by the 1941 amendment.

As to Kinds of Property. Leaseholds. Section 64-513 (Burns 1943 Replacement) provides that when exempt real estate is leased to a tax payer whose property is not exempt the "leasehold estate and the appurtenances shall be listed" as property of the lessee as real estate. Since the rules for assessment of omitted property are different for real estate and personal property, the question sometimes arises whether the property to be taxed is real estate or personal property. The question arose in 1941 when the Marion County Board of Review sought to assess as omitted personal property the value of improvements made by the Indianapolis Coliseum Corporation, under a ten year lease with option to renew, to the coliseum owned by the State Board of Agriculture. The Attorney General ruled that these improvements constituted real property and that the property of the corporation must be placed on the tax duplicate as real estate under Section 64-513. The Attorney General said the valuation is the value of the leasehold interest, although the value of the improvements may be considered in arriving at the value of the leasehold.[209]

Intangibles. In 1933 the Assembly provided for a specific method of taxing intangibles and provided that the tax there

206. Ops. Ind. Atty. Gen. (1941) p. 400.
207. Ops. Ind. Atty. Gen. (1942) p. 41.
208. Form 91, Indiana State Board of Tax Commissioners.
209. Ops. Ind. Atty. Gen. (1941) p. 170; Ops. Ind. Atty. Gen. (1942) p. 63.

imposed was to be in lieu of all other taxes.[210] At the same time, however, the Assembly did not specifically repeal from the 1919 property tax law, provisions requiring the listing intangibles under the personal property tax.[211] The 1933 Intangibles Tax Law defines intangibles in Section 64-901(a) and expressly excludes in Section 64-901(b) certain types of property from the intangibles tax. Although the State Board of Tax Commissioners beginning in 1933 omitted from the form for the schedules of personal property to be reported by taxpayers all provisions in the schedules for listing intangibles it was not completely clear that "intangibles" excluded from taxation under the Intangibles Tax Law were not thereby subject to taxation under the general provisions dealing with all personal property.[212]

In 1944 the Attorney General was asked to rule whether accounts receivable were taxable under the Intangibles Tax Law and if not, whether they were subject to assessment and taxation as personal property. As indicated elsewhere, the Attorney General ruled they were not taxable under the Intangibles Tax Law.[213] He, therefore, came to the question whether accounts receivable were taxable under the property tax laws. Section 63 of Chapter 59 of the Acts of 1919 (Burns 64-603) provides that all taxpayers are to make a list of their credits due among which are listed "bonds, notes, mortgages, accounts, demands" and "claims." In 1921 the Assembly without purporting to amend this section provided that accounts due or to become due and other forms of intangibles enumerated therein were to be considered as credits and reportable for taxation by the taxpayer.[214] It was further provided in the 1921 act that bona fide indebtedness could be

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210. Ind. Acts, 1933, Ch. 81 §31 p. 523.

211. Ind. Acts, 1919 Ch. 59 §63 p. 198, Ind. Stat. Ann. §64-603 (Burns 1943 Replacement).

212. See e.g. § 64-104 (Burns 1943 Replacement) providing that all property of any nature or kind except that defined as real estate "shall be deemed personal property" and shall be listed and taxed as such; § 64-103 providing all property "not expressly exempted shall be subject to taxation". Section 31 of the Intangibles Tax Law § 64-931 (Burns 1943 Replacement) provides that the tax there "imposed shall be in lieu of all other taxes" imposed upon intangibles by any law, except gross income and inheritance taxes.

213. Ops. Ind. Atty. Gen. (1944) p. 41, See page 127 supra.

214. Ind. Acts 1921, Ch. 260, p. 771; Ind. Stat. Ann. §14-103 (Burns 1926).

deducted from the credits listed. By Section 40 of The Intangibles, Tax Law, this 1921 act was expressly repealed but Section 63 of the 1919 act was not repealed. The situation facing the Attorney General was thus as follows: The 1919 act, not expressly amended by the 1921 act nor expressly repealed by the Intangibles Tax Law of 1933, probably included accounts receivable within its terms as subject to taxation; the 1921 act, expressly repealed by the Intangibles Tax Law of 1933 clearly included accounts receivable as taxable personal property. The Attorney General ruled that the 1921 act must have been intended as a substitution for the 1919 act and that the provisions in the 1919 act providing for the scheduling and taxation of intangible personal property were repealed by the 1921 act. He therefore ruled that the repeal of the 1921 act by the 1933 act left no provision in the property tax laws for taxing credits. As a persuasive aid in this construction the Attorney General relied on the administrative interpretation of the State Board of Tax Commissioners who since 1933 have made no provisions for listing intangibles on the personal property tax form.

Section 4[215] of the Property Tax Law provides that all property of any nature or kind other than that described as real property shall be deemed personal property and shall be listed and taxed as such. Relying on *State Board of Tax Commissioners v. Holliday*,[216] the Attorney General ruled that since this general provisions was not self-executory and since the statute provided no methods for taxing intangible property, intangible property was not taxable under this section of the general property tax act. This ruling, confirming as it does the administrative practices since 1933, should make it clear that intangibles not subject to the Intangibles Tax Law are not thereby made taxable under the property tax laws.[217]

Reassessment Procedure. An emergency act of 1945 removed a weakness in the power of the State Board of Tax Commissioners to order a reassessment which had appeared as a result of chapter 291 of the Acts of 1943. The Attorney

215. Ind. Acts 1919, Ch. 59, Ind. Stat. Ann. §64-104 (Burns 1943 Replacement).

216. 150 Ind. 216, 49 N.E. 14, 42 L.R.A. 826 (1898).

217. See note 55 supra for a recommendation of the State Board of Tax Commissioners to clarify the coverage of the Intangibles Tax Law.

General had ruled [218] that while under Section 64-1019a the expenses of a reassessment were to borne by the county and that an appropriation was not necessary, chapter 291 of the Acts of 1943[219] authorizing employment of deputy assessors and clerks by the township assessors, provided that the salary and per diems were to be fixed by the county council. It was ruled that this power was in the county council, and that if they failed to fix the per diems for a reassessment, the state board could do nothing about it except that the individual assessor performing the duty could make claim for compensation and compel payment for the services. Under this ruling if the county in which a reassessment had been ordered refused to fix the per diems and salaries of deputy assessors and clerks, the reassessment could not take place as the state board could not find any one willing to perform the duties when the only method of payment was a law suit against the county.[220]

The 1945 Act [221] which does not purport to amend the 1943 act, authorizes the appointment of deputy and assistant township assessors and makes it obligatory upon the county council to make the necessary appropriations to enable the township assessors to secure qualified deputies in the event of a general reassessment of real estate in such county.

A further defect in the power of the state board was corrected in 1943 by an amendment authorizing the state board to approve petitions for extending the session of the County Board of Review.[222] This weakness was seen in a decision of the Indiana Appellate Court in 1945, *McCreery v. Ijams* [223] in which previous to this amendment, the state board had ordered a reassessment and then ordered the county board to adjourn and reconvene after completion of the reassessment. The court held that the order of adjournment by the state board was void and that therefore the assessment by the county board of review was invalid. Thus,

218. Ops. Ind. Att'y Gen. (1943) p. 261.
219. Ind. Stat. Ann. §64-1005b (Burns 1943 Replacement).
220. This weakness was illustrated at one time in the refusal of the County Council of Marion County to appropriate funds necessary for carrying out a reassessment ordered by the State Board of Tax Commissioners. See Indiana Year Book (1944) p. 697.
221. Ind. Acts 1945, Ch. 187, p. 577.
222. Ind. Acts 1943 Ch. 103, p. 331, Ind. Stat. Ann. §64-1205 (Burns 1943 Replacement).
223. —— Ind. App. ——, 59 N.E. (2d) 133 (1945).

previous to the 1943 amendment, if the ordered reassessment could not be completed during the regular session of the county board of review there was no provision for convening the county board of review to equalize the reassessment.

Assessment of Omitted Property. Prior to 1943, the township assessor's power to assess omitted property was limited to the time "prior to the filing of his return with the county auditor."[224] A 1943 amendment[225] eliminated the quoted phrase thus giving the township assessor power to assess omitted property at any time.

County Board of Review. Section 64-1201 (Burns 1943 Replacement) establishing the County Board of Review of assessments and defining its powers was amended in 1943 to provide that it should assess according to "uniform and just values" rather than according to "true cash value," thus making the section in accord with Sections 64-103 and 64-601 also amended in 1943 as to the basis of assessment.[226] The time of meeting provided for the County Board of Review was amended, to correspond to the 1943 amendment to the powers of the state board, authorizing the county board to petition for an extension of time.[227] However, the 1943 amendment limited the power of the county board to review assessments on complaint of taxpayers to complaints by owners of "personal property" instead of owners of "property and taxables" under the former section.[228]

The Attorney General ruled in 1942[229] that under section 64-1201 the County Board of Review has power to make original assessments of any property omitted on the asssessment list.

State Board of Tax Commissionrs. While the powers of the County Board of Review were changed in 1943, as indicated above[230] to correspond to other changes in the tax act making a "just, equitable and uniform valuation" the basis of assessment rather than "true cash value," the powers

224. Ind. Acts 1919, Ch. 59 §156 p. 198.
225. Ind. Acts 1943, Ch. 159 p. 476, Ind. Stat. Ann. §64-1025 (Burns 1943 Replacement).
226. Ind. Acts 1943, Ch. 103, p. 311, Ind. Stat. Ann. §§64-1201, 64-1205 (Burns 1943 Replacement).
227. See n. 222 supra.
228. Ind. Stat. Ann. §64-1201 (Burns 1943 Replacement).
229. Ops. Ind. Atty. Gen. (1942) p. 63.
230. See pages 182, 173 supra.

of the state board were not so changed. Thus in Section 64-1303 (Burns 1943 Replacement) the state board is directed to assess all property[231] at its "true cash value" and in 64-1313 it is prohibited from reducing the assessed valuation below "true cash value." This omission, if omission it was, is not too significant however as the factors to be considered in arriving at a true cash value under 64-103 are approximately the same as those to be considered in arriving at a "just value" under the other sections of the Act.

Correction of Errors in Assessment. An amendment in 1941 made substantial changes in the powers of the State Board of Tax Commissioners to correct erroneous assessments.[232] Previous to the 1941 amendment the state board was empowered at any time prior to the first Monday in November of the year following the assessment[233] to correct any assessments upon application if it should appear that the taxpayer was wrongfully charged with the taxes. The state board was given power to issue orders of refund and direct concellation of unpaid taxes erroneously charged.

