

2995.

TOWNSHIP TRUSTEES—INSURANCE ON TOWNSHIP OWNED MOTOR VEHICLES AND ROAD BUILDING MACHINERY—MAY PROCURE SUCH INSURANCE TO PROTECT THEMSELVES AGAINST LIABILITY WHEN OPERATED IN FURTHERANCE OF OFFICIAL DUTIES.

*SYLLABUS:*

*By reason of the liability created by Section 3298-17, General Code, boards of township trustees may lawfully protect themselves against liability for damages by procuring liability or property damage insurance upon township owned motor vehicles and road building machinery while such vehicles and machinery are being operated in furtherance of the official duties of said trustees.*

COLUMBUS, OHIO, February 25, 1931.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Under date of May 29th, 1928, Attorney General Turner rendered to this department an opinion in which it was held that a board of township trustees is without authority to enter into a contract and expend public moneys for the payment of premiums on public property or property damage insurance, covering damages to property and injury to persons caused by neglect in the operation of township owned motor vehicles and road building machinery. This department, through our examiners, has been following this opinion.

Under date of July 26th, 1929, Opinion No. 673 was addressed to Hon. Frank F. Cope, Prosecuting Attorney, at Carrollton, Ohio, in which it was held that 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. This opinion was rendered in answer to an inquiry as to the right of county commissioners, township trustees, boards of education, councils of villages, and boards of affairs to carry public liability, collision and property damage insurance on motor vehicles owned by them and operated by their employes.

Question: Was it intended by this later opinion to overrule the opinion of the former Attorney General and is it your opinion that township trustees may legally pay for liability and property damage insurance on trucks owned by them?”

Section 3298-17, General Code, reads as follows:

“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.”

It has been the consistent holding of this office that the premium on public liability insurance may lawfully be paid from public funds if there is a real liability to be insured against, but if not, it is a sheer waste of public funds to pay

such premiums and it is unlawful to expend those funds for the payment of premiums on insurance against a liability that does not in fact exist.

Whether or not township trustees may lawfully expend the public moneys of the township to effect public liability insurance on motor vehicles owned by them and operated by their employes depends on whether or not the operation of those vehicles may be said to be in furtherance of an official duty of the township trustees, as the term is used in the above statute. At common law, no liability existed under such conditions and it is only by reason of the above statute that any liability exists if in fact it does. The syllabus of the opinion referred to in your inquiry, which is found in the Opinions of the Attorney General for 1928, page 1297, reads as follows:

"1. By the terms of Section 3298-17, General Code, a board of township trustees is liable, in its official capacity, for damages received by any person by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties. If an action be brought against a board of township trustees for such damages it must, to succeed, be for a wrong committed or an obligation incurred by such trustees while in the discharge of their official duties.

2. Statutes, such as Section 3298-17, General Code, being in derogation of the common law, should not be extended beyond the plain meaning of their terms.

3. A board of township trustees is without authority to enter into a contract and expend public moneys for the payment of premiums on 'public property' or 'property damage' insurance covering damages to property and injuries to persons caused by the negligent operation of township owned motor vehicles and road building machinery."

Without reviewing the above mentioned opinion in detail, it is sufficient for our present purposes, to note that the conclusion therein reached, with reference to the payment of premiums by township trustees for liability insurance, is based on the principle that township trustees are not responsible in damages for the negligent operation of township owned motor vehicles and road building machinery when operated under the trustees' management in the construction or repair of roads and bridges and therefore the trustees are not authorized to expend public funds for insurance against a liability that does not exist.

The opinion held that while Section 3298-17, General Code, imposes on a board of township trustees, a liability for damages by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties, the statute, being in derogation of common law, should not be extended beyond the plain meaning of its terms and should not be construed to render a board of township trustees responsible in its official capacity in damages for carelessness or negligence in the operation of motor vehicles and road building machinery owned by it and operated by its employes in the construction and repair of roads and for other purposes on township business, for the reason that the term "official duties," as used in the statute, does not include such operation of motor vehicles and road building machinery, as the attorney general then construed the term.

In a later opinion the same attorney general modified his former opinion to some extent, and held:

"Where a road under the jurisdiction of a board of township trustees is being improved by such trustees, the board may become liable in its official capacity for damages received by any person when the proximate cause of the injury was the negligence of said board of trustees in

failing to erect proper barriers or signals to warn travelers upon the highways of the presence of danger due to such construction work."

See Opinions of the Attorney General for 1928, page 2964.

The question under consideration in the latter opinion was whether or not a board of township trustees was liable in the light of Section 3298-17, General Code, for failure to erect proper barriers or signals to warn travelers upon the highways of the presence of danger due to construction work that was being done on said highway by the said trustees. The question of liability insurance was not involved in the opinion. In the course of the opinion, the attorney general said:

"Whatever may be the nature of the work in improving township roads, as to its being construction, reconstruction, maintenance or repair, once the work is undertaken the board of township trustees is acting in the discharge of its official duties."

In the 1929 opinion referred to by you, which is found in the reported Opinions of the Attorney General for 1929 at page 1013, it is held:

"By reason of the liability created by Section 3298-17, 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."

It will be noted that the first 1928 opinion, which is the one referred to by you in your inquiry, does not assume to hold that a real liability may not be protected against by the carrying of liability insurance, but merely that township trustees may not effect such insurance upon their trucks and road building machinery for the reason that they incurred no liability in the operation of those trucks.

Upon consideration of the terms of Section 3298-17, General Code, I am of the opinion that the term "official duties" as used therein, includes the construction, reconstruction and repair of roads, and so expressed myself in the 1929 opinion above referred to. This is practically the same view taken by the Attorney General in the preparation of the latter of his 1928 opinions referred to above. Carrying this idea to its logical conclusion, it follows that the liability imposed by the statute on township trustees for negligence or carelessness in the operation of motor vehicles and road building machinery in the construction, reconstruction and repair of township roads or in the furtherance of any business of the township may lawfully be protected against by the carrying of liability insurance. This is contrary to the view expressed by the Attorney General in the earlier of his 1928 opinions referred to above, and in effect overrules the principle there set forth.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

2996.

FORCE ACCOUNT—COUNTY ROAD CONSTRUCTION—COUNTY COMMISSIONERS MAY NOT AUTHORIZE TOWNSHIP TRUSTEES TO SO PROCEED—SUCH AUTHORITY MAY ONLY BE CONFERRED ON COUNTY SURVEYOR.

*SYLLABUS:*

1. *County commissioners, under their power to construct county roads, have no power to authorize township trustees to construct county roads by force ac-*