

his employment by the Commission was without the written consent of the then Attorney General it was invalid. That if proper consent was given it terminated with the term of such Attorney General. That, therefore, it would not be proper to pay him salary or compensation for legal services for the Indiana State Toll Bridge Commission.

OFFICIAL OPINION NO. 59

July 21, 1953.

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

Dear Sir:

I have your request for an Official Opinion which reads as follows:

“We have reference to the Acts of 1947, Chapter 208, § 3324, a part of the Employment Security Act, same being found in Burns' Indiana Statutes Annotated, 1951 Replacement, Vol. 10, Part 1, § 52-1557w, reading as follows:

“CERTIFICATES OF DISSOLUTION OR WITHDRAWAL WITHHELD UNTIL FILING OF CERTIFICATE OF FULL PAYMENT WITH THE SECRETARY OF STATE.—The Secretary of State of Indiana shall withhold the issuance of any certificate of dissolution of any corporation organized 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 certificate from the employment security division to the effect that all contributions due from such corporation as an employer have been paid or that such corporation is not subject to contribution hereunder.’

* * *

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"1. Do the words in the section 'withhold the issuance of any certificate of 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 certificate from the Employment Security Division to the effect that all contributions due from the non-surviving corporation, in the event of a merger, have been paid, or that such corporation is not subject to contribution, or where, in the case of a consolidation, the Secretary of State has not received a certificate from the Employment Security Division to the effect that all contributions due from any such domestic consolidating corporations have been paid or that they are not subject to contribution under the 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 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 certificate from the Employment Security Division to the effect that all contributions due from the non-surviving foreign corporation, in the event of a merger, have been paid, or that such corporation is not subject to contribution under the Act, or where, in the case of a consolidation, the Secretary of State has not received a certificate from the Employment Security Division to the effect that all contributions due from such foreign consolidating corporation have been paid, or that it was not subject to contribution under the 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?”

Since the answers to your questions hinge on the Employment Security Act we must first discover the purposes of the Act and the construction given to the Act by the Indiana courts.

Chapter 208 of the Acts of 1947, hereafter referred to as the Employment Security Act, is found in Burns' Indiana Statutes Annotated (1951 Repl.), Section 52-1525 *et seq.* The title of said act is “An Act concerning unemployment compensation, stabilization of employment, employment service, employment security, providing for contributions in connection therewith, repealing all laws in conflict therewith and declaring an emergency.”

Section 101 of said Act is the declaration of public policy, the same being Burns' Indiana Statutes Annotated (1951 Repl.), Section 52-1525 which is as follows:

“As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is declared hereby to be a serious menace to the health, morale and welfare of the people of this state and to the maintenance of public order within this state. Protection against this great hazard of our economic life can be provided in some measure by the required

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and systematic accumulation of funds during periods of employment to provide benefits to the unemployed during periods of unemployment and by encouragement of desirable stable employment. The enactment of this measure to provide for payment of benefits to persons unemployed through no fault of their own, to encourage stabilization in employment, and to provide for a state employment service is, therefore, essential to public welfare; and the same is declared to be a proper exercise of the police powers of the state."

The court said in *Merkle v. Review Board of Indiana Employment Security Division et al.* (1950), 120 Ind. App. 108, 90 N. E. (2d) 524 that the Employment Security Act, being social legislation designed to alleviate economic insecurity due to unemployment should be liberally construed in order to effectuate the legislative intent in that respect.

A liberal 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 of 1929, Chapter 215, hereafter referred to as the Corporation Act, Section 42, as amended, 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 (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 (1951 Supp.), Section 25-232, provides in part as follows:

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“Any two (2) or more 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 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 a “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:

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“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 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 69 (a), as amended, the same being Burns' Indiana Statutes Annotated (1948 Repl.), Section 25-314 (a) 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 52-1557w, *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 cor-

*poration * * *, 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 the 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 corporation 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 Employment Security Act to which you have reference was passed in 1947. 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 its provisions in view.

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

Smith Petroleum Company v. Department of Audit 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 52-1557w, *supra*, to apply only to a “dissolution” or “withdrawal” in their statutory definition.

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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 52-1557w, *supra*.

The Corporation Act, Section 32, page 725, the same being Burns' Indiana Statutes Annotated (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) prescribed 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 69 (a), 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

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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 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. 60

July 22, 1953.

Mr. Willis K. Batchelet,
State Senator,
321 N. Martha Street,
Angola, Indiana.

Dear Mr. Batchelet:

I have before me your letter of June 23, 1953 which is as follows:

"The state traffic code provides for speed limits within incorporated towns, both on state highway and also the residential section.

"The question has arisen many times as to whether or not a city or town who has a traffic ordinance setting forth the same speed regulation as the state code both on state highway passing through the town and in the residential district, whether or not the violators of such ordinance can be prosecuted under the city ordinance on the state highway passing through the town. Also in the residential section for violation of the traffic code. These cases to be prosecuted under the city ordinance.

"Will you please furnish me, as State Senator, official opinion on this question."

The Acts of the General Assembly of 1939, Chapter 48, as found in *Burns' Indiana Statutes Annotated* (1952 Repl.),