The 1941 amendment restricted the power of the state board to the situation where the assessment complained of was made by the assessor or County Board of Review without notice to the taxpayer and without opportunity for the taxpayer to be heard.[234] It further provided that no assessment is to be considered wrongful unless the taxpayer after being notified of the assessment filed a petition for re-hearing or appeal on the assessment. An amendment in 1943[235] made

231. Under the present law the state board assesses telephone companies, railroads, sleeping car companies, pullman companies and other utilities and transportation companies. See Burns Ann. Stat. §§64-1303, 64-703, 64-748. No power is at present given to the board to assess airplane companies and the board has recommended that it be given that power and also power to tax transportation companies that operate motor vehicles the same as other public utility companies are assessed. See Indiana Year Book (1944) p. 698. For recent development in power of the states to tax interstate airlines, see Northwest Airlines v. Minnesota, 322 U.S. 292 (1944); 57 Harv. L. Rev. 1097 (1944).

232. Ind. Acts 1941, Ch. 224 §1 p. 714, Ind. Stat. Ann. §64-1407 (Burns 1943 Replacement).

233. The Attorney General has ruled that this phrase does not refer to the year of the assessment but to the first Monday in November of the year subsequent to the year in which the assessment is made. See Ops. Atty. Gen. (1943) p. 254.

234. See Ops. Atty. Gen. (1943) p. 310.

235. Ind. Acts 1943, Ch. 241 p. 681. Ind. Stat. Ann. §64-1407 (Burns 1943 Replacement).

further substantial changes, this time adding to the power of the state board to correct assessments in certain specifically enumerated situations.[236] The amendment provided that upon petition which has been approved by the county auditor, county treasurer and assessor filed "at any time" with the state board by an affected taxpayer, the state board may correct assessments or order cancellation if the assessed improvements have been destroyed by disaster or removed from the real estate by the first day of March of the year in which the petition was filed.[237] The 1943 amendment further provides that where identical property has been assessed in more than one county the state board may determine which county is entitled to charge the taxes and the Board may direct the county not entitled to the tax to refund it. A further provision of the 1943 act authorizes the state board to cancel taxes against real estate acquired by any county, township, city, or town. The 1941 amendments had limited this provision to land acquired by the county.

Previous to the 1941 act the state board under its previous general power cancelled back taxes on land purchased by any goverument agencies.. The 1941 and 1943 acts limit

236. In this act of 1943 the state board was empowered, until the first day of May, 1943, (that act became effective on March 10, 1943) to cancel taxes delinquent prior to December 1, 1941 where in the opinion of the state board it would be advantageous to the taxing unit to have the accumulated delinquency cancelled either in whole or in part. The Attorney General in 1945 ruled that under this authority the state board did not have power to condition the cancellation ordered on payment within 90 days of the balance of all taxes that at date of payment are unpaid. The Attorney General thereupon held the order of cancellation valid with this condition deleted. See Ops. Ind. Atty Gen. (1945) p. —— (April 5, 1945).
The State Board of Tax Commissioners has recommended that § 64-1407 be further amended to continue some procedure similar to the 1943 act for the cancellation of delinquent taxes in extreme cases. The board pointed out that the limitation in the 1945 act did not give them adequate time to consider properly the large number of petitions presented. The reasons assigned for requesting such authority were that there are many situations where delinquent taxes have accumulated on property in an amount greater than the sale value thereof and for the purpose of the taxing unit it would be advantageous to cancel the same in whole or in part. See Indiana Year Book (1944) p. 698.

237. The state board has pointed out that the local taxing authorities have the knowledge necessary to intelligently pass on this matter and it recommends that this section be amended so as to handle the matter there and thereby decrease the burden of the state board. See Indiana Year Book (1944), p. 698.

this power and exclude cancellations of taxes on property acquired by state and federal government agencies.[238]

Previous to the 1941 amendment, the state board had power to order refunds when it cancelled taxes erroneously assessed but which had been paid. As a result of the 1941 and 1943 amendments this power to order refunds is now available only in the situation where the property has been taxed in more than one county. Presumably, however, the taxpayer who obtains an order of the state board correcting an assessment may obtain a refund with little difficulty under the refund provisions in Section 64-2819 (Burns 1943 Replacement) by applying to the Board of County Commissioners.

Property Exempt From Taxation

With the exception of exemptions specifically applicable to the members of the armed forces and veterans[239] there has been little development in the area of property exempt from property taxes. The 1944 report of the State Tax Board, however, has recommended that Section 64-201 (Burns 1943 Replacement) be completely re-written in order to clarify the meaning of such terms as "owned and used or occupied exclusively," or "owned and actually occupied" by the exempt institution.[240] In the near future the legislature may clarify the exemption provisions as the judicial decisions are in considerable confusion as to the meaning of these and other terms.

The first exemption enumerated in Section 64-201, that as to property of the United States and the State of Indiana, was changed substantially in 1945 because of changing conceptions of tax immunity of instrumentalities of government.[241]

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238. See Ops. Ind. Atty. Gen. (1944) p. 9 ruling the state board does not have power to cancel the taxes on real estate acquired by one of the state colleges.

239. See p. 115 supra.

240. See Indiana Year Book (1944) p. 700. See Ops. Ind. Atty. Gen. (1944) pp. 123, 262, 272 for discussion of the authorities on various types of exemption. Particular reference was given to various lodges and hospitals. In 1943 the Atty. General ruled that neither local officials nor the state board could agree with property owners to exempt their property when used for a governmental or charitable purpose. See Ops. Ind. Atty. Gen. (1943) p. 310.

241. Also to clarify the tax status of manufacturing plants and real estate of the Defense Plant Corporation, operated by private manufacturers.

The 1945 amendment[242] provides that property of the State of Indiana is exempt but that property of the United States, its agencies and instrumentalities are exempt to the extent that the State is prohibited by law from taxing it. The amendment provides, further, that any right, title, interest, lien, claim, or leasehold held in or on such property of the United States shall be taxed to the extent not prohibited by the Constitution. The 1945 amendments provide that if the United States shall provide for payment of money in lieu of taxes upon property exempt, such payment shall be to and settled by the State Board of Tax Commissioners who are given full power and authority to make agreements, appraisements, and other necessary acts to ascertain the amount due. Power is also given to the State Board to distribute the money so received to appropriate governmental taxing units.[243]

Mortgage Indebtedness. There have been several important rulings interpreting the mortgage deduction under Section 64-209 (Burns 1943 Replacement). If mortgaged property is held by the entireties the Attorney General has ruled that the wife may take a $500 exemption on the property and the husband may take a $1,000 exemption on other property held by him alone.[244] The Attorney General pointed out that to hold otherwise would deprive the wife of her right to claim an exemption on property of which she is as much the owner as the husband. The Attorney General has also ruled[245] that only one deduction is allowed on any one mortgage and that therefore only one $1,000 deduction is permitted where there are two separate pieces of property covered by the same mortgage but owned by the husband and wife separately. This ruling may not be completely in accord with the theory of the ruling as to property held by the entirety and the act itself. In the ruling on property held by the entirety the emphasis is on the fact that the property held by entirety is a separate entity. The act allows only a total of $1,000 in deductions even though several mortgaged pieces of property are held by the person claiming

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242. Ind. Acts 1945, Ch. 33.
243. See Indiana Year Book (1944) pp. 703-708 for list of U.S. government property leased to private corporations, the assessed valuation thereof and amounts paid to Indiana taxing units in lieu of taxes by Federal Public Housing Authority.
244. Ops. Ind. Atty. Gen. (1942) p. 28.
245. Ops. Ind. Atty. Gen. (1941) p. 75.

the exemption. This provision seems to imply therefore that the exemption is personal. If so the fact that one mortgage covers two pieces of property held by two separate individuals should not prevent each individual from claiming his "personal" exemption under that one mortgage.

The Attorney General has also ruled[246] that a lessee in possession under a 99 year lease is not entitled to file a claim for a mortgage deduction on the ground that the leasehold interest is not "real estate" in the terms of the statute.

Chapter 186 of the Acts of 1943[247] provide that any blind person, owning real estate used exclusively for his residence who does not receive any income from the property in question, and whose total net income is not in excess of the exemption under the normal Federal Income Tax Act may have a $1,000 deduction from the assessed value of his real estate so used as a residence.

Special Assessments

In 1945 the General Assembly provided for the creation of a commission to make a survey of the laws concerning assessments for public improvements.[248] The act creating the commission provides that the commission is to survey all the laws of the state concerning the assessments for public improvements, the issuance of bonds therefor, the methods of accounting for the funds derived from such assessments, and the payment of such bonds.

The most important judicial development in the field of special assessments occurred in 1943 in *Board of Wells County v. Falk.*[249] Prior to that time it had been thought that In-

246. Ops. Ind. Atty. Gen. (1943) p. 468.

247. Ind. Stat. Ann. §64-226 (Burns 1943 Replacement).

248. Ind. Acts 1945, Ch. 345. Other legislative developments have been of a minor nature as far as tax matters are concerned. See e.g.: *1941*: Chapter 481 (§48-4401, Burns 1943 Replacement) (duties of cities and towns relative to the collection of Barrett Law Assessments fall on certain specified officers); Chapter 173 §§ 27-139 and 27-140, (Burns 1943 Supplement) (transfer of unexpended balances in ditch fund to general fund; date of expiration of liens for assessments for drainage ditches); Chapter 165 (§ 27-203, Burns 1943 Supplement) (drainage ditches). *1945*: Chapter 221 (amendments to drainage ditch law); Chapter 309 (construction of sewers in platted additions outside corporate limits of cities of first class).

249. 221 Ind. 376, 47 N.E. (2d) 320 145 A. L. R. 1190, (1943), 42 Mich. L. Rev. 177 (1943). Other decisions and opinions of lesser importance were: City of Hammond v. Melville, 114 Ind. App. 602, 52 N.E. (2d) 845, (1944) (city is liable to Barrett law bondholder

diana required notice and hearing to property owners to validate additional assessments against their property when such additional assessments were made in accordance with the original valuation of accrued benefit to their lands. In the *Wells County* case plaintiff Falk brought action against the Board of Commissioners to quiet his title to land and to enjoin enforcement of supplemental drainage assessments upon his property. The plaintiff contended that the statute creating drainage districts violated due process of law in that it authorized supplemental assessments for repair without the same notice and hearing which was required before the original assessment could be made. In the case in question the original drainage assessment had been made in 1918. In 1937 the surveyor was notified that the drain was out of repair and after inspection he gave notice of letting a contract for repair. After the drain had been repaired the cost of repair was assessed against the lands originally assessed for the construction of the drain in the same proportion as used in the original assessment. The Supreme Court expressly overruled *Harmon v. Bolley* (1918)[250] in so far as it was inconsistent with the opinion with the case at bar. The court held that the lower court was in error in permitting evidence that the plaintiff's land was not benefitted by the repair. The legislature has provided means to determine that the land included in the district benefitted by the construction of the drain. Once having complied with this procedure and the determination of the lands benefitted having been made neither notice nor hearing of proceedings to repair is required. This decision of the Indiana Supreme Court reversing *Harmon v. Bolley* is clearly in accord with the general rule and removes the uncertainty as to the Indiana requirement for notice and hearing.

