health would be authorized to order that all dogs be so vaccinated. The further question may arise as to whether or not the district board of health should pay the cost of such vaccination, or whether or not such cost should be paid by the individual owners of the dogs. However, this matter is not before me and it is accordingly not necessary to comment thereon.

Specifically answering your question, I am of the opinion that an order of a district board of health made pursuant to the provisions of Section 1261-42, General Code, intended for the general public, may contain a reference to the statutory penalty for violation of such orders, which penalty is set forth in Section 4414, General Code. If reference to a penalty is made in such order, it should be so worded as to clearly indicate that the district board of health is not fixing the penalty.

Respectfully,
GILBERT BETTMAN,
Attorney General.

673.

INSURANCE—RIGHTS OF VARIOUS SUBDIVISIONS OF STATE TO CARRY PUBLIC LIABILITY POLICIES COVERING MOTOR VEHICLES —PROPER FUND FOR PREMIUMS.

SYLLABUS:

1. *County commissioners and boards of education may not lawfully carry public liability and property damage insurance payable to others on account of damages growing out of the operation of motor vehicles by such boards in connection with their official duties, for the reason that when acting in such capacity they are performing a governmental function and that no liability arises under such circumstances.*

2. *By reason of the liability created by Section 3298-17 of the General Code in cases where boards of township trustees are negligent in the performance of their duties in connection with roads, such boards may lawfully protect themselves against damages by means of insurance.*

3. *Municipal officers when not acting in a proprietary capacity, such as when operating a public utility, are limited in the acquiring of such insurance in the same manner as boards of education and township trustees.*

4. *Such boards and officers may legally contract for fire or collision insurance to protect automobiles owned and operated by them from loss to the property itself.*

5. *Premiums for such insurance may properly be paid out of any fund of the subdivision operating and maintaining the same which is available for the purpose of maintenance of such vehicles.*

COLUMBUS, OHIO, July 26, 1929.

HON. FRANK F. COPE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication, which reads:

> "We wish to inquire relative to county commissioners, township trustees, boards of education, councils of villages and boards of affairs carrying public liability, collision and property damage insurance on motor vehicles owned by them and operated by their employes, purchased from insurance companies.

In brief, we wish to know if such insurance can be carried and if so out of what fund the premium should be paid."

The question of liability insurance in connection with the operation of motor vehicles by the various subdivisions of the state has been under consideration many times by the Attorney General. Without attempting to review the many opinions upon the subject, it may be stated to have been conclusively established as a proposition of law that, in the exercise of the various duties of boards of education, township trustees and county commissioners, such boards act in a governmental capacity as contradistinguished from a proprietary capacity and, therefore, there is no liability to third persons for damages growing out of the operation of motor vehicles in connection with the performance of such duties as such boards are required under the law to perform, in the absence of statutes expressly creating such a liability. Where there is no liability, it follows that there is no consideration for such expenditure and the same would be illegal.

In an opinion of my predecessor, found in Opinions of the Attorney General for the year 1927, at page 814, it was held, as disclosed by the syllabus, that:

"A board of county commissioners cannot legally enter into a contract and expend public moneys for the payment of premiums on 'public liability' or 'property damage' insurance covering damages to property and injury to persons caused by the negligent operation of county owned motor vehicles; there being no liability to be insured against, the payment of premiums would amount to a donation of public moneys to the Insurance Company."

In my opinion No. 210, issued under date of March 19, 1929, to Hon. S. K. Mardis, Chairman of the School Committee, House of Representatives, it was held that House Bill No. 301, if enacted into law in the form it then existed, would be unconstitutional. Said bill provided, among other things, that the board of education of each school district should procure liability insurance covering each school wagon or motor van and all pupils transported under the authority of the board of education. In said opinion, it was pointed out that under the present law there is no liability on boards of education for injuries resulting under such circumstances caused by negligence or otherwise; that insurance against a liability that does not exist would result in the diversion of public funds for a useless purpose and, therefore, would be unconstitutional.

In an opinion of the Attorney General, found in Opinions of the Attorney General for the year 1920, at page 341, it was held, as disclosed by the second branch of the syllabus:

"County commissioners have no authority to procure insurance on behalf of the county against loss which may accrue to it in the use of automobile trucks, through injuries to the person or property of third persons; * * * ."

