

Summarizing the foregoing I am of the opinion that in answer to your first question the sum of \$55,681.07 transferred by the county to the State under said ordinance cannot be returned to the county for loans for any purpose; that the sum of \$12,732.02 paid into the State treasury to become a part of the State common school fund or permanent endowment fund of Indiana University, by the county auditor without authority must be returned to Ripley County to become a part of the common school fund or the permanent endowment fund of Indiana University in such county. In answer to your second question I wish to advise the said sum of \$12,732.02 together with any other funds in such common school fund or permanent endowment fund of Indiana University in said county may be loaned to the county for the purpose of acquiring such land to be thereafter transferred to the State Park system, by complying with all the requirements of the statutes heretofore cited.

OFFICIAL OPINION NO. 115

November 13, 1945.

Hon. Clement T. Malan,
State Superintendent of Public Instruction,
State House,
Indianapolis, Indiana.

Dear Doctor Malan:

I have your letter of October 30, 1945, requesting an official opinion on the following questions:

"1. If the Acts of 1945 are not promulgated more than thirty (30) days prior to December 15, 1945, may the State Board of Textbook Commissioners give a thirty (30) days notice of adoption of text books and make a legal adoption on December 15th if the 1945 Acts become effective on or before December 15th?

"2. If the Acts of 1945 are not promulgated before December 15th, may a legal adoption be made subsequent thereto under the provisions of Chapter 243 of the Acts of 1945?"

1. In answer to your first question it is submitted the same requires a construction of Section 3 of Chapter 243 of the Acts of 1945, which reads as follows:

“In the case of subjects and grades for which textbooks are adopted on the effective date of this act the multiple listing and contracting shall be conducted as follows: Not later than December 15 of the year preceding the expiration of any contract or contracts, the board shall adopt and enter into new contracts for three (3) textbooks for each subject and grade, for which contracts will expire during the next succeeding calendar year, provided three (3) satisfactory textbooks for such subject and grade are submitted. In the case of readers for the first three (3) grades the board shall adopt and enter into contracts for three (3) textbooks and the board also shall adopt and contract for six (6) supplementary books which together with the two (2) remaining textbooks shall constitute a supplementary book list of eight (8) books. Notice of the meeting of the board for the purpose of making such adoptions and contracts shall be given by publication thirty (30) days prior to the time of such meeting in two (2) daily newspapers published in the State of Indiana having a paid circulation of not less than eighty-five thousand (85,000), such notice to include a complete list of all subjects and grades for which textbooks are to be adopted.”

The law applicable to your first question is well stated in *Corpus Juris* in the following language:

“* * * The general rule is that a statute speaks from the time it goes into effect and not otherwise, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. * * * While a statute may have potential existence, although it will not go into operation until a future time, until the time arrives when it is to take effect and be enforced, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose. *Before that time no*

rights may be acquired under it and no one is bound to regulate his conduct according to its terms, and all acts purporting to have been done under it prior to that time are void."

50 *Corpus Juris*, paragraph 673, pages 1137-1138;

Smith v. Thomas, 317 Ill. 150, 157 (1925), 147 N. E. 788;

Dunne v. County of Rock Island, 283 Ill. 628, 636 (1918), 119 N. E. 1103;

People v. Rose, 166 Ill. 422, 431 (1897), 47 N. E. 64;

Price v. Hopkin, 13 Mich. 318, 326 (1865).

The Supreme Court of Indiana has declared the same rule by holding that an act of the legislature must be construed to speak and operate from the time it takes effect in exactly the same manner as a will speaks and operates from the time of the death of the testator.

Evansville, etc., R. R. Co. v. Barbee (1877), 59 Ind. 592 on 593;

Evansville, etc., R. R. Co. v. Barbee (1881), 74 Ind. 169 on 171;

McCalment v. State (1881), 77 Ind. 250.

I am therefore of the opinion the State Board of Textbook Commissioners could not legally give a thirty (30) day notice of a date upon which textbooks would be adopted unless at the time of giving such notice the Acts of 1945 have been duly promulgated by the Governor. This is due to the fact Chapter 245 does not contain an emergency clause and any acts taken by said Commission regarding giving of notice under the provisions of said Act prior to the taking effect of said Act would be void.

2. In answer to your second question it is submitted Section 1 of said statute provides as follows.

"That the State Board of Education, hereinafter referred to as the board, shall make multiple adoptions of textbooks and enter into contracts with publishers

of textbooks to furnish them at fixed prices, so that there shall be a multiple list of textbooks for all subjects in all grades of the public schools in the State of Indiana.”

When Sections 1 and 3 of said Act, *supra*, are construed in harmony with the other sections of said statute it is clear the Legislature intended said Commission to adopt a multiple list of textbooks in all subjects in all grades of the public schools in the State of Indiana.

Due to the fact Chapter 243 of the Acts of 1945, did not contain an emergency clause the same will not be in effect until promulgated by the Governor. If said statutes are not promulgated in time to give such thirty (30) day notice prior to December 15, 1945, and if said statute is construed according to its literal terms, the intention of the Legislature would fail for in such case no provision is made in said Act for adoption of a multiple list for those subjects and grades for which contracts expire next June under Section 3 of said Act.