In *Mee v. Lafayette Loan and Trust Company*[251] the In-

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for assessments collected but erroneously applied to other bond series even though bondholder is also proceeding by foreclosure against the property); Ops. Ind. Atty. Gen. (1945) p. —— (No. 59, June 28, 1945) (certificates of indebtedness issued to holders of Barrett law bonds by cities which have become liable for payment need not be advertised and sold at public auction under Ch. 178 of Acts of 1943 (§§61-413, 61-419) (Burns 1943 Replacement); Ops. Ind. Atty. Gen. (1945) p. —— (No. 60, July 6, 1945) (ruling as to applicability of any statute of limitations on actions against city to recover amount of cities liability on Barrett law bonds).

250. 187 Ind. 511, 120 N.E. 33 (1918).

251. 112 Ind. App. 38, 41 N.E. (2d) 684 (1942).

diana Appellate Court held that the landowner's written statutory waiver of irregularities and illegalities of a special assessment filed in order to qualify for the election to pay in ten installments, not only bound the land owner personally but likewise established the assessments as liens against the tract covered by the assessment. It was therefore ruled that the waiver was binding on the land owners grantee and that the grantee could not set up in defense that the board of trustees exceeded its authority in levying on the land in question for the construction of a sewer.

In 1940 in *Hankins v. State ex rel Miller*[252] the taxpayer sought to mandate a board of trustees of a town to compel them to file a list or roll of all owners of property affected by the vacation of certain parts of certain streets. The Court pointed out that the complaint fails to show a necessity for making an assessment roll or any harm to the complainant by reason of such failure. The court held therefore that injunctive relief could not be obtained against irregularities in assessments or in the making of the assessment roll, nor would mandamus lie where the statute has provided another adequate remedy by appeal. The court said that this action of mandamus constituted a collateral attack upon the action of the board of trustees and does not lie to correct errors which do not affect the jurisdiction of the board. Here the board gave notice as required by law and the attack was upon one of the procedural steps taken by the board after notice.

In *Rosenbloom v. Hutchins*[253] the Supreme Court held that school fund property, after purchase by the Auditor for the benefit of the school fund, when sold, is sold free and clear of the Barrett law liens. The Court held that Section 48-4406 (Burns 1943 Supplement) provides that in the event of delinquency of school fund mortgages and sale by the county auditor, the sale shall be for an amount sufficient to pay the Barrett law lien and that in the event the auditor purchases the property for the benefit of the school fund the lien shall be paid out of the school fund. The court therefore held that if the sale does not bring enough to pay both the school fund lien and the Barrett law lien the county is charged with the deficiency in the school fund. In the action considered, brought by a Barrett law lien holder to foreclose his lien, the

252. 217 Ind. 225, 27 N.E. (2d) 365 (1940).
253. 222 Ind. 590, 55 N.E. (2d) 315 (1944).

court affirmed judgment in favor of the purchaser of the school land from the county auditor and gave judgment to the lien holder against the county commissioners for the amount of his lien.

DETERMINING TAX RATE

General. While assessment principles and procedure are generally involved in most questions of property taxation in which a lawyer is called, the assessment—that is, the determination of the value of the taxable property in the taxing district, is only the first step in determining the amount of tax that a taxpayer has to pay. The budget and the levy based on the assessed valuation are also sources of conflict between taxpayer and tax collector.

After the State Board of Tax Commissioners has completed its assessments, equalization, and review of assessments on petition of aggrieved taxpayers, it reports its actions to the various county auditors[254] who then apportion the amount of the assessed valuation of the taxable property that goes to each taxing unit and notifies the taxing unit.[255] The proper local officials of each taxing unit then make tax levies authorized by law within certain restrictions and report the same to the county auditor prior to the second Monday in September.[256] On receipt of the proposed tax levy by the county auditor from the taxing unit the County Board of Tax Adjustment meets on the second Monday of September to consider the budgets and the proposed levy.[257] The County Board of Tax Adjustment completes its work prior to the first of October. Either the municipal corporation whose budget has been reduced by the county board or ten or more aggrieved taxpayers may appeal to the state board[258] on or before the 15th of October. The state board holds hearings and completes its action on the proposed tax levy by the 30th of November.[259]

254. Ind. Acts, 1919, Ch. 59 §196, Ind. Stat. Ann. §64-1328 (Burns 1943 Replacement).

255. Ind. Acts, 1919, Ch. 59 §197, Ind. Stat. Ann. §64-311 (Burns 1943 Replacement).

256. Ind. Acts, 1937, Ch. 119, §5, Ind. Stat. Ann. §64-311 (Burns 1943 Replacement).

257. Ind. Acts, 1937, Ch. 119, Ind. Stat. Ann. §§64-310, 64-311 (Burns 1943 Replacement).

258. Ind. Acts, 1937, Ch. 119 §8, Ind. Stat. Ann. §64-314 (Burns 1943 Replacement).

259. Ind. Acts, 1937, Ch. 119, §8, Ind. Stat. Ann. §64-314 (Burns 1943 Replacement).

Then the county officials record on the tax duplicate the amount of tax which becomes due and payable on January 1st.

Budget, Levy and Appropriation

Limitations on Levy. There are certain statutory limitations on the rates which the various taxing units can levy on each one hundred dollars of property.[260] In addition to this limitation most taxing units are units operating under specifically delegated authority and from time to time the General Assembly authorizes the imposition of an additional levy by such unit for a particular purpose such as the maintenance of public parks and acquisition of fire-fighting equipment.[261]

In 1943[262] the Attorney General was asked to rule on the legality of an act of a city in expending public funds for the purpose of constructing a building to be owned by the city and then rented by the city to a particular manufacturing firm at an attractive rental to be used for manufacturing purposes. The Attorney General pointed out that Sec. 48-1407 (Burns 1943 Replacement) defines the powers of the common

260. E.g.: state tax rate, § 64-307 (Burns 1943 Replacement); cities of first class, Acts of 1941, Ch. 213, Ind. Stat. Ann. § 48-6728 et. seq. (Burns 1943 Supp.); towns, Acts of 1941, Ch. 176, Ind. Stat. Ann. §48-6806 (Burns 1943 Supp.); other municipal corporations, Section 64-309 (Burns 1943 Replacement); school taxing districts, Ch. 39, Acts of 1945.

If the rate prescribed by statute is inadequate, the County Tax Adjustment Board can recommend a higher rate to the State Board of Tax Commissioners, § 64-311 (Burns 1943 Replacement); the limitation on rate is not applicable to rates required by municipal corporations to meet certain enumerated purposes, § 64-312 (Burns 1943 Replacement).

261. E.g.: the General Assembly in 1945 authorized the following levies: Ch. 169 amendment to act authorizing levy for township fire-fighting equipment); Ch. 127 (levy by cities of fourth and fifth class and towns and school townships for recreation centers); Ch. 52 (amendment to act levying tax for state forestry fund); Ch. 40 (amendment to act authorizing levy for public libraries); Ch. 114 (authorizing certain counties to levy a tax for public aid to colleges located in county); Ch. 190 §7½ (special tax for aviation purposes).

262. Ops. Ind. Atty. Gen. (1943) p. 325. The Attorney General has made several rulings interpreting power of particular taxing units to appropriate money or levy a tax for a particular purpose: Ops. Ind. Atty. Gen. (1940) p. 103 (township levies for park purposes); Ops. Ind. Atty. Gen. (1941) p. 376 (repair of bridges by counties); Ops. Ind. Atty. Gen. (1942) p. 253 (appropriation of funds to defend a law suit); Ops. Ind. Atty. Gen. (1943) p. 419 (appropriations for kindergartens); Ops. Ind. Atty. Gen. (1943) (repair of a county owned ferry).

council of cities. In the absence of statutory delegation to the common council the city has no power or authority to construct this kind of a building or to expend its public funds derived from taxes for such a purpose.

In *Pavey v. Pavey*[263] the Supreme Court in 1942 considered one of the various statutory provisions making it mandatory to levy a tax for a particular purpose. The suit involved the police pension fund of South Bend. The act in question required the city to levy a tax to make up any deficiency in the fund and the question turned on what revenue should be taken into consideration before it is determined that a tax must be levied to make up the deficiency. The Court ruled that proceeds from the sale of capital assets such as securities should not be included in determining the amount available for current expenses but that the policy of the law was to keep the invested funds intact. The City Council contended that the suit should be dismissed because the 1942 ordinance levying taxes had already been passed. The Supreme Court ruled that the question was not moot as the obligation of the city to levy a tax cannot be avoided by a mere failure to levy in any particular year.

Bond Procedure. In *Murray v. State ex rel. King*,[264] the Supreme Court in 1942 passed on the procedure involved in issuing bonds under an emergency. The facts of the case were as follows:

> A fire had destroyed the airport facilities at the St. Joseph airfield owned and operated by the county. The Board of Commissioners and the county council determined that an extraordinary emergency existed requiring improvements at the airfield and the county council appropriated $215,000 and by ordinance authorized the issuance of bonds in that amount, which issue after hearing was approved by the State Board of Tax Commissioners. At the meeting of the county council a petition filed by more than fifty taxpayers was presented requesting the bond issue in accordance with Sec. 64-313. The council in its ordinance inserted a clause to the effect that in the event of a remonstrance against the issuance of the bonds being filed then no further steps would be taken toward issuing the bonds until the council shall have determined the sufficiency of the remonstrance. Without waiting for the council's conclusion as to the sufficiency of the remonstrance the relator brought this action to compel the county auditor to issue the bonds.

The court held that under the circumstances of this case

263. 220 Ind. 276, 41 N.E. (2d) 622 (1942).
264. 220 Ind. 323, 42 N.E. (2d) 1019 (1942).

there was no occasion for the compliance with any of the provisions of Ch. 119 of the Acts of 1937 as to the issuance of bonds, as Section 6[265] of that Act expressly exempts bonds issued to meet an emergency growing out of fire, war or other disaster. The court further pointed out that if the proceedings for this issuance of bonds are not based on the emergency clause but are based solely upon a taxpayer's petition the only duty of the county council is to determine whether the bonds shall be issued and that it is the duty of the auditor to determine the sufficiency of the remonstrance, not the county council.

The important point of the case is that the 1937 Act as to fixing tax rates and levies and the procedure prescribed therein is held not to be applicable to all bond issues by municipal corporations. The court stated that the procedure in the Act does not apply to tax levies for the kinds of obligations specifically exempted in clauses a, b, c and e of Sec. 6. The court stated that the procedure set up in Sec. 7[266] of the Act is not applicable to that type of obligation.