While, by analogy, it would seem that the same rule of common law that applies to insurance by county commissioners would apply to a board of township trustees, the Legislature has otherwise provided in the enactment of Section 3298-17, General Code, which reads:

"Each board of township trustees shall be liable, in its official capacity for damages received by any person, firm or corporation, by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties."

In an opinion of my predecessor, found in Opinions of the Attorney General for the year 1928, p. 2964, which construed the section last quoted, it was clearly indicated that a board of trustees were liable under said section in damages to third persons for negligence in the improvement of a township road.

There are no such statutory provisions in reference to boards of education. Section 2408, General Code, which is not so comprehensive as Section 3298-17, which relates to county commissioners, in part, provides:

> "The board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair. * * * . "

However, it is clear that liability arises under this section by reason of the failure of the board of county commissioners to keep roads and bridges in proper repair and does not include a situation such as you mention, where there is negligence in the operation of a motor vehicle in connection with the performance of their duties.

The foregoing has related, of course, to liability and property damage to be paid to third persons. However, apparently by the use of the term "collision' insurance, you also inquire in reference to the insurance of such motor vehicles to protect the subdivisions against loss by reason of injury to the property itself. In the latter case, the question is not so easily disposed of. In the 1920 opinion of the Attorney General, hereinbefore referred to, it was pointed out that there was no express statutory authority authorizing county commissioners to obtain such insurance. It was further stated in said opinion that "neither is there any provision which by implication or inference might give rise to such authority."

My immediate predecessor had under consideration on several occasions the question of paying premiums upon burglary or holdup insurance for county treasurers. However, it is believed necessary to discuss but one of said opinions for the purposes hereof, namely, the opinion of the then Attorney General, found in Opinions for the year 1927, p. 2160. Said opinion of the Attorney General discusses an opinion of the Court of Appeals of Clark County in the case of *Funderburg, et al.*, vs. *Webb*, decided by said court in 1924. Apparently the opinion of said court affirmed the opinion of the Court of Common Pleas without an extended discussion on the subject. The said opinion of the Common Pleas Court stated that "if the power exists at all it must do so under the general provisions which clothe the county commissioners with inherent authority to perform acts to preserve or to benefit the corporate property of the county over which they have control." And, of course, it was upon this proposition that the conclusion of the Court of Common Pleas and the Court of Appeals was based. The then Attorney General disagreed with such holding in so far as it affected the question of burglary insurance for the county treasurer and indicated that the holding of the Court of Appeals upon said question should not be considered as binding except in the jurisdiction of said court. The Attorney General in said opinion, among other things, stated:

> "Cognate sections of the General Code direct the county commissioners to furnish, at the expense of the county, necessary books, stationery and similar supplies as may be needed for the county offices. This express authority to provide office equipment and supplies necessarily includes within it the authority to protect and preserve this physical property by insurance or otherwise, whether that insurance be against losses by fire, theft, robbery or burglary. The same rule would apply to other county property which it is the duty of the county commissioners to provide and care for.
>
> At no place in the statute will there be found any provision granting to the county commissioners, custody of the monies of the county. * * * "

By reason of the above language of the Attorney General, it is thought that he clearly recognized the power of county commissioners to contract for insurance, the purpose of which was to preserve the corporate property over which they had control, and his conclusion with reference to there being no power to contract for burglary insurance was based upon the fact that the commissioners did not have the custody and control of the money in the county treasury. It is an established practice of boards of education, township trustees, county commissioners and other subdivisions of the state, having custody and control of property belonging to the public, to insure the same against loss or damages to the property itself, and I am inclined to the view that there is sufficient authority, in view of the duty of such boards to protect such property, to authorize them to contract for such insurance.

The foregoing will dispose of your inquiry in so far as boards of county commissioners, township trustees and boards of education are concerned, and, of course, these are the boards mentioned in your communication which you, in your official capacity are required to advise.

In so far as your question with reference to the municipal officials which you mention is concerned, it is believed that the same rule, by analogy, that applies to county commissioners and boards of education would apply, excepting by reason of the peculiar powers of municipalities and specific statutes relating thereto. There are instances in which the courts have said they act in a proprietary capacity.

