

1953 O. A. G.

Starr v. Board of Commissioners, Delaware County
(1906), 40 Ind. App. 7, 76 N. E. 1025, 79 N. E. 390.

Words and phrases are to be given their plain ordinary meaning unless such construction would manifestly defeat the legislative intent.

Hammell v. State (1926), 198 Ind. 45, 152 N. E. 161.

The language of the statute is clearly not intransigent with the intent of the legislature as it is expressed in the 1933 statute, *supra*.

It is therefore my opinion that the cities of Gary, East Chicago and Hammond respectively are entitled to request and be allowed in their respective city budgets the sum of \$4,200.00 annually for Barrett Law Deputy hire as set out in Burns' Indiana Statutes Annotated (1950 Repl.), Section 48-1224.

OFFICIAL OPINION NO. 57

July 20, 1953.

Hon. Crawford F. Parker,
Secretary of State,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your request for an official opinion which reads in part as follows:

“We have reference to the Acts of 1937, Chapter 117, § 25, a part of the Gross Income Tax Law as amended, the same being found in Burns' Indiana Statutes Annotated, 1951 Replacement, Vol. 11, Part 2, § 64-2625, reading as follows:

“SECRETARY OF STATE—DUTIES—CORPORATIONS—CERTIFICATE OF DISSOLUTION OR WITHDRAWAL—WITHHOLDING.—The Secretary of State shall withhold the issuance of any certificate of voluntary dissolution of any corporation organized

OPINION 57

under the laws of this state, or any certificate of withdrawal of any corporation organized under the laws of another state and admitted to do business in this state, until the receipt of a notice from the department to the effect that the tax levied under this act against any such corporation has been paid, or until he shall be notified by the department that such corporation is not subject to taxation hereunder.'

"1. Do the words in said section 'withhold the issuance of any certificate of voluntary dissolution' require the Secretary of State to refuse to accept for filing Articles of Merger or certified copies thereof involving a domestic corporation that does not survive the merger, or Articles of Consolidation or certified copies thereof involving a domestic corporation, where the surviving corporation in the event of a merger, or the resultant corporation in the event of a consolidation, is either another Indiana corporation or a foreign corporation qualified to do business in Indiana, but where the Secretary of State has not received a notice from the Treasury Department to the effect that the tax levied under the Gross Income Tax Law against any such non-surviving domestic corporation, in the event of a merger, has been paid or that such corporation is not subject to taxation under said Act, or where, in the case of consolidation, the Secretary of State has not received a notice from the Treasury Department to the effect that the tax levied under the Gross Income Tax Law against any such domestic consolidating corporation has been paid, or that such corporation is not subject to taxation under said Act?

"2. If the answer to Question No. 1 is in the negative, should the Secretary of State, although accepting such paper or papers for filing, withhold the issuance of any certificate evidencing the filing of any such paper or papers?

"3. Do the words in said section 'withhold the issuance * * * of any certificate of withdrawal of any corporation organized under the laws of another state and admitted to do business in this state' require the

Secretary of State to refuse to accept for filing Articles of Merger or certified copies thereof involving a foreign corporation admitted to do business in this state but which does not survive the merger, or Articles of Consolidation or certified copies thereof involving a foreign corporation admitted to do business in this state, where the surviving corporation in the event of a merger, or the resultant corporation in the event of a consolidation, is either an Indiana corporation or a foreign corporation qualified to do business in Indiana, but where the Secretary of State has not received a notice from the Treasury Department to the effect that the tax levied under the Gross Income Tax Law against any such non-surviving foreign corporation, in the event of a merger, has been paid or that such corporation is not subject to taxation under said Act, or where, in the case of consolidation, the Secretary of State has not received a notice from the Treasury Department to the effect that the tax levied under the Gross Income Tax Law against such foreign consolidating corporation has been paid, or that such corporation is not subject to taxation under said Act?

“4. If the answer to Question No. 3 is in the negative, should the Secretary of State, although accepting such paper or papers for filing, withhold the issuance of any certificate evidencing the filing of such paper or papers?”

The answers to your questions depend on whether a “merger” and “consolidation” are covered by the terms “dissolution” and “withdrawal” as found in Burns’ Indiana Statutes Annotated, Section 64-2625, *supra*. To determine this we must first consider the construction of the taxing power as declared by the courts.