Budget And Levy Procedure

Budget Making. An opinion of the Attorney General in 1945[267] requires strict compliance with a notice issued pursuant to the law calling a meeting of the county council to make an appropriation. The notice called for a meeting at 10:00 a.m. on a specified day. Several days previously the members of the council agreed informally to meet at 7:30 p.m. The Attorney General ruled that the appropriating ordinance passed at 7:30 p.m. was invalid as the purpose of the budget statute was to procure a hearing for the taxpayers at which they would be advised of the purposes for which the funds were to be expended and if the county council can change the time of meeting in this manner the door would be open to fraud on the taxpayers and the general public.

Power of County Commissioners and County Council. In two rulings in 1943[268] the Attorney General interpreted the power of the county commissioners and the county council in

265. Ind. Stat. Ann. §64-312 (Burns 1943 Replacement).
266. Ind. Stat. Ann. §64-313 (Burns 1943 Replacement).
267. Ops. Ind. Atty. Gen. (1945) p. —— (Mar. 19, 1945).
268. Ops. Ind. Atty. Gen. (1943) pp. 512, 543.

relation to budget making. In these opinions the Attorney General ruled:

1. That the Board of County Commissioners has power to revise the budget estimates of a county official before it becomes a part of the published budget in order to eliminate proposed expenditures for departments which have not been approved by the board, and which according to statute must be approved by the board.

2. If county officials in submitting their budget exceed statutory limitations or omit mandatory items the county commissioners have the right and duty to revise such estimates before the budget is published.

3. Increases or additional appropriations after the publication of the budget by the County Council must be made in conformity with the provisions of the budget law. Therefore, the County Council can not by ¾ vote or otherwise increase any published item and make appropriations for any items that are in excess of the amounts ordered in the budget.

4. The requirements and provisions of the budget law regulato and control steps and procedures to be followed by the Common Council of the city, the Board of Trustees of the town, the Advisory Board of the township or any other appropriating body of any taxing unit in the matter of making appropriations of greater amounts than those stated or in making appropriations for items that have been omitted from the published budget.

The Attorney General in 1945[269] interpreted the power of the County Council to cancel, reduce or change appropriations as follows:

1. Section 26-507 (Burns 1933) does not give specific authority to the county council to cancel or annul in whole or in part an appropriation previously made by such county council.

The ruling continued that *Crouse v. Lehman*[270] indicated that a change in appropriation could not be done by resolution and the language of the opinion indicated that the court doubted that it could be done by an ordinance repealing the previous appropriation.

2. The county council is not authorized to transfer funds specifically appropriated for one purpose in order to be used for another.

3. The county council does not have authority to provide a limit on the use of the appropriation as to the quantity or number of items to be purchased or to specify a maximum or minimum price. Burns 26-536 gives to the Board of County Commissioners the exclusive power to purchase materials or supplies.

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269. Ops. Ind. Atty. Gen. (1945) p. —— (January 10, 1945).

270. 170 Ind. 408, 83 N.E. 714, 84 N.E. 769 (1908).

In 1943 the Attorney General ruled[271] that if a law passed at the previous session of the legislature authorizing an appropriation or a tax levy had not been published and was therefore not yet effective, the county council had no power to include an appropriation for such an item in its budget. He ruled that the procedure required by Burns 64-1331 must be strictly followed.

Power of County Board of Adjustments and State Board of Tax Commissioners. In 1941 and 1942 the Attorney General made rulings as to the power of the County Tax Adjustment Board or State Board of Tax Commissioners to reduce an appropriation below the amount contracted for between a school board and a teacher. With reference to the contract made by the board of school commissioners of Indianapolis, the Attorney General pointed out[272] that the County Tax Adjustment Board and the State Board of Tax Commissioners had no control over the salaries which are fixed by law and that therefore these boards had no control over contracts where the salary does not exceed the minimum salary as required by law. This lack of control also extended to contracts renewed under Burns 28-4521 and also teacher tenure contracts unless the salary was increased. Where the contracts are made in excess of the minimum wage law or where renewals and tenure contracts are made with a salary increase above that of the previous year, the Attorney General ruled that since the school city of Indianapolis is operating under a special law the county and state tax adjustment boards had no control over the salaries of the teachers if the contract was binding. In the second opinion the Attorney General pointed out[273] that a contract by the township trustees to be valid must be made on the basis of a prior appropriation. He pointed out, however, that there was no similar provision affecting school towns or school cities. He ruled that the appropriation by the township advisory board is sufficient to meet the requirements of a prior appropriation for a legal contract and if the contract is executed after this appropriation but prior to the act of the county or state board on the appropriation, the county or state board can not make a reduction of these legal contracts.

271. Ops. Ind. Atty. Gen. (1943) p. 497.
272. Ops. Ind. Atty. Gen. (1941) p. 379.
273. Ops. Ind. Atty. Gen. (1942) p. 131.

The Attorney General ruled in 1943[274] that ten or more tax payers under Section 64-1331 (Burns 1943 Replacement) did not have a right of appeal to the state tax board from the action of the county council upon the budget of the County Welfare Department. He pointed out that under Section 64-316 (Burns 1943 Replacement) the budget of the County Department of Public Welfare is expressly excluded from the provisions of the tax limitation law and therefore there is no right of appeal except as provided in the provisions of the Public Welfare Act in Sections 52-1304 and 52-1308 (Burns 1943 Supplement). As a result of this ruling it was provided in Ch. 5, Acts of 1945 that the County Tax Adjustment Board had authority to review the budget of the County Welfare Department and that the right of taxpayers to appeal the budget and the tax rate of this department should be in the same manner as provided for all other budgets and tax rates of municipal corporations.

In this same opinion the Attorney General ruled that Section 64-314 providing for an appeal to the State Tax Board immediately following the action taken by the County Board of Tax Adjustments had repealed and superceded Section 64-1331 authorizing an appeal immediately upon completion of the action of the County Council. Under this ruling ten or more taxpayers may now appeal on or before the 15th day of October to the State Tax Board rather than on or before the 1st Monday of September under Section 64-1331.

Conclusiveness of Determination by State Tax Board. Section 64-1331 provides that the decision of the State Board of Tax Commissioners upon additional appropriations over and above the budget shall be "final and conclusive". In 1944 the question arose whether this provision meant that no question could be raised concerning any irregularities or illegalities in the proceedings of the local appropriation unit seeking to make the additional appropriation. The Attorney General ruled[275] that this determination of the state board was final and conclusive only on two questions: (a) as to the existence of the emergency for such additional appropriations and (b) the amount of such appropriation. He therefore ruled that the validity of the proceedings of the common council of a

274. Ops. Ind. Atty. Gen. (1943) p. 553; Ops. Ind. Atty. Gen. (1942) p. 233.

275. Ops. Ind. Atty. Gen. (1944) p. 191.

city, or the advisory board of a township, or the board of trustees of a town, or the county council authorized to make additional appropriations could be challenged even though the State Board of Tax Commissioners had approved the additional appropriation.

COLLECTION AND ENFORCEMENT OF THE PROPERTY TAX AND TAXPAYERS REMEDIES

Grouped in this section are the various statutory provisions tending to coerce payment of the tax as well as provisions giving the state a remedy in cases on non-payment. The customary method of enforcing property taxes is the sale of property for the delinquent taxes. The tax sale procedure of Indiana was substantially amended in 1941 and is considered at length in the latter part of this section. Other methods of securing payment are considered first.

Payment of Taxes Prerequisite to Obtaining Licenses. Prior to 1941 it was a prerequisite to obtaining the various licenses under Title 42 (Burns Ann. Stat.) that the applicant submit evidence of payment of his poll tax if subject to such taxation. An amendment in 1941 extended this requirement to proof of payment of personal property taxes.[276]

Collection of Delinquent Taxes from Public Employees. Ch. 170, The Acts of 1941, changed the provisions of the Tax Act relating to tax delinquency of public employees.[277] The 1941 Act provides that the city, town, school and township officials shall furnish the County Treasurer a list of their employees, and on receipt from the County Auditor of a list of delinquent employees the disbursing officers of the employees of these subdivisions are required to deduct a sum equal to 10% of the sums due from the delinquent employee but not more than $15 a week until delinquent taxes are paid. The previous act made no provision for a percentage deduction but required withholding of all sums due the employee until the entire tax was paid. A 1941 Act[278] also requires the County Auditor to furnish state and state educational institution of-

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276. Ind. Acts, 1941, Ch. 61, Ind. Acts, 1943, Ch. 124, Ind. Stat. Ann. §42-102 et seq. (Burns 1943 Supp.).

277. Ind. Acts, 1941, Ch. 170, Ind. Stat. Ann. §§64-1505, 64-1506 (Burns 1943 Replacement).

278. Ind. Acts, 1941, Ch. 8, Ind. Stat. Ann. §§64-1505a, 64-1056a, (Burns 1943 Replacement).

ficials a list of all persons who are delinquent in taxes and who are believed to have money due from the state or the state educational institutions. This Act requires that the state or university officials are required to withhold from a person who is named on the delinquent tax list a sum equal to the amount of the tax and to pay this amount to the County Treasurer.

Personal Action to Recover Delinquent Taxes. In 1944 the Attorney General made an important ruling as to collection of delinquent taxes by a personal action.[279] The facts put to the Attorney General were as follows:

> On November 19, 1941 X corporation transferred the real estate and the personal property of one of its factory sites located in Indiana to Y Company, a firm of junk dealers residing in Pennsylvania. In the deed of conveyance Y corporation assumed and agreed to pay all taxes that were a lien on the property purchased. Taxes for the year 1941, payable in 1942, in the amount of $15,871.42 are delinquent and unpaid. Y corporation has refused or failed to pay these taxes and has removed the equipment, machinery, and buildings from the discontinued factory leaving only the real estate of approximately $4,000.00 or $5,000.00 value in the state. It was doubtful whether the state could collect the taxes from Y corporation since it was a non-resident. On these facts the State Board of Tax Commissioners requested a ruling whether a personal action would lie against X corporation for the collection of the 1941 taxes.

The Attorney General ruled that *Prudential Casualty Company v. State of Indiana*[280] controlled the question and that under that ruling the state could bring a personal action to recover delinquent taxes. The Attorney General continued that the action should be brought by the State of Indiana as plaintiff and that it was not necessary that the State Board of Tax Commissioners be a relator nor should it be a plaintiff. The Attorney General continued that in the action, taxes due the state and its sub-divisions may be recovered. The Attorney General quoted from the opinion in the *Prudential* case to the effect that certain sections of Burns 1914 Revised Statutes indicated that personal liability for taxes was in order.

