
March 23, 1933.

Hon. James D. Adams, Chairman,
State Highway Commission,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion interpreting the provisions of chapter 258 of the Acts of 1933 as to their applicability to contracts entered into by the State Highway Commission. You submit the following questions:

"1. Does section one of this act apply to contracts made by this commission for the construction of bridges, highways and other public work?

"2. Does section one of this act apply to contracts made by this commission for the furnishing of stone, gravel, sand and other material delivered on the highways and used in the repair and maintenance of highways and bridges?

"3. Does section one of this act apply to contracts made by this commission for the provision of material for the repair of highways where the contract requires the contractor to deliver the material in place on the highway?

"4. If section one of this act applies in any of the above instances will it be necessary to write into such contracts the provisions required by the first part of section two of said act to be written into other contracts for public works?

"5. If section one of this act applies to contracts made by this commission as above outlined, do the provisions of the section apply to contracts heretofore entered into by this commission of the character described above and on which final settlements have not been made?

"6. Does section two of this act require that this commission comply with its provisions as to the form of contract bonds or is it to be governed solely by the provisions of the highway commission act in reference to bonds? (See last sentence of section two.)

"7. If section one of this act applies to contracts made by this commission for the repair, material, men,
etc., does this give two remedies for the collection of their demands? (Under the act of 1933.) (Under highway commission act.) (See section three of the original act of 1911 of which the act of 1933 is amendatory.)"

Briefly stated, section 1 of chapter 258, supra, requires boards and commissions to withhold final payment to contractors for public work until such contractors have paid to the subcontractor or sub-contractors or material men for material furnished or labor employed in such construction or those furnishing any service in relation to or in connection with the construction, erection, alteration or repair of public improvements made under contract,—until such contractor has paid all bills due and owing the same to sub-contractors, material men and laborers so employed. Said section is an amendment of section 1 of chapter 168, of the Acts of 1931, which was itself an amendment of section one of chapter 44 of the Acts of 1925, the latter being an amendment of section 1 of chapter 173 of the Acts of 1911. As originally enacted in 1911, the section provided—

"That all boards of trustees of state institutions and commissioners appointed for the building of state buildings * * * authorized to contract for any public building or public improvement, and officers and boards authorized by the state * * * to distribute funds and pay contractors for public buildings or any public improvement where contracts have or may hereafter be entered into through such officers * * * for the erection of public buildings or any public improvement of the state, * * * such officers, boards, commissioners or trustees shall withhold full payment to the contractor until such contractor has paid to the subcontractor or sub-contractors or laborers employed in such construction, all bills due and owing the same."

* * *

When this section was amended in 1925, it was broadened so as to embrace contracts for the construction of "any public building or any other public work or improvement of any character whatsoever" which was being constructed, erected,
altered or repaired under contract at the expense of the state or other public body.


It cannot be doubted, I think, that the effect of the amendment of 1925, was to bring the state highway commission within the scope of the provisions of said section. Such, in fact, was the accepted interpretation of the 1925 amendment.

In 1931, the section was again amended. In order to indicate more clearly what the 1931 amendment was, I desire to quote the opening lines from the section as it was enacted in 1925. Note the following, quoting now from the 1925 act:

“That when any public building or any other public work or improvement of any character whatsoever is being constructed, erected, altered or repaired under contract at the expense of the state... it shall be the duty... to withhold final payment.”

The 1931 amendment, inserted after the first word of the above quoted language, the words “except as hereinafter otherwise provided.” The use of the above language was clearly for the purpose of excepting from the operations of the act something which would be considered as within its terms unless expressly excepted therefrom. It is not difficult from a consideration of the act of 1931, to determine what that exception was. On page 583 of the Acts of 1931, new matter is inserted by way of amendment to the act of 1925, supra, in the following language:

“The terms ‘public building,’ ‘public work’ and ‘public improvement,’ or combinations thereof, as used in this act, shall be construed to include all buildings, work or improvements the cost of which is paid for by funds derived from taxation or from special assessments imposed and levied on the real estate, land and lots benefited thereby. *The term ‘assessment district’ shall be construed to mean and include all of the real estate, lands and lots embraced within a distinct area upon which special assessments for benefits are levied or imposed for the construction, reconstruction, betterment, replacement or repair of any ditch, drain, levee, dike, street, alley, sewer, park, parkway, boulevard, play-
ground or any other like work or improvement the cost of which is paid for by funds derived from special assessments imposed and levied on the real estate, land and lots benefited thereby, but shall not include state highways, or state highway bridges, or any other work constructed under the supervision and paid for out of the funds at the disposal of the state highway commission.” (Our italics.)

In an opinion from this department addressed to the state highway commission under date of October 29, 1931, an interpretation of the above quoted language was under consideration. In that opinion, the history of the legislation was set out at length and a conclusion was reached that the italicized language should be inserted immediately after the asterisk, so that the language would read—

“The terms ‘public building,’ ‘public work’ and ‘public improvement’ or combinations thereof, as used in this act, shall be construed to include all buildings, work or improvements the cost of which is paid for by funds derived from taxation or from special assessments imposed and levied on real estate, land and lots benefited thereby, but shall not include state highways or state highway bridges, or any other work constructed under the supervision and paid for out of the funds at the disposal of the state highway commission.”