The Court said in *Myers, Auditor, et al. v. Wilson et al.* (1923), 80 Ind. App. 459, 464, 41 N. E. 474:

“In construing this section of the statute it must be borne in mind, as said in the case of *Reynolds, Auditor, v. Bowen, Admr.* (1894), 138 Ind. 434, 36 N. E. 756, 37 N. E. 962: ‘The power to assess is a summary power;

OPINION 57

and, to secure uniform and just taxation, and protect the revenues of the State, both as to unscrupulous and dishonest evasion of the law, and also in the interests of honest taxpayers, it is necessary that assessment statutes should be liberally interpreted in aid of the taxing power.' See, also, *Pittsburgh, etc., R. Co. v. Backus, Treas.* (1893), 133 Ind. 625, 33 N. E. 432; *Graham v. Russell, Aud.* (1899), 152 Ind. 186, 52 N. E. 806; *Hunter Stone Co. v. Woodard* (1899), 152 Ind. 474, 53 N. E. 947; *Fell v. West* (1905), 35 Ind. App. 20, 73 N. E. 719; *State v. Taylor* (1871), 35 N. J. Law 184."

However, a broad construction does not contemplate disregarding the obvious intention of the legislature and where the terms used are clear and unambiguous, they are to be taken in their ordinary sense. *Ebner v. Ohio State Life Ins. Co.* (1918), 69 Ind. App. 32, 121 N. E. 315.

A search of the Corporation Act of Indiana involving domestic corporations must be made to discover the meaning of a "merger" and "consolidation" as intended by the legislature. The Acts 1929, Chapter 215, Section 42, p. 725 as amended, hereafter referred to as the Corporation Act, the same being Burns' Indiana Statutes Annotated (1951 Supp.), Section 25-241 provides in part:

"(b) By Act of the Corporation. Any corporation may liquidate its affairs and dissolve in the following manner:

* * *

"(c) Certificate of Dissolution. Upon presentation of the certificate of the incorporators, as provided in paragraph (a) of this section, or of the articles of dissolution and proof of publication, as provided in paragraph (b) of this section, the secretary of state, if he finds that it or they conform to law, shall endorse his approval upon each of the triplicate copies of the certificate or articles, as the case may be, and, when all fees have been paid as required by law, shall file one (1) copy of the certificate or articles and accompanying proof of publication in his office and issue a certificate of dissolution to the corporation, and shall return the

certificate of dissolution to the corporation together with two (2) copies of the certificate of incorporators or articles of dissolution, as the case may be, bearing the endorsement of his approval.

* * *

“(e) Effect of Certificate of Dissolution. Upon the issuance of the certificate of dissolution and the recording of the certificate of the incorporators or the articles of dissolution, as the case may be, as provided in the preceding paragraph (d) of this section, *the corporation shall be dissolved and its existence shall cease.*” (Our emphasis.)

The Corporation Act, Section 31, page 725, as amended, the same being Burns' Indiana Statutes Annotated (1948 Repl.), Section 25-230 provides:

“Any two (2) or more corporations organized under, or which have accepted the provisions of, this act may merge into one (1) of such corporations, or may consolidate into a new corporation to be organized under this act, by complying with the provisions of this article.”

The Corporation Act, Section 32, page 725, as amended, the same being Burns' Indiana Statutes Annotated (1948 Repl., 1951 Supp.), Section 25-231 provides in part as follows:

“Any two (2) or more such corporations may merge into one (1) of such corporations in the following manner: * * *.”

The Corporation Act, Section 33, page 725, as amended, the same being Burns' Indiana Statutes Annotated (1948 Repl., 1951 Supp.), Section 25-232 provides in part as follows:

“Any two (2) or more such corporations may consolidate into a new corporation organized under this act in the following manner: * * *.”

The Corporation Act, Section 35, page 725, the same being Burns' Indiana Statutes Annotated (1948 Repl.), Section

OPINION 57

25-234 explains the terms "merger" and "consolidation" as contemplated by the legislature.

"When such merger or consolidation has been effected as hereinabove provided:

"(a) The several corporations parties to the agreement of merger or consolidation shall be a single corporation, which shall be:

"(1) In case of a merger, the surviving corporation a party to the agreement of merger into which it has been agreed the other corporations parties to the agreement shall be merged, which surviving corporation shall survive the merger; or

"(2) In case of a consolidation, the new corporation into which it has been agreed the corporations parties to the agreement of consolidation shall be consolidated;

"(b) The separate existence of all of the corporations parties to the agreement of merger or consolidation, except the surviving corporation in the case of a merger, shall cease;

"(c) Such single corporation shall have all of the rights, privileges, immunities and powers and shall be subject to all of the duties and liabilities of a corporation organized under article 2 (§§ 25-213—25-220) of this act;

"(d) Such single corporation shall thereupon and thereafter possess all the rights, privileges, immunities, powers and franchises as well of a public as of a private nature of each of the corporations so merged or consolidated; and all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares of capital stock, and all other choses in action and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate; or any interest therein, under the laws of this state vested in any of such corporations shall not revert

or be in any way impaired by reason of such merger or consolidation;

“(e) *Such single corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated in the same manner and to the same extent as if such single corporation had itself incurred the same or contracted therefor; * * *.*” (Our emphasis.)