Since the decision of the *Prudential* case on which the Attorney General relied there have been substantial changes in the provisions of the law relating to the collection of delinquent taxes. In the *Prudential* case the court relied on Sec-

279. Ops. Ind. Atty. Gen. (1944) p. 313.
280. 194 Ind. 542, 143 N.E. 631 (1924).

tions 10-157 and 10-158 (Burns 1914), for its conclusion that the person was liable for the taxes assessed. These provisions, still in the tax act[281] in substantially the same form, provide that personal property shall be listed for taxation with reference to the quantity held or owned on the first day of March of the assessment year and that persons purchasing or acquiring property either real or personal on the first day of March shall be considered as the owner on that day and be "assessed and liable" for the taxes of that year. The court also relied on Section 10-162 (Burns 1914), still in the tax act,[282] providing that "each partner shall be liable for the whole tax". It also relied on Sections 10-343 and 10-344[283] (Burns 1914) to the effect that the state shall have a lien for all its taxes on all the property of the person in the state.

In addition to the provisions relied on by the court certain other sections of the tax act of 1914 might have indicated the existence of personal liability. Section 10-324[284] (Burns 1914) provided that if the county treasurer believed that the delinquent tax payer has money or property in his possession or on deposit that "can be reached by any remedy known to law" he shall inform the prosecuting attorney who shall cause "such proceedings to be brought as will secure the payment of such delinquency." Section 10-361 (Burns 1914)[285] provided that any tract or part of the tract shall be offered for the whole sum due from such owner. Section 10-354 (Burns 1914)[286] provides that the auditor shall list for purposes of tax sale real property remaining delinquent for taxes including the real property of those persons whose personalty as assessed on the tax duplicate is less in value than the taxes charged against the lands or lots.

At the time the *Prudential* case was decided, therefore, a delinquent taxpayer even if the state did not proceed to get a personal judgment was subject to having all his property, real and personal, sold for all of his delinquent taxes. If the state obtained a personal judgment the taxpayer was faced, in effect with the same situation—that all his property might be

281. Now §§64-401, 64-402 (Burns 1943 Replacement).
282. Now §64-406 (Burns 1943 Replacement).
283. Now §§64-2825 and 64-2001 (Burns 1943 Replacement).
284. Compare § 64-1511 (Burns 1943 Replacement).
285. See §64-2207 (Burns 1943 Replacement).
286. See § 64-2201 (Burns 1943 Replacement).

sold to satisfy the judgment. So it was not difficult to argue at that time that subjecting a delinquent taxpayer to a personal action did not substantially increase his liabilities to the State.

Since 1935, however, the Assembly has reversed the policy as to subjecting all the property of a taxpayer for the claims arising from all his delinquent taxes. While most of the provisions referred to above existing in 1914 are still in Burns Annotated Statutes, the Assembly has enacted two new provisions which substantially change the law. The first of these enacted in 1935, is a proviso to Section 64-2207 (Burns 1943 Replacement), which provides that in no event shall any liability for delinquent taxes on any tract or lot be chargeable to or be a lien against any other tract or lot belonging to the same owner. In 1941 in Section 64-2203 (Burns 1943 Replacement) the Assembly provided that in order to sell real estate for delinquent taxes it should not be necessary to first levy upon the personal property or to collect such delinquent taxes out of the personal property and it further provided that in the sale of real estate for delinquent taxes no personal property tax delinquency should be included in the sale. These two provisions appear to establish the policy that taxes are levied on the property and not on the individual and that the state must look to the particular property on which it has levied the tax in order to secure its payment. The alternative facing a taxpayer now is not the same as that in 1914. If he is delinquent in taxes on one piece of property only that property can be sold for taxes.

If, therefore, the state may now bring a personal action and obtain a judgment against the delinquent taxpayer and then levy execution on the judgment as on any other judgment, the state may still subject all the property of the delinquent taxpayer to payment of all the taxes. Furthermore, if the provisions establishing priority for a tax lien were to be construed to carry the priority into the judgment[287] the state would be in substantially the same position as it was prior to the 1935 and 1941 amendments. The Attorney General's opinions relied on the *Prudential* case and did not consider the implications of the 1935 and 1941 amendments on that decision.[288]

287. Cf. § 64-1518 (Burns 1943 Replacement).

288. The fact situation put to the Attorney General is a persuasive situation for imposing personal liability. See note *199* supra for other possible uses.

SALE OF REAL PROPERTY FOR UNPAID TAXES

The most significant development in tax collection procedure is the 1941 Tax Sale Act,[289] and the 1943 and 1945 amendments, which considerably changes the tax sale procedure for the state. The act raises many new problems most of which have not yet been considered either by judicial decision or by attorney general opinions.

Sec. 5 of the Act[290] sets forth its purpose and a declaration of legislative policy. The section points out that there are many thousands of parcels of real estate upon which taxes are delinquent and upon which no taxes are now being paid; that many of these parcels are greatly needed to meet a housing shortage existing in the state. It provides therefore that the act shall be given a liberal interpretation and application in order that good titles to these parcels of real estate may be speedily acquired and that the real estate may be brought into useful ownership and bear the just share of the tax burden.

Taxes for Which Land May be Sold. Previous to the 1941 act delinquent personal property taxes were to be included in the sale of real estate and before real estate could be sold it was necessary to levy upon the personal property of the taxpayer or to show that he had an insufficient amount. The 1941 act provides that the personal property tax that is delinquent shall not be included in the sale of real estate for delinquent taxes and that it is not necessary for the purposes of the sale to levy upon the personal property or to attempt to collect the real estate taxes out of personal property. The act provides that sale shall be for the purpose of collecting all taxes then a lien against such real estate. Two questions have arisen under this change. The first one pointed out by the attorney general, that in computing the amount of the delinquent tax the computation should not include taxes on which the lien has been lost under Sec. 64-2825 (Burns 1943 Replacement) which provides that the lien is extinguished for taxes which have been due for more than ten years.

A second question arose as to whether the requirement that the sale shall be for taxes then a lien against the real

289. Ind. Acts, 1941, Ch. 224 §2 p. 714. Ind. Stat. Ann. §64-2203 (Burns 1943 Replacement).

290. Ind. Stat. Ann. §64-2213 (Burns 1943 Replacement).

estate, included personal property taxes which under Sec. 64-2001 (Burns 1943 Replacement) were a lien on all property of the taxpayer at the time of the passage of the act. In *Heekin Can Co. v. Porter* (1943)[291] the Supreme Court held that Ch. 224 of the Acts of 1941 withdrew the right to sell real estate to pay delinquent personal property taxes and that its effect therefore in taking away the only statutory way of enforcing the lien was to remove the lien from the real estate. The court held that the intent of the section was to remove the lien from the real estate in all cases in which the sale had not been made.

A further question as to what taxes for which the land may be sold arises as to whether Barrett law assessments and special assessments shall be included when the land is first offered for sale. The act is not clear on this point. In subsequent provisions referring to purchase by the county when no person has bid a sum equal to the delinquent taxes, the act provides that the county shall bid in the land for a sum equal to the amount of the delinquent taxes and cost thereon "but not to include liens for any improvements assessment against such real estate". It could be argued from this express reservation of the improvement assessments in the situation where the county bids in the land, that in offering the land to private purchasers in the first tax sale, the improvement assessment should be included. On the other hand Sec. 6 of the 1941 Act[292] repeals so much of Sec. 2 of Ch. 317 of the Acts of 1935 which requires a tax sale to be not only for the delinquent taxes but also for delinquent municipal assessments.[293] It would seem therefore that even on the first offering for sale

291. 221 Ind. 69, 46 N.E. (2d) 486 (1943).

292. Ind. Stat. Ann. §64-2214 (Burns 1943 Replacement).

293. Formerly § 48-4406 (Burns). §2, Chapter 317 of the Acts of 1935 was part of an act specifically applicable to Barrett Law Assessments. Section 2 which required the inclusion of delinquent Barrett Law Assessments in a tax sale for delinquent taxes was not specifically applicable only to Barrett Law assessments. In 1940 the Attorney General ruled that §2 of Chapter 317, Acts of 1935, was applicable to drainage law assessments as well as Barrett Law assessments. See Ops. Atty. Gen. (1940) p. 40. Section 6 of Chapter 224, the Acts of 1941, repeals so much of §2 of Chapter 317, Acts of 1935, as requires a tax sale to be not only for delinquent taxes but also for delinquent "municipal assessments" of a city or town. Query: Does this limited repeal leave effective the requirement under the ruling of the Attorney General that sales for delinquent taxes should include delinquent drainage law assessments?

the offer need be only for the delinquent taxes and penalties excluding Barrett law assessments.

Conditions Precedent to Sale. Sec. 2 of the 1941 Act provides that no real estate shall be sold for the purpose of collecting delinquent taxes until fifteen months shall have elapsed after any such installment shall have become delinquent.

Rules Governing the Sale. Sec. 2 of the Act provides for three types of sale. Where the real estate is offered for the first time the Act provides that it shall be sold by the County Treasurer at public sale as now provided by law. The act repeals the provisions in the old act that the smallest part of the tract which would bring the entire amount of delinquent taxes should be offered for sale and now provides that the sale shall be for the entire description advertised.

The attorney general has interpreted the provision "as now provided by law" to refer to the time of sale and the general type of notice set forth in Sec. 64-2202 (Burns 1943), and other applicable sections. Some question has arisen on the manner of sale as the 1941 Act purports to amend a section dealing with time and manner of sale but in effect completely repeals these provisions as the 1941 Act makes no mention at all of the manner of the sale.

A second class of sale is where the real estate has been offered for sale for two years or more. Here the same procedure is followed as in the situation where it is offered for the first time except that if neither in the first sale nor in the second sale a bid is received equal to the delinquent taxes thereon, then on the first Monday of December of the year of the second sale the county auditor must bid the property in for the county for a sum equal to all delinquent taxes and costs, delinquent taxes and penalties accruing since first offered for sale, but not including any improvement assessments. Here again the Act makes no provision for type of notice nor for any designation in the notice of sale to inform the taxpayer that this is the second sale and if it is not purchased the county will bid it in. The attorney general has ruled[294] that while the law does not require a separate publication of notice of each class of sale the notice should be drawn so as to identify property as being offered for sale for the first time or the second time or whether it is of the third

294. Ops. Ind. Atty. Gen. (1941) p. 310.

class. It is likewise not clear whether this reference to the "second sale" is to the second "consecutive" sale of land or to the second time land is sold for delinquent taxes irrespective of whether the taxes had been paid in full for several years after the first delinquency.