In the case of *Insurance Co.* vs. *Wadsworth,* 109 O. S. 440, the Supreme Court of Ohio held that a municipality operating a public utility did so in a proprietary capacity, and, under such circumstances, could enter into contracts with reference to insurance and other matters in the same manner as an individual could do. In all probability the board of public affairs would be, in most instances if not all, operating a public utility and acting in a proprietary capacity.

In this connection, it may be pointed out that the Supreme Court of Ohio, in *City of Wooster* vs. *Arbenz,* 116 O. S. p. 281, held, as disclosed by the syllabus, that:

> "Streets and highways are public and governmental institutions, maintained for the free use of all citizens of the state, and municipalities while engaged in the improvement of streets are engaged in the performance of a governmental function.
>
> Section 3714, General Code, imposes upon municipalities the obligation to keep streets, alleys and other highways within the municipality open, in repair, and free from nuisance; the legislation imposing this duty is an exercise of the sovereignty of the state, and municipalities as creatures of the same sovereignty are subject to the liability which follows a failure to discharge that duty.
>
> The duties and obligations thus imposed are in derogation of the common law and must therefore be strictly construed, and the prvisions of that legislation cannot by implication or interpretation be extended to make a municipality liable for the negligence of its servants while engaged in the act of making improvements to streets, unless such negligence relates to a condition of the street itself and the damage is caused by a defective condition thereof."

In said opinion it was assumed that the driver of a truck employed by the city and engaged in hauling cinders was negligent and that such negligence was the proximate cause of an injury to a third person who had not contributed to such injury. Notwithstanding such facts, the court held there was no liability.

Without further discussion, it may be briefly stated that in those instances in which municipal officials are not acting in a proprietary capacity, they would be gov-

erned by the same rules in reference to obtaining liability and property damage insurance on motor vehicles owned and operated by them as heretofore set forth with reference to the powers of boards of education and county commissioners.

You further inquire, if such insurance can be carried, out of what funds the premiums should be paid. Without undertaking to discuss the status of the various funds at the disposal of the subdivisions about which you inquire, it is believed sufficient to state that in most instances, if not all, such expenditures which arise by reason of the operation and maintenance of a motor vehicle, should properly be paid out of any funds available for the maintenance of such vehicle. In other words, if there are funds available to maintain such a vehicle, the payment of such a premium would be for the same purpose.

Based upon the foregoing, it is my opinion that:

1. County commissioners and boards of education may not lawfully carry public liability and property damage insurance payable to others on account of damages growing out of the operation of motor vehicles by such boards in connection with their official duties, for the reason that when acting in such capacity they are performing a governmental function and that no liability arises under such circumstances.

2. By reason of the liability created by Section 3298-17 of the General Code, in cases where boards of township trustees are negligent in the performance of their duties in connection with roads, such boards may lawfully protect themselves against damages by means of insurance.

3. Municipal officers when not acting in a proprietary capacity, such as when operating a public utility, are limited in the acquiring of such insurance in the same manner as boards of education and township trustees.

4. Such boards and officers may legally contract for fire or collision insurance to protect automobiles owned and operated by them from loss to the property itself.

5. Premiums for such insurance may properly be paid out of any fund of the subdivision operating and maintaining the same which is available for the purpose of maintenance of such vehicles.

Respectfully,
GILBERT BETTMAN,
Attorney General.

674.

SCHOOL DISTRICT—CREDITOR OBTAINING JUDGMENT FOR COST OF TRANSPORTATION OF SCHOOL CHILDREN—HOW CLAIMS SATISFIED—DISTRIBUTION OF STATE EDUCATIONAL EQUALIZATION FUND.

SYLLABUS:

1. *When a proposition to levy taxes, above the fifteen mill limitation, for the purpose, as it appears on the ballot, "for the better maintenance of the school," is submitted to the electors of a school district at a regular November election in any year, and the proposition carries, the taxes collected and paid into the school district treasury, the board of education of the school district may lawfully expend the proceeds of such levy for current expenses of the school district, including the cost of transportation of pupils and the payment of judgments based on claims for the transportation of pupils.*

2. *Judgment creditors of a school district may not lawfully levy execution for*