A “consolidation” involves the destruction of all pre-existing corporations and the creation of a new one, while a “merger” preserves one of the corporations but puts an end to the other.

In effect the statute says a “merger” is the absorption of one corporation by another corporation which survives and a “consolidation” is two or more corporations combining to form a new corporation with the pre-existing corporations ceasing to exist.

The effect of a “merger,” “consolidation” or a “dissolution” depends upon the statutes authorizing them. As has been seen in a “dissolution,” Burns’ Indiana Statutes Annotated, Section 25-241, *supra*, the corporation’s existence ceases. It is dissolved and the assets liquidated. It is apparent the Legislature desired a procedure to secure payment of taxes. However, the same problem does not arise in the case of “merger” or “consolidation,” Burns’ Indiana Statutes Annotated, Section 25-234 (d) and (e), *supra*, because the new corporation either by “merger” or “consolidation,” shall receive all assets and shall be liable for all liabilities and obligations to the same extent and manner as the old corporation or corporations.

Keeping in mind this reasoning I refer you to the Corporation Act, Section 65, page 725, the same being Burns’ Indiana Statutes Annotated (1948 Repl.), Section 25-310 which provides in part as follows:

“Any foreign corporation admitted to do business in this state may withdraw from this state by surrendering its certificate of admission, and any amended certificates of admission that may have been issued to it, and by filing with the secretary of state, accompanied

OPINION 57

by the fees prescribed by law, a statement of withdrawal setting forth:

* * *

“(6) * * *

“Upon the filing of such statement, accompanied by the certificate of admission and any amended certificates of admission issued to the corporation, the authority of the corporation to transact business in this state shall cease; but the filing of such statement shall not affect any action by or against such corporation pending at the time thereof or any right of action existing at or before the filing of such statement in favor of or against such corporation.”

The Corporation Act, Section 69a, as amended, the same being Burns' Indiana Statutes Annotated (1948 Repl.), Section 25-314a provides in part as follows:

“(a) Any one or more corporations organized or reorganized under the provisions of this act, may merge or consolidate with one or more other corporations organized under the laws of any other state, or states of the United States of America, if the laws under which such corporation or corporations are formed shall permit such merger or consolidation. The constituent corporations may merge into a single corporation, which may be any one of such constituent corporations, or they may consolidate to form a new corporation, which may be a corporation of the state of incorporation of any one of such constituent corporations as shall be specified in the agreement hereinafter required.
* * *”

I refer you to Burns' Indiana Statutes Annotated, Section 64-2625, *supra*, quoted in your request, which says in part:

“*The secretary of state shall withhold the issuance of any certificate of voluntary dissolution of any corporation * * *, or any certificate of withdrawal of any corporation * * *.*” (Our emphasis.)

From the foregoing statutes and authorities it is obvious that the Legislature did not contemplate a "merger" or "consolidation," either by a domestic or foreign corporation, as being the same as a "dissolution" or "withdrawal." In the latter the corporate affairs are wound up, its liabilities accounted for and its assets distributed in the case of a "dissolution," or taken from the state in the case of "withdrawal." It ceases to be a body corporate.

Hence, there was a very good and sufficient reason for Legislative action. *Hunt v. Lake Shore & M. S. Ry. Co.* (1887), 112 Ind. 69, 13 N. E. 263.

However, in case of a "merger" or "consolidation" this necessity does not exist. The absorbing corporation or the new corporation are going concerns, they are doing business, the assets and liabilities of the old corporations are the assets and liabilities of the new corporations. *Chicago, Indiana & Southern Railroad Company v. Taylor* (1915), 183 Ind. 240, 108 N. E. 1.

Further, the Corporation Act became law in 1929, while the section of the Gross Income Tax Law to which you have reference was passed in 1937. It is to be noted that the Legislature is presumed to be acquainted with the existing law and in legislating on any subject to have in view its provisions.

Town of Brownsburg v. Trucksess et al. (1934), 98 Ind. App. 322, 185 N. E. 315;

Smith Petroleum Company v. Department of Audit and Control of the State of Indiana et al. (1937), 211 Ind. 400, 5 N. E. (2d) 517.

It is, therefore, apparent the Legislature intended Burns' Indiana Statutes Annotated, Section 64-2625, *supra*, to apply only to a "dissolution" or "withdrawal" in their statutory definition and not a "merger" or "consolidation."

In view of the foregoing it is my opinion that your questions numbered 1 and 3 should be answered in the negative.

Questions numbered 2 and 4 present a slightly different problem. You ask whether the Secretary of State, although accepting such paper or papers for filing, may withhold the issuance of the certificate evidencing their filing.

As has been established previously, a "merger" and "consolidation" either of a domestic or foreign corporation do not come under the terms of Burns' Indiana Statutes Annotated, Section 64-2625, *supra*.

