

1. An accurate composite plat of the real estate to be conveyed should be furnished with the abstracts of title.
2. There should be a proper showing of payment of all accrued taxes, including May installment, 1937, November, 1937 installment, now a lien, also the taxes accrued on March 1, 1937, payable in 1938, are now a lien.
3. There should be a continuation of these abstracts to the present date, with the proper certificate of the abstractor.

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**ACCOUNTS, STATE BOARD OF: Motor Vehicle Fund—  
division of counties' portion of fund in counties contain-  
ing first, second or third class cities.**

May 7, 1937.

Hon. William P. Cosgrove,  
State Examiner,  
State Board of Accounts,  
State House,  
Indianapolis, Indiana.

Dear Mr. Cosgrove:

I have before me your letter calling attention to subsection (c) of section 3 of chapter 135 of the Acts of 1937, which reads as follows:

“(c) Except as to counties in which cities of the first and second class are located, the funds allocated to the respective counties from the motor vehicle highway account, or such portion thereof as may then be held in the motor vehicle highway account shall be distributed and paid to the respective counties by the auditor of state on the first day of April in each year and quarterly thereafter. As to counties in which are located cities of the first class the funds which would otherwise be annually allocated to such county or counties, respectively, from the motor vehicle highway account shall be divided so that the county shall receive two-fifths of the allotment and the city of the first class shall receive three-fifths of the allotment. As to counties in which are located cities of the second class, *and/or one city of the second class and one city of the third class* the funds which would otherwise be annually allocated to such counties, respectively,

from the motor vehicle highway account shall be divided so that the county shall receive four-fifths ( $4/5$ ) of the allotment and the city or cities of the second class shall receive one-fifth ( $1/5$ ) of the allotment, and whenever two or more cities of the second class\* are located in the same county such cities of said county shall share in the allotment in proportion to their population as determined by the latest U. S. census. Distribution of the respective annual allotments to said cities and counties, or such portion thereof as may then be held in the motor vehicle highway account, shall be made and paid thereto by the auditor of state on the first day of April in each year and quarterly thereafter." (Our italics.)

Acts of 1937, page 780.

NOTE: The asterisk is added.

You request an official opinion construing said subsection with respect to the following questions, viz.:

"1. Do cities of the third class which are located in counties together with a city or cities of the second class share in the money allotted to the county?

"2. Do cities of the third class located in counties not having a city of the second class share in such distribution under provisions of this section of this Act?

"3. Does a city of the second class located in a county not having a city of the third class share in such distribution under the provisions of this section of the Act?"

It should be noted that the above subsection has to do with the distribution between certain counties and certain classes of cities located in such counties of the portion of the motor vehicle highway fund which, upon the basis set up in subsection (b) of said section, would otherwise be allocated to such counties. In other words, after having provided a "cities and town" portion in the motor vehicle highway account (subsection (a) of section 3) and a "counties" portion in said account (subsection (b) of section 3), the latter is further subdivided as to certain counties in the manner set out in subsection (c) of section 3.

The first sentence of subsection (c) *supra* fixes the time for the distribution of the "counties" fund to the several counties as the first day of April in each year and quarterly thereafter, excepting therefrom counties in which are located cities of the first and second class. This, however, is not intended as indicating a different date for distribution as to such excepted counties (see the last sentence of subsection (c) *supra*) but simply as an exception of such counties for the purpose of providing a further division of said "counties" fund between the counties and the certain classes of cities located therein.

The second sentence of the subsection has to do with the division of said portion between a county within which is located a city of the first class and such city of the first class. The provision here is clear and resort to rules of construction is unnecessary.

The literary construction of the next sentence, however, is more complicated and presents some very obvious difficulties of rational explanation. For the purpose of analysis, I desire to separate this sentence from the remainder of the subsection. It reads as follows:

"As to counties in which are located cities of the second class, *and/or one city of the second class and one city of the third class* the funds which would otherwise be annually allocated to such counties, respectively, from the motor vehicle highway account shall be divided so that the county shall receive four-fifths ( $4/5$ ) of the allotment and the city or cities of the second class shall receive one-fifth ( $1/5$ ) of the allotment, and whenever two or more cities of the second class\* are located in the same county such cities of said county shall share in the allotment in proportion to their population as determined by the latest U. S. census." (Our italics.)

Acts of 1937, page 780.

NOTE: The asterisk is added.

I have underlined certain words in the above quoted provision because it is by reason of them that the difficulty of construction arises. Whereas, in the first sentence of subsection (c), *supra*, it is indicated that the distribution of the

“counties” fund in its entirety may be made to the several counties without diminution except in counties in which are located cities of the first and second classes, the underline language would indicate that a further exception is added so as to include in the exceptions, counties in which are located a city of the second class and a city of the third class. This indication clearly involves a further indication that in the case of counties having cities of the second class within their boundaries, it was only in counties having two or more cities of the second class within their boundaries that the exception applies, since there would be no occasion to include within the exceptions by express language counties having a city of the second class and a city of the third class if one city of the second class was sufficient. On the basis that it requires two or more second class cities or one second class city and one third class city in the same county to place said county in the excepted class, it is significant, however, that there is no express provision whereby a city of the third class within a county having within it both a city of the second and third class would participate in the distribution of the “counties” fund in such a case, a situation which would appear to be quite unreasonable, since as between two or more cities of the second class within the same county both cities share in proportion to their population according to the latest United States census.