However, in 2 Sutherland Statutory Construction, Section 4704, page 338, it is stated:

“The presumption is that the lawmaker has a definite purpose in every enactment and has adapted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if that is the intended effect, they will, at least, conduce to effectuate it. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. This intention affords the key to the sense and scope of minor provisions. From this assumption proceeds the general rule that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. ‘A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction.’”

Under the above authority it is therefore necessary to determine if the provision contained in Section 3 of said statute

that said meeting shall be held "not later than December 15" is *mandatory* or merely *directory*.

In 2 Sutherland Statutory Construction, pp. 216 and 217, the following rule is announced:

"Generally those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute, are not commonly considered mandatory. Likewise, if the act is performed but not in the time or in the precise manner directed by the statute, the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized.

"* * *

"* * * Likewise, where the time, or manner of performing the action directed by the statute is not essential to the purpose of the statute, provisions in regard to time or method are generally interpreted as directory only."

Also see 46 *Corpus Juris*, "Officer," Section 306.

In 53 *Corpus Juris*, "Statutes," Section 631, pp. 1073 and 1074, said rule is stated as follows:

"* * * On the other hand, the language of a statute, however mandatory in form, may be deemed directory whenever legislative purpose can best be carried out by such construction, and the legislative intent does not require a mandatory construction; * * *. Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of

absolute prohibition; and the same is true where no substantial rights depend on the statute, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results. * * *

Also see *In Re McQuiston's Adoption* (1913), 238 Pa. 304, 86 A. 205, 206.

Said rule of construction as specifically applied to the time for performance of official duties is found in 59 *Corpus Juris*, "Statutes," Section 634, pp. 1078 and 1079, and is as follows:

"A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time for the performance of certain acts which may as effectually be done at any other time is usually regarded as directory. * * *

In *Hisley, Auditor v. Rumble* (1924), 81 Ind. App. 573, with respect to interpretation of tax laws, the court said:

"There is a general rule founded on sound reason and principle which requires that when construing a tax law all those provisions which are intended to secure methodical procedure shall be regarded as merely directory, and that only those provisions which are necessary to the protection of the citizen shall be regarded as mandatory. * * *

Further exemplification and explanation of the rule is found in *Jones v. Swift* (1883), 94 Ind. 516, at page 523, in regard to remedial statutes:

"* * * It will not do to hold that this statute may be used as a weapon against the successful litig-

ant, for whose protection it was enacted, by rendering ineffectual the judgment rendered in his favor, because the judge violated or failed to observe its provisions. To avoid such injustices the statute must be construed as directory. It is said in Sedgwick on Statutory and Constitutional Law, 316, that 'When statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed. In these cases, by a somewhat singular use of language, the statute is said to be directory.'

It has also been held in this State that in construing a statute the legislative intent is to be kept in view, and such intent, as ascertained from a consideration of the whole, as well as with separate parts of the Act, will control the strict letter of the statute where adherence to the strict letter or literal import would lead to injustice, or contradict the evident intention of the Legislature.

Steiert v. Coulter (1913), 54 Ind. App. 643, 652;
Ramsey v. Yount (1918), 68 Ind. App. 378, 383;
Peoples Trust & Savings Bank v. Hennessey
(1938), 106 Ind. App. 257, 268.

From the above statutes it is clear the Legislature intended a multiple textbook list to be adopted by the State Board of Textbook Commissioners for those subjects and grades for which contracts for textbooks would expire next June. Under the foregoing authorities such intention of the Legislature must prevail even though such adoption cannot be made, pursuant to legal notice required by the statute, prior to December 15 of this year.

In answer to your second question I am therefore of the opinion the State Board of Textbook Commissioners may after the Acts of 1945 are duly promulgated, give the required thirty (30) day notice of a meeting to thereafter be held by the State Board of Textbook Commissioners and at which meeting a multiple list of textbooks may be adopted for each sub-

ject and grade for which contracts will expire at the end of the 1945-46 school year.

To summarize the answers to the foregoing questions I am of the opinion in answer to your first question the State Board of Textbook Commissioners are not authorized to give the thirty (30) day legal notice for a meeting under Section 3 of said statute prior to the promulgation of the Acts of 1945; and in answer to your second question I am of the opinion that after said Acts are duly promulgated said Textbook Commission may give the thirty (30) day notice of a meeting to thereafter be held for the adoption of a multiple list of textbooks for each subject and grade for which contracts will expire at the end of the 1945-1946 school year.

OFFICIAL OPINION NO. 116

November 14, 1945.

Hon. Ralph F. Gates, Governor
State of Indiana,
State House,
Indianapolis 4, Indiana.

My Dear Governor:

This will acknowledge receipt of your letter which is as follows:

“I am writing you regarding a situation that is very critical.

“The Boards of Trustees of Indiana University, Purdue and our State Teachers College called upon me a couple of days ago regarding proper buildings in order to care for properly the returning veterans. Of course, if we followed the usual procedure we would have a special session of the legislature in order to make these appropriations.

“I am wondering if it is possible the money which has accumulated from the alcoholic beverage tax which is earmarked for institutional use could be used for the building of these structures without the calling of the special session of the legislature.”