The third class of sale provided for in the act is that of real estate which "at the time of the passage of this act" has on it unpaid and delinquent taxes for five or more years. In this class of sale the act provides that the property may be offered immediately, after passage of the act, to the highest bidder but for a sum not less than all taxes, penalities and charges including the current taxes due in the year in which the sale is held. The act provides that the sale is to be continued from day to day until the first Monday of December when the county auditor must bid in the property. Unlike the preceeding types of sale there is no second offer. The major difference however in the class of sales is in the redemption features.

The attorney general has ruled that there are certain general rules governing the sale which are applicable to all three types. Except where in conflict with the act the provisions as to notice of sale, execution and delivery of certificates of sale and the deeds are applicable.

The act provides, and the attorney general has ruled,[295] that this covers the third class of sale; that the notice shall be sufficient if it contains the name of the fee simple owner or the person shown on the tax duplicate as owner and if it contains a description of the real estate from which the land may be identified. The attorney general has ruled[296] that this requires that the description of the real estate sold in the tax sale as shown in the notice of sale must be the same in the certificate of sale and in the tax deed as on the tax duplicate and that if the description of the land as now carried on the tax duplicate is incorrect, correction should be made pursuant to Sec. 1 of Ch. 224, prior to notice of sale. The attorney general has ruled[297] that this correction should be done preferably before the last tax-paying period preceding the sale. Under Sec. 1 of Ch. 224, Acts of 1941, the auditor is author-

295. Ibid.
296. Ibid.
297. Ibid.

ized to correct the description of the real estate as it appears on the tax duplicate at any time prior to notice of sale.[298]

Who May Purchase. The only provisions in the 1941 Act as to who may purchase are those relating to purchase by the county. As stated above the county must bid in the property after it has been offered for sale twice. The act further provides that any county which has a tax lien or any other rights, interest or ownership in any lot or land may purchase the same at the sale and that it is not necessary in such a case for the county to pay cash but only upon resale by the county shall it pay the County Treasurer who shall distribute the money received among the several subdivisions of the government who have uncollected taxes on the tax duplicate.[299] This provision authorizing the county to purchase at the public sale is un-clear in that it does not set forth who may purchase for the county. The attorney general has declared that while it is not clear as to what officer may purchase the real estate for the county if it is purchased prior to the first Monday in December it would appear that the county auditor should purchase the property but only on the authority of the Board of Commissioners.[300] The act makes no provision as to other purchasers. Presumably persons previously legally bound to pay taxes cannot so purchase at the tax sale as to acquire a clear title thereto.

An interesting case under the old act but probably applicable to the new act is *Kelly, Glover and Vale Realty Co. v. Bruck,*[301] decided by the Appellate Court in 1941, in which it applied the principle that one who occupies a position of trust and confidence with another person cannot acquire title to the property of such other person which is the matter of relationship.

Rules Governing Redemption. While the act does not purport to amend Sec. 64-2301 (Burns 1943 Replacement) setting forth the manner of redemption in tax sales, the 1941 Act does contain provisions as to redemption when the land is bid in by the county and a proviso clause providing for a six months' redemption. The proviso clause immediately follows

298. Ind. Stat. Ann. §64-1407 (Burns 1943 Replacement).
299. Ind. Acts, 1941, Ch. 224, Ind. Stat. Ann. (Burns 1943 Replacement), §64-2203.
300. Ops. Ind. Atty. Gen. (1941) p. 310.
301. 109 Ind. App. 440, 33 N.E. (2d) 777 35 N.E. (2d) 120 (1941).

the class of sales where taxes have been delinquent for five or more years and presumably the redemption proviso is applicable only to that type of sale. The attorney general ruled that the proviso in Sec. 2 applies only to the situation where the purchaser under this act is anyone other than the county, of land on which at the time of the passage of the act taxes have been delinquent for five years or more.[302] This proviso authorizes redemption in this class of sales within six months from the time of the sale by paying the treasurer for any purchaser the full sum of the price named in the certificate plus 10% plus any tax which the purchaser may have paid since the sale with interest at the rate of 6%. If there is no redemption within this six months period the act provides that the purchaser is entitled to a deed.

The attorney general has ruled that when the purchaser is anyone other than the county in a tax sale where the land is offered for the first or second time, the provisions in Sec. 64-2301 are applicable.[303]

Sec. 3 of the 1941 Act[304] set forth the method of redemption where the purchaser is the county. It provides that the original owner or occupant or any other person or persons having an interest therein may after the county has acquired title redeem the land in the following manner: (a) If redeemed within six months from the Monday on which the county bought it the "owner or redemptioner" shall pay the sum for which the land was bid in plus costs and 5%; (b) if redeemed after six months and within one year the "owner or redemptioner" shall pay the sum at which it was bid, together with costs and 7% of the sum in addition, together with all taxes subsequently accruing. The 1943 Assembly added to the term "owner and redemptioner" who could redeem the land within one year but not to those who could redeem in 6 months, the term "or any lien-holder".[305] A 1943 amendment also added a proviso that owners or "any other person having an interest in" the real estate bid in for the county on the first Monday of December 1942 could redeem the land until April 15, 1945 by paying the full amount of the sum for which the land was bid in together with costs and 10% of such sum in

302. Ops. Ind. Atty. Gen. (1941) p. 310.
303. Ibid.
304. Ind. Stat. Ann. §64-2205 (Burns 1943 Replacement).
305. Ind. Acts, 1943, Ch. 137, Ind. Stat. Ann. (Burns 1943 Replacement).

addition.[306] The 1941 act with its 1943 amendment raises several questions. The act originally provided that the owner or occupant or any other person or persons having an interest in the land could redeem the land under certain terms if done within six months and under certain other terms if done within one year. The 1943 act purported to add "lien-holders" to the persons who may redeem after six months. This would seem to imply that lien-holders are not within the term "persons having an interest therein" in the original act and it therefore creates an anomalous situation that any person having an interest in the land except a lien-holder may redeem it within six months but that a lien-holder can redeem the land only after six months but within one year.

An emergency act of 1945, Ch. 222, effective March 8, 1945, further confuses the redemption picture. The 1945 act does not purport to amend the 1941 or 1943 acts but provides a procedure which in effect substantially amends the above methods. It provides that where the county has bid in the land and where the county has not subsequently disposed of it the "original owner or occupant" or "any other person or persons having an interest therein" may redeem from the sale to the county "at any time during the next two years ensuing, or April 15, 1946, whichever date is the later". The redemption under this act is in the following manner: (a) If within six months after the auditor has bid in the land by payment of the sum for which the land was bid in together with costs plus 5% in addition; (b) If after the expiration of six months then the redemptioner shall pay in addition to what he must pay in the first six months after such bidding in, 1% on the amount for which it was bid in for each sixty days or fractional part thereof after the first six months. It further provides that the redemptioner must also pay all taxes which have accrued and become payable after the auditor's bid on behalf of the county.

On first reading, it would appear that the intent of the legislature was to allow owners to redeem, during the two years following the passage of the act, land which the county had previously bid in but not yet sold. The attorney general in an opinion on July 23, 1945[307] interpreted the term "next two

306. Ibid. This provision is not applicable to property bid in by the county in December 1941. Ops. Atty. Gen. (1944) p. 38.

307. Ops. Ind. Atty. Gen. (1945) p —— (No. 70, July 23, 1945).

years ensuing" to refer back to the words at the beginning of the section, that is the time at which the county bids in the property and that therefore the owner under this act has two years after the bid by the county auditor provided the county has not otherwise disposed of the property, in which to redeem. This interpretation constitutes an amendment of the 1941 act in giving a redemption after the one year provided in the original act and in effect restores the original two year redemption period in 64-2301 to cases where the county bids the land in. Since after the tax deed is taken by the county the lands are exempt from taxation as county-owned land the question arises as to how the redemptioner can pay and discharge all taxes which have accrued since the auditor's bid as presumably no taxes have accrued. The attorney general ruled[308] that construing the provisions of the 1941 act and the 1945 act together it is contemplated that the property shall remain upon the tax duplicate even after it has been bid in by the county and shall continue to be charged with taxes each year. The attorney general ruled that if this has not been done the property should be restored to the duplicate and the taxes charged as omitted property.

If the county must now carry the property on the tax duplicate even though the title is in the county the question arises whether if there is no redemption and the county proposes to sell the property the purchaser must pay not only the price at which he offers to buy it at a sale conducted by the county but also taxes put on the tax duplicate since the county acquired the title. If so, it would seem that the legislature has accomplished nothing in its purpose in getting property off the delinquent list and back into productive use.

A further question arises as to how, after the county has taken a tax deed, the county's deed can be eliminated from the record. The attorney general's opinion states that the auditor's memorandum of redemption under Section 64-2313 (Burns 1943) would sufficiently eliminato from the record the transfer of title to the county. From the standpoint of conveying a good title this method of eliminating the county's title is not so clear. The statutes contain specific provisions as to the method of disposition of real estate owned by the county[309] and the elimination of the county's deed by merely

308. Ibid.
309. See §§ 26-2008, 26-534, 28-254, 28-256 (Burns 1943 Supp.).

crossing it off the books would not seem to comply with the requirements as to disposal of property by the county. In situations where the county has bid in the property but not taken a tax deed this difficulty might be avoided by the county not taking its deed until after the two years in which the redemptioner is given the right to redeem has expired. On the other hand the attorney general has ruled that the term "two years next ensuing" relates back to the term where the lands have been "bid in or title acquired and not disposed of" so that presumably another two years redemption period would begin after the county has acquired title. Only in the situation where the county acquires title and immediately disposes of that property in a manner provided by law can it be said that the redemptioner does not have another two years in which to redeem the property.

An opinion of the attorney general in 1941 under the old act would seem to be still applicable. In this opinion the attorney general ruled that the redemptioner has the right to redeem until the purchaser has requested the issuance of the deed even though the two year period in Sec. 64-2301 has expired.[310]

Since the 1945 act does not purport to amend the 1941 act a further question arises as to the amount which the redemptioner must pay to redeem his land. If the redemption is within six months, the amount in the two acts is the same. However the 1941 act provides that if the redemption is made after six months the redemptioner shall pay in addition to the amount for which the land was bid in, 7% The 1945 act provides that after six months the redemptioner shall pay in addition to the 5% in the first six months a sum representing 1% of the amount for each 60 days or fractional part of any sixty day period. Under the 1945 act if the redemptioner redeems in the seventh or eighth month he would only have to pay 6% as compared with 7% under the 1941 act, whereas if he redeems in the 11th or 12th month he would pay only 7% under the 1941 act but 8% under the 1945 act. There is nothing in the two acts to indicate whether the redemptioner has a right of election during the first year after bidding by the county. Presumably the 1945 act is controlling, at least as to that part of the redemption period that occurs after the passage of the Act.