It appears, therefore, that the “except as hereinafter provided,” heretofore referred to applied specifically to the exception of the state highway commission and the only purpose in inserting a definition of terms was to provide for the exception. When section 1, supra, was again amended in 1933, (Chapter 258 of the Acts of 1933), the legislature struck out the language “but shall not include state highways or state highway bridges, or any other work constructed under the supervision and paid for out of the funds at the disposal of the state highway commission,” being the italicized language heretofore referred to. It is true that the legislature did not strike out the language “except as hereinafter otherwise provided,” nor did it strike out the definition of terms, but it did strike
out the exception which had been inserted by the legislature in 1931.

I think that the foregoing history of the legislation under consideration shows the clear intent of the legislature to bring the state highway commission within the provisions of the act and the sole question remaining for consideration therefore, is whether the language used by the legislature is sufficient to justify such construction. It is well settled that the purpose of the construction of a statute is to discover and give effect to the intent of the legislature and while a court is rarely, if ever, justified in so construing a statute as to contradict its express language, yet it is a fundamental rule that a matter or thing within the intention of the makers of the law is the same in effect as if it were within its express letter.

Conn v. Board of Commissioners of Cass County, 151 Ind. 517, at p. 525.
See also the case of Parvin v. Wimberg et al., 130 Ind. 561, at p. 571, where the court used the following language:

"The purpose of construing a statute is to arrive at the intention of the legislature. For that purpose the courts will look to the whole statute, and all its parts, and when such intention is so ascertained, it will prevail over the literal import and the strict letter of the statute."

See also the case of Cummins v. Pence, 174 Ind. 115, at page 124, where the court said:

"A thing within the intent of an act is as much a part of it as if written therein."

In the case of Parvin v. Wimberg et al., supra, the court on page 571, stated the further rule of construction which I think is applicable, that—

"Where the meaning is doubtful and uncertain, the courts will look also to the situation and circumstances under which it was enacted, to other statutes, if there are any upon the same subject, whether passed before or after the statute under consideration, whether in force or not, as well as to the history of the country and
will carefully consider, in this connection, the purpose sought to be accomplished."

I think it is entirely within the above rule to consider the section as it existed before amendment in order to determine what the purpose of the amendment was. If that rule be applied, it seems to me that it is clear, as already stated, that there was only one purpose to serve by the amendment and that was to strike out of the section the exception of the state highway commission which had been put into the section by the 1931 legislature.

I doubt, however, whether it is necessary to enter into a discussion of the above rules of construction and I have done so simply for the purpose of showing that even if the act be regarded as ambiguous, the application of the above rules of construction would resolve that ambiguity so as to include the state highway commission within the meaning of the act. I think, however, that the act is clear without resorting to the above rules of statutory construction. The language used is broad and inclusive, to-wit:

"Any public building or other public work or public improvement of any character whatsoever."

The definition of terms likewise is broad and inclusive. Note the following:

"The terms 'public building,' 'public work' and 'public improvement' or combinations thereof, as used in this act, shall be construed to include all buildings, work or improvements, the cost of which is paid for by funds derived from taxation or from special assessments imposed and levied on the real estate, land and lots benefited thereby."

The language used is not in limitation of the earlier language in the section but is descriptive thereof. In my opinion, section 1 of chapter 258 of the Acts of 1933, embraces within its terms contracts for public work entered into by the state highway commission. It follows from the above, that your first question is answered in the affirmative.

It will be noted that section 1 of chapter 258 of the Acts of 1933, applies only to cases when public buildings or other public works or public improvements are being constructed,
erected, altered or repaired under contract. If I understand the import of your second question, it refers simply to the purchase of material by the highway commission which the commission uses in the repair and maintenance of highways and bridges. As an incident to the purchasing of the material, delivery is required at the point where the same is to be used. I do not think such an operation is within the statute and your second question is therefore answered in the negative.

Your third question is not entirely clear. If the contract for the purchase of the material, although requiring the delivery on the road, does not require its spreading in the form in which it is to be left on the road, but the same requires additional treatment or handling as a part of its use in either repair or construction, such contract would not be within the meaning of section 1 of chapter 258, supra, and, in that event, your third question is answered in the negative.

The answer to your fourth question is in the affirmative.

With reference to your fifth question, without entering upon an elaborate discussion of the rule, I think it is clear that the legislation of 1933 must be given a prospective interpretation so as not to impair the obligation of existing contracts. For that reason, I think your fifth question should be answered in the negative.

Your sixth question is double. The first part of it is answered in the negative. The last part of it is answered in the affirmative. Note the following language on page 1147 of the Acts of 1933:

"On state highway road and bridge contracts, the provisions of the state highway commission act with respect to the bond shall govern."

The answer to your seventh question is in the affirmative.

TREASURER OF STATE: Applicability of Gross Income Tax law—companies subject thereto.

March 27, 1933.

Hon. William Storen,
Treasurer of State,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion relative to the application of chapter 50 of the Acts of the Gen-