State Highway Commission — Contract — Specification Holding Contractor Liable for Damage Resulting from Natural Causes—Validity of—Waiver of Obligation of Contractor by State Highway Commission.

The State Highway Commission may enforce the clause in a contract between the Commission and a contractor in which the contractor assumes liability for damage resulting from natural causes.

The State Highway Commission may not waive the enforcement of a clause in its contract with a contractor to the effect that the contractor assumes liability for damage resulting from natural causes.

John N. Edy, Esq.,
Chief Engineer, State Highway Commission,
Helena, Montana.

My dear Mr. Edy:

You have submitted copy of your Standard Specifications, calling my attention to Article 44, page 8, Article 45, page 9, and Article 76 (a), page 15, and requested my opinion in the following particulars:

1. "Can this Department enforce the clause in our specifications which holds the contractor liable for damage resulting from natural causes similar to that in question?"

2. "May this Department recognize the conditions peculiar to such cases and waive the enforcement of the provision referred to, if, in the opinion of the Commission, such action is deemed wise and fair?"

The articles to which you call my attention read as follows:

"44. Contractor's Responsibility for Work. Until its acceptance by the Engineer, the roadway shall be under the care and charge of the Contractor, and he shall be responsible for and shall repair and make good any injury or damage to the roadway or to any part thereof caused by the action of the elements or from any other cause whatsoever, except as noted in Articles 45 and 77 (a).

"45. Opening of Section of Highway to Traffic. Whenever, in the opinion of the Engineer, any roadway, or portion thereof is in acceptable condition for travel, and is required for the convenience of the public, it may be opened to traffic as directed, and such opening shall not be held to be in any way an acceptance of the roadway, or any part of it, or as a waiver of any of the provisions of these specifications and contract. Necessary repairs or renewals made on any such section of the roadway so opened, due to defective materials or work, to natural causes other than ordinary wear and tear, pending completion and acceptance of the roadway, shall be performed at the expense of the Contractor."

"76. Embankments. * * *

"(a) Material containing sand in such proportions as to prevent it, when dry, from compacting satisfactorily, shall not be used except on written approval. The Contractor shall be responsible for the stability of all constructed embankments and shall replace all portions which, in the opinion of the Engineer, have become displaced due to careless or negligent work on the part of the Contractor, or to damage resulting from natural causes, such as storms, cloudbursts, etc., and not attributable to the unavoidable movement of the natural ground upon which the embankment is made."

As I understand from your letter, on certain Federal Aid Projects near Wibaux and Glendive, being built under specifications identical with those submitted, certain embankments constructed and practically complete were damaged by cloudbursts, and the contractor has requested that he be allowed additional payment at contract unit prices for repairing and replacing such damaged embankments. He contends that the damage was the result of an "act of God" and is not covered by Article 76 (a) quoted above, as such article is unenforcible under the law.

The statute of this State concerning the so-called "act of God" doctrine or rule excusing performance of a contract is Section 4950, Revised Codes of 1907, and reads, in so far as it applies to this case, as follows:

> "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate. * * *
>
> "2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary."

Volume 13 C. J. Sec. 715 (d), on page 641, states as a general rule the following:

> "The general rule is that an absolute undertaking is not discharged by a subsequent act of God rendering performance onerous or even impossible. And, although the promisor cannot be compelled to perform an undertaking impossible of performance through an act of God, he cannot, on the ground of hardship or impossibility, escape liability in damages, in the absence of a reservation covering such impossibility of performance."

In the case of Berg v. Erickson, 234 Fed. Rep. 817, the court laid down the following rule:

> "Where an obligation or a duty is imposed on a person by law, he will be absolved from liability for nonperformance of the obligation if his performance is rendered impossible

without his fault by an act of God, or an unavoidable accident. But this rule is not generally applicable to contract obligations."

"The general rule is that one, who makes a positive agreement to do a lawful act, is not absolved from liability for failure to do it by a subsequent impossibility of performance, caused by an act of God or an unavoidable accident, for the reason that he voluntarily contracts to perform it, without reservation or exception, which, if he desired, he could make in his agreement, thereby inducing the other contracting party, in consideration of his positive agreement, to enter into and become bound by the contract, and while courts may enforce, they may not avoid contracts, in the absence of fraud or some similar ground."