310. Ops. Ind. Atty. Gen. (1941) p. 345.

Title Conveyed by the Tax Deed. Section 2 of the 1941 Act provides that the deed and conveyance of the land sold shall be conclusive evidence that the sale was regular and according to requirements of law. It further provides that the deed shall convey to the purchaser a clear and indefeasible title free and clear of all tax or other encumbrances. Several questions will arise under this section. Section 64-2401 (Burns 1943), the old law as to the tax deed, says that a tax deed vests " an absolute estate in fee simple". Does the 1941 Act providing that the deed conveys "a clear and indefeasible title" convey more than §64-2401? If it does then it would appear that §64-2401 has been amended, although not specifically amended by the 1941 Act. A further question arises as to whether the conveyance shall be "conclusive evidence" that the sale was regular. Does this clause repeal §64-2411 (Burns 1943) defining when the sale shall be valid and §64-2416 defining proof that is required to defeat the title of a tax deed? Considering the legislative declaration of purpose in §5 and the requirement that the Act shall be given a liberal interpretation, it would appear that one of the purposes of the 1941 Act was to over-rule the judicial interpretations under §64-2416 and §64-2411 and limit, if not eliminate attacks upon the validity of a tax title. However, §4[311] of the 1941 Act provides that no action to contest the validity of any title acquired under the act shall be brought after the expiration of one year from the date of the execution of the deed. It would appear, therefore, that the provision that the deed is "conclusive evidence" does not mean that it cannot be attacked as §4 implies that at least during one year after the execution of the deed the validity of the title may be attacked. The Attorney General in his brief in *First Bank & Trust Company of South Bend v. Ralston*, conceded that the provision that the deed was conclusive evidence might be unconstitutional, but pointed out that §4 of the act permitting an action to contest the validity of title within one year clearly implied that the deed was not conclusive and at most was only prima facie evidence of the regularity of the proceeding.

Two decisions under the former act may still be applic-

311. Ind. Stat. Ann. §64-2212 (Burns 1943 Replacement).

able to the 1941 Act. *Schofield v. Green*[312] decided by the Appellate Court in 1944 held that where the life tenant failed to pay taxes a tax deed conveyed not only the interests of the life tenant but also the fee. In 1942 in *Fowler v. Burmaster*[313] the Appellate Court held that where the auditor failed to comply with §§64-2201 and 64-2202 and failed to show on the record the manner in which the notice was posted, the place where it was posted, and the length of time the tax deed was ineffective to convey title. The person holding title under the tax deed contended that the taxpayer had to show one of the grounds set forth in §64-2416. The Appellate Court pointed out that the Supreme Court had held to the contrary in *Skelton v. Sharp*.[314] While the *Schofield* case is undoubtedly still applicable to the present law as to the title conveyed, the *Fowler* case brings the question previously discussed as to the effect of the provision that the title shall be conclusive evidence that the sale was regular. An interpretation of the Act in light of the legislative purpose explained in §5 would seem to require a review of the prior holdings of the Supreme Court permitting attacks upon tax titles.

On the other hand the Assembly in 1943 seemed to have had doubts as to what effect the 1941 Act really had on conveying a valid tax title. In chaptor 251 of the Acts of 1943 concerning the loan of the common school fund, the congressional township school fund, and the permanent endowment fund of Indiana University, the General Assembly provided that persons applying for a loan must show a good and sufficient title in fee simple "not derived solely from sale for taxes". Thus while the 1941 General Assembly stated that their purpose was to provide for good titles to real estate on which taxes were delinquent, the 1943 General Assembly was of the opinion that the 1941 Act did not convey a sufficiently good title to warrant the loan of school funds on land acquired by tax titles. It is difficult to see how the General Assembly can hope to have private individuals recognize the validity of a tax title when they themselves refuse to permit government officials to recognize the validity of such title.

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312. —— Ind. App. ——, 56 N.E. (2d) 506 (1944), 20 Ind. L. J. 194 (1945).

313. 112 Ind. App. 43, 41 N.E. (2d) 629 (1942). See also Smith v. Fisher, 109 Ind. 654, 36 N.E. (2d) 945 (1941).

314. 161 Ind. 383, 67 N.E. 535 (1903).

Disposition by the County. The 1941 Act provides in §3[315] that whenever the county acquires title to any real estate under this Act, the County shall sell the real estate "without unnecessary delay" and that the sales shall be "in the same manner now provided by law" for sales of land owned by counties.[316] When the county makes a sale, the Act provides that the money received after payment of costs shall be apportioned to the tax levying and tax certifying bodies in proportion to their interests in the taxes for which the real estate was sold based upon the several levies established by them for the year last preceding the sale. Any surplus is to go to the General fund of the county.

Difficult questions may be presented by county ownership of numerous parcels of land acquired in this manner. The effect of the 1941 Act requiring compulsory purchase by the county if there is no private purchaser is to put the county in the real estate business and probably with the most undesirable property in the county. If the county rents the property are the proceeds subject to the gross income tax on the grounds that it is engaged in a proprietary activity even though the land was acquired in lieu of taxes?[317] A further question arises as to the duties of the county as a land owner toward its tenants and the public at large as far as tort liability is concerned.[318] Since under the interpretation of the Attorney General, the original owner has the right to redeem for two years after aquisition by the county, a question arises as to the duties of the county toward the prospective redemptioner. A further question arises as to whether the county can sell the land to the original owner or a person having an interest therein who could have redeemed, and thereby defeat all liens and Barrett Law Assessments. If the original owner can purchase the land from the county at a public sale for amounts less than the delinquent taxes, an effective device is created for delinquent taxpayers to relieve themselves of the burden of delinquent taxes and other encumbrances for a sum less than the amount due. A constitutional question might

315. Ind. Stat. Ann. §64-2205 (Burns 1943 Replacement).
316. See note 309 Supra.
317. See discussions of this question on page 169 supra.
318. The Attorney General ruled in 1944 that county funds could not be expended to make needed repairs on buildings on property bid in pursuant to the Tax Sale Act. See Ops. Atty. Gen. (1944) p. 208.

thereby be raised. To permit the original owner to re-acquire the land by a payment less than the amount due permits some taxpayers to escape part of their tax liability. This might therefore violate the requirement that taxes shall be uniform and equal.[319] If such a result is permitted, property owners who promptly pay their tax will pay more taxes than those who default and re-purchase their property from the County.

Statutes of Limitations. Section 4 of the Act as indicated above limits actions to contest the validity of the tax sale under the Act to one year from the date of the deed.

Section 6 of the 1941 Act specifically repeals §222 and §261 of the Act of 1919, §2, Ch. 65 of the Acts of 1932 and so much of §2 of Ch. 317 of the Acts of 1935 as requires a tax sale to be not only for the delinquent taxes but also for the delinquent municipal assessments of a city or town. It also provides that all laws or parts of laws in conflict with the Act are repealed.

Constitutionality Upheld. In 1944 the Supreme Court in *First Bank and Trust Co. of South Bend. v. Ralston,*[320] held constitutional the provision of the 1941 Act requiring the county to bid in the unsold land for a sum not including the amount of the Barrett Law Assessments.

The bank brought suit for itself and on behalf of all others similarly situated and owning and having an interest in Barrett Law Bonds issued by the City of Indianapolis prior to June 30, 1931 for a declaration of rights and an injunction, under the Declartory Judgment Act, seeking to enjoin the defendant county officials from making certain sales of real estate.

The controversy was as follows:

> The Bank alleged in its complaint, inter alia, that there were delinquencies in taxes and delinquencies in installments of Barrett Law Assessments on property upon which the plaintiff's bonds were a lien; that at various times these properties have been offered for sale including the tax sale in April 1941 on account of the delinquencies but that on no occasion was a bid received sufficient to pay the taxes and the Barrett Law Assessments and that consequently no sale was made; that the county officials are threatening to make sales pursuant to the 1941 Act. A temporary restraining order was issued and continued in force until hearing. After hearing there was judgment dissolving the restraining order and for the defendants.

319. Ind. Const. Art. 10, §1.
320. 222 Ind. 584, 55 N.E. (2d) 115 (1944).

In order to present the case for a construction of the statute, there was a stipulation that Lot X in Indianapolis was liable for a Barrett Law Bond owned by the Bank and that at time of effective date of the Act taxes had been delinquent for a period of more than 5 years and that none had been paid since 1930; that P owned a parcel of land, acquired by tax title on which the taxes were delinquent for a period of 5 years or more prior to Jan. 1, 1941. It was further stipulated that the property in question had been advertised for sale two or more times prior to Jan. 1, 1941 and that the defendants were threatening to take title of the property in question for the county pursuant to the Tax Sale Act of 1941.

On appeal the bank's main contention centered on the Barrett Law lien rather than on the property which it owned. It contended that the Act would deprive it of its contractual rights under the bonds.

The Court (Fansler, J.) held that the 1941 Act did not deprive the bank of any substantive rights under its bond contract. It found that the bank still had its remedy by sale by the treasurer, if a purchaser could be found who would pay the full amount of all liens and that the bank had its remedy by foreclosure and sale subject to the tax lien. It held that the provision by which the property could be sold for taxes alone in event that it could not be sold for enough to satisfy the taxes and Barrett Law lien merely constituted the granting of an additional remedy to the governmental unit whose lien for taxes was a prior lien in any event.

As to the liens held by the bank as a purchaser at a tax sale the court pointed out that such liens were always junior to liens of subsequent taxes and liens of purchasers at subsequent tax sales. The court also held that the statute was applicable to cases in which the property has been advertised for sale prior to its passage. The court did not pass on the character of the title which the county will have when it bids in the property upon a tax sale.

Since the property in question had already been advertised for sale in 1941 when this action was brought, and the 1941 Act passed, for a sum equal to taxes, penalties, interest and Barrett Law assessments, Judge Fansler is correct that for the sale in question the bank had, until the first Monday in December, the remedy of a tax sale to a purchaser who would pay this total amount. However we have seen above that it is no longer necessary to offer the property for sale for a sum including the Barrett Law Assessments so that as to property advertised for sale after 1941 the only remedy of the Barrett Law bondholder is that by foreclosure and sale subject to the tax lien. He no longer has the remedy of a sale to a purchaser who will pay the delinquent taxes and delinquent assessments.