It thus appears that a literal construction of the language last above quoted leads to a result which it is difficult to justify upon the basis of substantial equality as between cities and counties in relatively similar positions; and the question arises as to whether such literal construction expresses the intent of the legislature and, if not, whether by the application of recognized rules of construction that intent may be ascertained without doing violence to the language used.

My attention has been called to certain legislative procedure in the enactment of the legislation under consideration. From an examination of the records in the office of the Legislative Reference Bureau I find that the underlined language *supra* found its place in the Act through the conference committee which reported it as an amendment to the bill, but which through error in enrolling the amendment was inserted where it now appears instead of immediately following

the asterisk where it should have been inserted. Inserting the underlined language immediately following the asterisk the provision would read as follows:

“As to counties in which are located cities of the second class, the funds which would otherwise be annually allocated to such counties, respectively, from the motor vehicle highway account shall be divided so that the county shall receive four-fifths ( $4/5$ ) of the allotment and the *city* or cities of the second class shall receive one-fifth ( $1/5$ ) of the allotment, and whenever two or more cities of the second class\* *and/or one city of the second class and one city of the third class* are located in the same county such cities of said county shall share in the allotment in proportion to their population as determined by the latest U. S. census.” (Our italics.)

The foregoing transposition of the underlined language, it will be observed, removes all difficulty of construction and gives to the language consistency of purpose. Thus it appears from the language last quoted that, without the amendment, the intention to include in one general class of counties all counties wherein there is a city of the second class becomes clear. It is, likewise, apparent that the purpose of the amendment was not to add a new type of county to the already created class but to authorize a city of the third class in the already created class of counties to share along with a second class city in the same county.

The question remains as to whether I may make the above transposition for the purpose of construction. It is well settled, I think, that evidence of error in enrollment cannot be received to impeach the enrolled Act, properly attested by the presiding officers of the senate and house and signed by the governor. *State, ex rel., v. Wheeler*, 172 Ind. 578. In the above case on page 580 the court said:

“It is settled law in this state that, when an enrolled Act is authenticated by the signatures of the presiding officers of the two houses, it will be conclusively presumed that the same was enacted in conformity with all the requirements of the constitution, and that the enrolled bill contains the Act as it actually passed, and it is not allowable to look to the journals

of the two houses, or to other extrinsic sources, for the purpose of attacking its validity or the manner of its enactment.”

Later on, quoting from Dwarris, Statutes, the court used the following language on page 584:

“ ‘Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than, that every act, state and national, should at any and all times be liable to be put in issue, and impeached by the journals, loose papers of the legislature, and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable. \* \* \* The result of the authorities in England and in other states clearly is, that, at common law, whenever a general statute is misrecited, or its existence denied, the question is to be tried and determined by the court as a question of law—that is to say, the court is bound to take notice of it, and inform itself the best way it can; that there is no plea by which its existence can be put in issue and tried as a question of fact; that, if the enrollment of the statute is in existence, the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed, or weakened by the journals of parliament or any other less authentic or less satisfactory memorials; and that there has been no departure from the principles of common law in this respect in the United States, except in instances where a departure has been grounded on or taken in pursuance of some express constitutional or statutory provision requiring some relaxation of the rule, in order that full effect might be given to such provisions; and in such instances the rule has been relaxed by the judges with great caution and hesitation, and the departure has never been extended beyond an inspection of the journals of both branches of the legislature.’ ”

I think it is clear both by precedent and reason that the discovery of the probable error in enrolling the amendment *supra* does not furnish a sufficient reason to authorize the transposition. To make changes in enrolled acts upon such

a basis might lead to very grave abuses much more disastrous, in fact, than the occasional injury attendant upon a simple error growing out of the acknowledged imperfection of the human agency.

It is with considerable hesitancy, therefore, that I call attention to the following rule of construction of statutes which, when applicable, however, undoubtedly, tends to effect the real purpose of all construction. I call attention, first, to section 376 of Lewis' Sutherland Statutory Construction (2nd Ed.) which provides as follows:

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the Act." \* \* \* "When the intent is plain, words and even parts of sentences may be transposed to carry it into effect."

Lewis' Sutherland Statutory Construction (2nd Ed.), section 376.