In support of this rule, the court cites some twenty cases. Probably the leading case on the point, as stated by most law writers as well as courts, is that of Paradine v. Jayne, Aleyn 26, 82 Reprint 897, since it discusses the general rule, gives the reason therefor, exceptions thereto, and illustrations thereof.

In that case it is stated that: "When a party by his own contract creates a duty or charge on himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against this by his contract; therefore, if a lessee covenants to repair, the circumstances of the premises being destroyed by lightning, or thrown down by an inevitable flood of water or an irresistible tornado, will not effect his discharge."

"Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it."

Trenton Public Schools v. Bennett, 27 N. J. L. 513, 72 Am. D. 373,

"The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids or what He renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law."

School District No. 1 v. Dauchy, 25 Conn. 530, 68 Am. D. 371;

See, also:

Dow v. State Bank of Sleepy Eye, 88 Minn. 355, 88 N. W. 121.

In the instant case, either the contractor or the State Highway Commission must sustain this loss. By specific terms of the contract (Article 76 (a)), supra, the contractor has agreed to "replace all portions which * * * have become displaced due to * * * damage resulting from natural causes, such as storms, cloudbursts," etc. Therefore, applying the above rule, the contractor must be the one to sustain the loss.

Steele v. Buck, 61 Ill. 343, 14 Am. R. 60.

There are numerous cases sustaining the above rule, but it is needless to cite more.

It is my opinion that the State Highway Commission may enforce the clause in the contract above quoted, and that the contractor is not released from his liability to restore the damaged embankment at his own expense by reason of the damage being caused by a so-called "act of God."

Your second inquiry raises a more difficult question, viz., whether the State Highway Commission has the power to compromise a claim against a contractor.

At the outset, we find in our State Constitution, Article V, Section 39, the following:

> "No obligation or liability of any person, association or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released or postponed, or in any way diminished by the legislative assembly; nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury.'

The above quoted section, it is true, is intended as a limitation upon the Legislature, but if the claim before us is such as is contemplated by the said section, and therefore one that the Legislature could not compromise, the Highway Commission could not compromise it, as the Highway Commission is a creature of the Legislature, and the Legislature cannot delegate powers that it does not itself possess.

The Constitutions of at least twelve other States contain similar provisions, but as far as we have discovered, only two, Illinois and Texas, have received judicial interpretation, and they are not entirely in point with the instant case.

In the latest Illinois case, Chicago v. P. C. C. & St. L. Ry. Co., 244 Ill. 231, the court says:

> "It may be conceded that if the General Assembly could not release or extinguish a liability to any municipality it could not authorize the municipality to do the same thing; but that would not prohibit a city council from giving up a liability in consideration for something which was deemed of equal or greater value."

To the same effect is Agnew v. Brall, 124 Ill. 312:

> "A city council has no power to squander or give away funds or property of the corporation, but it may settle doubtful and disputed claims, and any settlement and compromise of a doubtful claim, made in good faith, binds the city."

The Texas court in Riggins v. Post, 213 S. W. 600, in quite a recent case, held:

> "When county commissioners' court released one-half of a tract of land burdened with a $21,000 school fund mortgage debt in favor of the county from all but $10,500 of such debt, the transaction not being in the nature of a resale, but to prevent payment of the whole mortgage, such transaction falls within the inhibition of Const. art. 7, sec. 6, and art. 3, sec. 55, and is void."

Article 3, Section 55, corresponds to our Article V, Section 39, supra.

The Texas case comes nearest to being in point with that before us. In that case the County Commissioners attempted to release part of a mortgage debt due the county. In the instant case, the contractor is asking the State Highway Commission to release him from part of the liability resting upon him under his contract. In both cases a release would mean that the county or the state would have to assume the liability. It would mean canceling an obligation of a person, association or corporation held or owned by the State through the State Highway Commission, a Department of the State.

It is my opinion that the Legislative Assembly would be prohibited under Article V, Section 39, supra, from extinguishing this obligation, and, as before stated, what the Legislature cannot itself do, it cannot delegate to a department of its creation to do. Therefore, I must answer your second question in the negative.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.