Another point strongly pressed in the briefs was that the sale under the 1941 Act extinguished the Barrett Law lien, under the provision of the Act that the sale shall be free and clear of the tax and other encumbrances. Judge Fansler stated that granting power to the governmental unit to sell for a sum not including the Barrett Law Assessment did not deprive the plaintiff of any right. "The lien on the property, or the amount due thereunder, is not altered or modified in any respect." If this statement refers to the situation prior to sale, it is of course correct, but if it means that the county or a purchaser at the tax sale takes subject to the lien, then the statutory provision that the sale shall be free of encumbrances has little meaning left.[321]

Taxpayers' Remedies, Injunctive Relief. In recent years the Supreme Court has restricted the availability of the tax refund provisions of §64-2819 for recovery of wrongfully assessed taxes so that it is practically non-available to taxpayers as a means of asserting their rights to a correct assessment of their property.[322] The clause which restricts the availability of the refund provisions is that which provides that no taxes shall be considered as having been wrongfully paid or as having been wrongfully assessed when the taxes were extended or assessment made as the judgment of taxing officers authorized to make the assessment and concerning which no complaints were registered at the time the assessment was made. This provision prevents suits for refunds where the contention is overvaluation of the taxpayer's

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321. Compare Ops. Ind. Atty. Gen. (1940) p. 40 ruling that in a sale under § 222 Ch. 59 Acts of 1919 (repealed by Tax Sale Act of 1941) to the highest bidder, the Barrett law lien was not extinguished. Section 222 provided the title to purchaser should be "free and clear of tax encumbrances" and see Ops. Atty. Gen. (1943) p. 28 ruling that if real estate has been sold at a tax sale and not sold for a sum sufficient to enforce payment of delinquent ditch assessments, the bondholder has a right to foreclose the lien held by virtue of his bond regardless of the tax sale. No mention was made of the 1941 Tax Sale Act.

322. See Board of Com'rs of Marion County v. Millikan, 207 Ind. 142, 190 N.E. 185 (1934); Culbertson v. Board of Commissioners of Fayette County, 208 Ind. 22, 194 N.E. 638 (1935).

property and apparently prevents it in all other situations where the taxpayer has not registered a complaint by applying for a rehearing or by appealing.[323] If a taxpayer complies with the provisions requiring the filing of an application for a rehearing or an appeal and thereby uses his administrative remedies and he loses his contention either before the administrative board or an appeal to the court and he thereupon pays the tax he would presumably be met with the plea of res-judicata if he applied for a refund. Consequently taxpayers are compelled if they desire to attack a property assessment to resort to "preventive relief", that is, to seek an adjudication of their rights before any payment is made. Here they may be met with the contention that the error is only informal or an irregularity and therefore not subject to injunctive relief.

The Indiana courts however apparently are not too strict in requiring a traditional basis for equity jurisdiction in permitting injunction suits to lie. In *McCreery v. Ijams*,[324] there is no new development as to the use of the injunction but it does restate the rule as to its use. The court said that while the injunction may not be used against the collection of taxes resulting from an assessment informal or irregular only, without further showing the assessment was larger than it should have been, assessments may be enjoined when made by a board legally powerless to act. In that case the State Board of Tax Commissioners has ordered a reassessment of certain mineral properties in Sullivan county and then ordered the County Board of Review which had convened pursuant to §64-1201 on the first Monday of June to recess on July 5, 1939 and to reconvene later at a time to be fixed by the state board. After the reassessment had been completed by the township assessor the state board ordered the County Board of Review to reconvene and consider the assessment so made. Adequate notice was apparently given at all stages of the proceeding. Nevertheless, the court did not compel the taxpayer to resort to his administrative remedies and legal remedies by making a direct appeal from the tax boards to the courts,[325] but permitted the taxpayer to enjoin the collect-

323. In Board of Com'rs v. Millikan supra n. 322 the Court indicated that this requirement governed even though the tax payer had no notice and could not therefore appeal.

324. —— Ind. App. ——, 59 NE (2d) —— (1945).

325. Under Section 64-1020 (Burns 1943 Replacement).

ion of the tax. The court held that the order of the state board adjourning the county board and ordering it to reconvene at a later date was illegal and that therefore the action of the County Board of Review at its later meeting increased the assessed valuation of the taxpayer's property was void. The defendants contended that even if the action of the County Board of Review was invalid injunctive relief should not be granted in the absence of a showing that the assessment as increased by the board of review was larger than it should have been. The court held that this rule is applicable only where the injunction is sought against the collection of taxes part of which are illegal and part legal and that since the assessment by the County Board of Review was completely void an injunction against the collection of taxes based on this assessment was proper.

Recovery of the Tax From the Legitimate Taxpayer When Paid by Mistake by a Third Party

In *Federal Land Bank of Louisville v. Dorman,*[326] the Appellate Court in 1942 ruled that in a case where the Land Bank paid by mistake taxes due on the land owned by the defendant that the Land Bank could not recover such taxes from the defendant and was not subrogated to the lien of the state. The court followed the rule in this state that a volunteer who in error pays the taxes of another cannot recover.

MISCELLANEOUS TAXES

Insurance Premium Tax. Section 39-4802 (Burns 1933) provides that all foreign insurance companies doing business in Indiana shall pay a gross premiums tax based on the amount of gross premiums reduced by deductions allowed which includes losses paid in Indiana, reinsurance paid on Indiana risks and dividends paid to residents insured and premiums returned. As is customary in many states this tax is at a higher rate for foreign insurance companies than for domestic companies.[327] In 1944 in *United States v. Southeastern Underwriters*[328] the United States Supreme Court held, 4 to 3,

326. 112 Ind. App. 111, 41 N.E. (2d) 661 (1942).

327. CCH State Tax Guide Service, paragraph 36-030. Domestic insurance companies in Indiana are not subject to this gross premium tax but do pay a 1% gross income tax under § 64-2601 (o.) (p.) (Burns 1943 Replacement).

328. 322 U.S. 533 (1944).

that: (1) insurance transactions which stretch across state lines are "commerce among the several states" so as to make them subject to regulation by Congress under the commerce clause and (2) that the Sherman Act tended to prohibit conduct of insurance companies which restrain or monopolize interstate fire insurance trade. In that case the United States charged by indictment the Southeastern Association and its membership as violators of the Sherman Act. The Underwriters Association demurred on the ground that they were not required to conform to the requirements of the Sherman Act. Although the majority opinion was careful to point out that the only question before them was the power of Congress, this decision has thrown many state tax and insurance commissions into panic as to the validity of their taxation and regulation of foreign insurance companies particularly those which imposed different burdens on foreign companies than on domestic companies.

In *Prudential Insurance Company v. State of Indiana*, now on appeal before the state Supreme Court, the Prudential Insurance Company brought suit to recover taxes paid under the Indiana gross premiums tax on the theory that the tax was unconstitutional as a burden on, and a discrimination against, interstate commerce. The Superior Court of Marion County held that this tax which was at a higher rate on foreign insurance companies was invalid.[329]

It is clear that the mere fact that the Supreme Court held that Congress has the power to regulate insurance transactions in interstate commerce does not in, and of itself prohibit the state from also regulating the same transactions.[330] In the absence of a showing that the Indiana gross premium tax actually discriminates against the foreign insurance companies it it doubtful whether there would be any substantial federal question in this case. The company contends that the discrimination is based on the fact that the 3% premium tax here involved is not imposed on domestic insurance companies. This type of "discrimination" has been considered many times and sustained against attacks under the equal protection and due process clauses. See *Lincoln National Life Insurance*

329. CCH State Tax Guide Service, paragraph 36-030. In Michigan, California, Idaho, New York, and South Carolina similar provisions of the statutes of those states were held valid.

330. Cf. Mauer v. Hamilton 309 U.S. 598 (1940).

Company v. Read[331] which, decided after the Southeastern Underwriters case, upheld an Oklahoma tax on foreign insurance companies at a higher rate than on domestic companies against attacks under the equal protection and due process clauses (the commerce clause question was not before the Court). The question therefore arises whether the burden of proving an unconstitutional discrimination is any easier under the commerce clause than it is under the equal protection and the due process clauses of the U.S. Constitution. If the standards of an unconstitutional discrimination are the same under all three clauses, the *Lincoln National* case would seem to foreclose any substantial federal question in this case. A further factor in this case is the effect of the McCarran-Ferguson Act (P. Law 15, approved March 9, 1945) which provided that the continued regulation and taxation by the several states of the business of insurance was in the public interest and that insurance should be subject to the laws of the several states which relate to regulation or taxation of such businesses. This problem is now before the Indiana Supreme Court.

Unemployment Compensation Tax. The Indiana Unemployment Compensation Law[332] provided prior to 1943 that an employer subject to the tax included any employing unit which together with one or more employing units is "owned or controlled" directly or indirectly by the same interests or which owned or controlled one or more other employing units and which if treated as a single unit with such other employing units or interests would be an employer within the definition of the act (employing 8 or more individuals). Two decisions in the Indiana Supreme Court in 1940 and 1943 turned on the applicability of this section to the facts there involved. In both *Benner-Coryell Lumber Company v. Indiana Unemployment Compensation Board*[333] and *State Unemployment Compensation Board v. Warrior Petroleum Company*,[334] the court held that this provision was not applicable on the facts found to situations where two establishments operating in corporate form had the same majority stockholders. The court seemed to require something approaching intent to evade the tax be-

331. 325 U.S. —— (1945).
332. Ind. Stat. Ann. § 52-1502 et seq.
333. 218 Ind. 20, 29 N.E. (2d) 776 (1940) cert. denied, 312 U.S. 698.
334. 221 Ind. 180, 46 N.E. (2d) 827 (1943).

fore the section would be applicable. This provision of the act was in effect deleted by Chapter 286 of the Acts of 1943. The act now contains provisions governing only the situation where an employing unit acquires another employing unit subject to the tax, or where an employing unit subject to the tax acquires another employing unit. Presumably if the tax evasion motive is present, such as in the situation where one business is divided into two businesses in order to avoid the tax, the court will be able to impose the tax on the theory that the division of business was fictitious.

Alcoholic Beverage Taxes. The major problems in connection with the alcoholic beverage tax have been in connection with selling to post exchanges on United States government reservations. No cases have reached the courts but the Attorney General made a ruling which turns on the fact situation put to him[335] and holds that sale to an army post on a reservation ceded to the United States is not taxable.

Motor Fuel Tax. As in the alcoholic beverage tax the principal development in this field of taxation has been in determing the applicability of the tax to sales to contractors working for the United States government and sales to post exchanges on government reservations. The Attorney General's rulings as to the applicability of the tax to the contractor turned on the form of the government contract so that in the situation where the government contract provided that title to all materials purchased by the contractor be vested immediately upon delivery in the United States, the motor fuel tax could not be imposed.[336] A 1942 opinion of the Attorney General determined the tax liability of sales to post exchanges.[337]

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335. Ops. Ind. Atty. Gen. (1943) p. 557.

336. Compare Ops. Ind. Atty. Gen. (1940) p. 206 with Ops. Ind. Atty. Gen. (1941) p. 39.

337. Ops. Ind. Atty. Gen. (1942) p. 164; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, (1944), 20 Ind. L. J. 326 (1945).