The Corporation Act, Section 32, page 725, the same being Burns' Indiana Statutes Annotated (1948 Repl., 1951 Supp.), Section 25-231 (h) prescribes the duties of Secretary of State in case of a merger of a domestic corporation:

"Certificate of Merger. Upon the presentation of the articles of merger, the secretary of state, if he finds that they conform to law, shall indorse his approval upon each of the multiple copies of the articles, and, when all fees have been paid as required by law, *shall file one (1) copy of the articles in his office and issue a certificate of merger*, and shall return the remaining copies of the articles bearing the indorsement of his approval, together with the certificate of merger, to the surviving corporation." (Our emphasis.)

The Corporation Act, Section 33, page 725, as amended, the same being Burns' Indiana Statutes Annotated (1951 Supp.), Section 25-232 (g) prescribes the duties of Secretary of State in case of a consolidation of a domestic corporation:

"(g) Certificate of Consolidation and Incorporation. Upon the presentation of the articles of consolidation, the secretary of state, if he finds they conform to law, shall indorse his approval upon each of the multiple copies of the articles, and, when all fees have been paid as required by law, *shall file one (1) copy of the articles in his office and issue a certificate of consolidation and incorporation to the new corporation* and shall return the remaining copies of the articles of consolidation bearing the indorsement of his approval, together with the certificate of consolidation and incorporation, to the new corporation or its designated agent." (Our emphasis.)

The Corporation Act, Section 34, the same being Burns' Indiana Statutes Annotated (1948 Repl.), Section 25-233 provides:

“Upon the issuance of a certificate of merger or a certificate of consolidation and incorporation by the secretary of state, the merger or consolidation, as the case may be, shall be effected.”

As to foreign corporations merging or consolidating, the answer is found in the Corporation Act, Section 69a as amended, the same being Burns' Indiana Statutes Annotated (1948 Repl.), Section 25-314a which provides in part:

“(a) * * * Such agreement shall be authorized, adopted, approved, signed and acknowledged by each of such constituent corporations in accordance with the laws under which it is formed, and, in the case of an Indiana corporation, in the manner provided in article 4 (§§ 25-230—25-240) of this act pertaining to mergers and consolidations. Triplicate copies of the agreement so authorized, adopted, approved, signed and acknowledged, together with one certified copy of the laws of the foreign state or states applicable to such merger or consolidation and affecting the corporation or corporations not organized under the laws of this state, executed by the secretary of state of such state or states under the seal thereof shall be filed *in the office of the secretary of state and such agreement shall thenceforth be taken and deemed to be the agreement and act of merger or consolidation of such constituent corporations for all purposes of the laws of this state. A copy of such agreement, duly certified by the secretary of state under the seal of his office, shall also be recorded as provided in article 4 (§§ 25-230—25-240) of this act pertaining to mergers and consolidations.*” (Our emphasis.)

If the same words are used more than once and the meaning is clear as used in one place, it is presumed that they are used in the same sense in other places of the same Act when there is nothing to indicate the contrary. *Ryan v. State* (1910), 174 Ind. 468, 92 N. E. 340, Ann. Cas. 1912 D, 1341.

When the word “shall” is used in a statute, it is presumed to be used in its imperative sense. *Board of Finance of School*

OPINION 58

of Aurora v. Peoples National Bank (1909), 44 Ind. App. 573, 89 N. E. 904.

In view of the foregoing it is my opinion that your questions numbered 2 and 4 should be answered in the negative.

OFFICIAL OPINION NO. 58

July 20, 1953.

Hon. Frank T. Millis,
Auditor of State,
State House,
Indianapolis, Indiana.

Dear Mr. Millis:

I have your request for my opinion in regard to the legality of paying an attorney hired by the Indiana State Toll Bridge Commission when the employment of said attorney has not been approved by the Attorney General and when said attorney is a stockholder in a corporation which is the holder of an alcoholic beverage permit.

We have been furnished with various records and documents which show the following facts:

- (1) The Indiana State Toll Bridge Commission has attempted to employ one Joseph B. Minor, as its attorney, at an annual retainer of \$6,000.00 per year.
- (2) Mr. Minor also has a contract with the Toll Bridge Commission, which contract is set out in full below:

“AGREEMENT

“THIS AGREEMENT, made as of the 29th day of December, 1952, by and between the INDIANA STATE TOLL BRIDGE COMMISSION, hereinafter referred to as ‘COMMISSION,’ and JOSEPH B. MINOR, an Attorney in the city of Evansville, Indiana, hereinafter referred to as ‘ATTORNEY’: WITNESSETH:

“WHEREAS, the Commission is contemplating the construction of a vehicular traffic bridge across the Ohio River at Lawrenceburg, Indiana, pursuant to the