See also Endlich on the interpretation of statutes, page 434, where the rule is stated in the following language:

"A transposition of words is, indeed, to be made wherever the intention of the legislature and the context require such a change. Thus 'current expenses of the year' was read 'expenses of the current year'; and in another case a clause in a section of revised statutes was construed as if a proviso found in the middle of the clause were placed at the end, and again, in construing a statute so as to make it conform to the legislative intent, it was held that a clause which was included in the second section should be read as if included in the first, and as qualifying the provisions of the latter."

Endlich on the Interpretation of Statutes, page 434.

Many authorities are cited by the above text writers.

In the case of Northern Pacific R. R. Co. v. Mase, 63 Fed. 114, the statute under consideration was as follows:

“That in every case the liability of the corporation to a servant or employee, acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him as if such servant or employee were a passenger.’”

Applying the principle above stated, the court in construing the above provision transposed the phrase “or to an employee not appointed or controlled by him” so as to make the provision read as follows:

“That in every case the liability of the corporation to a servant or employee acting under the orders of his superior, or to an employee not appointed or controlled by him, shall be the same in case of injury sustained by default or wrongful act of his superior, as if such servant or employee were a passenger.’”

Northern Pacific R. R. Co. v. Mase, 63 Fed. 114, at page 116.

In the case of Board, etc., v. Scanlan, 178 Ind. 142, a proviso was transposed from one section, section 19 of the statute, to the section immediately following in order to give effect to the plain intent of the legislature.

Board, etc., v. Scanlan, 178 Ind. 142, at p. 148.

Numerous authorities are cited by the court in the above case in support of the proposition. The court said in the above case on page 148, “by transposing this proviso to section 20, the solution is plain, and we are warranted in thus transposing the proviso to its proper connection and subject, when, as here, the purpose and intention are plain, and the statute should be construed so as to give a sensible effect to every part.”

While, in the present case, I do not think it can be said that the language of the amendment inserted by the conference committee is void of meaning at the point where it appears in the subsection under consideration, I do think that to insert it immediately following the asterisk *supra* overcomes considerable difficulty of construction and gives the language a more consistent meaning in harmony with what appears to be the actual intent of the legislature. It was said by the court in *Clare v. The State*, 68 Ind. 17, quoting from page 25:



“It has been well said that it is the duty of courts to execute all laws according to their true intent and meaning; and that intent, when collected from the whole and every part of a statute, must prevail even over the literal import of terms, and control the strict letter of the law, when the latter would lead to possible injustice and contradictions.”

Earlier in the same opinion on page 25, the court used the following language:

“But we do not understand that this court is bound, in the interpretation and construction of a statute, to take the words used therein in their plain, exact and literal sense. On the contrary, the true rule is, and always has been, as recognized in many decisions of this court, to make the legislative intention in the enactment of the particular statute, the chief guide of the court in its interpretation and construction. If the object, purpose and intention of the legislature, in the enactment of the particular statute, can be fairly ascertained and arrived at, then it is the duty of the court to overlook and disregard all apparent inaccuracies and mistakes in the mere verbiage or phraseology of the statute, and, if possible, to give force and effect to the evident reason, spirit and intention of the law. This, we think, is the true and only safe rule for the guidance of the courts in all statutory exposition and construction, and as such it has been recognized and acted upon by this court, in a large number of its reported decisions.”

The above case is extraordinary in that what purported to be an amendment of section 74 of an act was given effect by construction as an amendment of section 36 of said Act.

With the foregoing array of authorities to support it, the rule permitting the transposition of clauses and phrases in statutes for purposes of construction where the language is otherwise ambiguous may be considered as well settled. I think it will have to be admitted that the subsection under consideration as written is ambiguous and perhaps subject to different constructions; but when the transposition is made

all ambiguity is removed and the language used becomes clear, and expressive of an intent both reasonable and harmonious with the apparent basis underlying the provision.

Your first question, therefore, is answered in the affirmative. When the transposition is made the language reads:

\* \* \* "Whenever two or more cities of the second class and/or one city of the second class and one city of the third class are located in the same county *such cities* of said county shall share in the allotment in proportion to their population as determined by the latest U. S. census." (Our italics.)

"*Such cities*" very evidently refers back to the language "two or more cities of the second class and/or one city of the second class and one city of the third class" and includes a city of the third class when it is in a county with a city of the second class.

Your second question is answered in the negative. This is very clear.

Your third question is answered in the affirmative. Note the following language as it appears after the transposition is made:

"As to counties in which are located cities of the second class, the funds which would otherwise be annually allocated to such counties, respectively, from the motor vehicle highway account shall be divided so that the county shall receive four-fifths (4/5) of the allotment and *the city* or cities of the second class shall receive one-fifth (1/5) of the allotment." (Our italic.)

Before the transposition, the underlined language, *supra*, was justified as providing for the case of the city of the second class within a county which also had within it a city of the third class but only one of the second class. But after the transposition such language cannot be given effect except upon the theory that a single city of the second class in any county is to share in the redistribution of the "counties" fund irrespective of the presence within the same county of a third class city.