Second, when a person is so employed, he may lawfully draw his pension during the time he is in active service. He becomes, upon such employment, a "member" of the Teachers' Retirement System, and thereby becomes subject to the rights and obligations of the State Teachers' Retirement Law, including the right of retirement thereunder or the right to the withdrawal of his accumulated contributions under Sections 7896-40 and 7896-41, General Code, as the case may be.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3140.

INSURANCE—FOREIGN AGENT NOT QUALIFYING AS FOREIGN INSURANCE BROKER IN OHIO—NO RIGHT TO CIRCUMVENT LAW BY WRITING INSURANCE ON OHIO PROPERTY WITHOUT THE STATE —SPECIFIC CASE DISCUSSED.

SYLLABUS:

A foreign insurance agent, not qualified to do an insurance business in Ohio as a foreign insurance broker, who contracts to control insurance on Ohio real estate, and who writes or causes to be written said insurance elsewhere, and without proper qualification in Ohio, is violating the insurance laws of this state in so doing.

COLUMBUS, OHIO, January 14, 1929.

HON. WILLIAM A. DOODY, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a communication from your predecessor, Hon William C. Safford, which reads:

> "Herewith I hand you a letter dated October 9th, received from the H. & H. Company, Insurance Agent, Cleveland, Ohio, together with photographs of letters passing between the H. & H. Company and S. W. S. & Company, Chicago, Illinois, and between H. F. E., Cleveland, Ohio, and S. W. S. & Company.
>
> The last named concern is a money lending institution and an insurance agency of Chicago, Illinois.
>
> Your reading of the letter to me from the H. & H. Company will disclose to you the points upon which we respectfully seek your opinion, as to whether the insurance laws of Ohio have been violated by S. W. S. & Company in their insistence upon writing insurance on properties on which they have made loans.
>
> We await your opinion at your convenience."

From the accompanying letters it appears that a certain Chicago money lending institution, which is also engaged in the insurance business, about three years ago, financed the construction of a building situated in Cleveland, Ohio. The then owner

of said property gave the Chicago institution a mortgage deed of trust securing a ten year bond issue upon which there is now outstanding $210,000. Said mortgage contained the following provisions, among others:

"*Article V—Insurance*

Section 1. The mortgagor further covenants that it will keep all buildings and improvements at any time forming part of said premises * * * insured against loss or damage by fire and/or lightning for not less than 80% of the full insurable value thereof and for an aggregate amount at no time less than the sum of $210,000.

Section 2. The mortgagor further covenants that it will also provide policies in good and responsible companies for the insurance of said premises in a reasonable amount, against plate glass loss * * * boiler and flywheel, workmen's compensation, public liability and elevator, policies for all such insurance to be renewed from time to time until all indebtedness hereby secured shall be paid.

Section 3. Any and all policies of insurance shall at all times be subject to the approval of the trustee, and if he shall deem any company unsatisfactory, new policies shall be substituted. All policies of insurance shall be delivered to the trustee and all loss for damage to property shall be made payable to him. * * * All said fire insurance, plate glass and all other insurance policies shall from time to time be procured and renewed by S. W. Straus & Co., as the agents of the mortgagor hereby for that purpose irrevocably appointed, and the mortgagor covenants that it will in each case promptly pay the premiums on said policies on presentation to it of the bills therefor by said S. W. Straus & Co. Said S. W. Straus & Co. in so procuring insurance as above provided, shall be considered the agents of the mortgagor and not of the trustees, or of the bondholders, but said S. W. Straus & Co. are hereby expressly released by the mortgagor from any liability on account of failure to procure any such insurance and from any liability to account for any commissions or brokerage on placing such insurance.

Section 4. In case of the failure of the mortgagor to do so in any such case, the trustee may, in his discretion, but without any obligation so to do, procure and/or renew such insurance, and pay any and all premiums in connection therewith. * * * ."

After the execution and delivery of said mortgage the original mortgagor transferred all of his title and interest to Mr. and Mrs. E., who assumed said mortgage. Mr. and Mrs. E. undertook to renew the expiring insurance policies by placing the same with an Ohio agency. The policies were written and forwarded to the mortgagee, the Chicago company, to take the place of the expiring policies. The Chicago company refused to accept the policies, contending that under the terms of the mortgage deed of trust it was to renew all of said insurance.

It may be mentioned in this connection that the trustee mentioned in the mortgage deed is a subsidiary of the firm of S. W. S. and Company, the mortgagee. It further appears that the Chicago company at one time was licensed to transact insurance as an insurance broker by the Ohio Insurance Department, but the license was subsequently revoked.

It is contended by the Ohio agency, whose letter you enclose, that the said Chicago company, by reason of the provisions in the mortgage deed, is indirectly engaged in the insurance business in violation of the insurance laws of Ohio.

It is further stated that the mortgagee is making threats that unless it continues to control the insurance, the mortgagor will be held to be in default, and it will proceed to call the loan.

The said Chicago Company contends that the agreement to place the insurance with the said mortgagee constitutes a part of the consideration for the making of the loan.

On the other hand, the Ohio company insists that the entire program is a subterfuge for controlling and influencing the insurance on property in Ohio without a license, and, therefore, in violation of the insurance laws of Ohio.

It is a well known practice in Ohio, as elsewhere, for the mortgagee to require a stipulation in the mortgage requiring the mortgagor to maintain insurance in approved companies upon the mortgaged premises, payable to the mortgagee as its interest may appear.

It cannot be claimed, however, in this case, that the mortgagor or his assignee, the present owner, failed to provide for the renewal of insurance in an approved insurance company. It is stated that he tendered to the mortgagee, before the expiration of the former policies of insurance, new policies as follows: one for $50,000 in the Hartford Fire, one for $50,000 in Phoenix of Hartford, one for $50,000 in Atlas, and one for $60,000 in Federal Union.

The only objection to the insurance thus offered to the mortgagee was that it had contracted in the mortgage itself to control the insurance. It is obvious that there was at least some pecuniary advantage to itself to do so, as the commission on the renewal of $210,000 worth of insurance is of considerable value.

It may be readily conceded that if the mortgagor or his assignee failed to provide proper insurance in a thoroughly reliable and approved company of known standing in the insurance world, at or before the expiration of the former policy, the mortgagee would have a right to do so and charge the same against the mortgagor. However, that is not the claim in the instant case.

The property in question is Ohio real estate. The mortgage seeks to make the mortgagee the agent of the mortgagor to procure the insurance. However, Section 9586, General Code of Ohio, provides that a person who solicits insurance and procures the application therefor, shall be held to be the agent of the party, company or association thereafter issuing the policy upon such application, or a renewal thereof, anything in the application or policy to the contrary notwithstanding.

Section 5438, General Code, provides how insurance on property in Ohio shall be placed. It provides as follows:

> "An insurance company or agent legally authorized to transact insurance business in this state shall not write, place or cause to be written or placed, a policy, renewal or policy or contract for insurance upon property, situated or located in this state, except through a legally authorized agent in this state, who shall countersign all policies so issued and enter the payment of the premium upon his record. The writing, renewal, placing or causing to be written or placed of a policy of insurance, in any other manner or form is a violation of the law providing for the payment of taxes by foreign insurance companies doing business in the State of Ohio, as set out and provided in this chapter. Provided, that any authorized agent of an insurance company duly authorized to transact business in this state may procure the insurance of risks

> or parts of in other like companies, duly authorized to transact business in this state, and may pay a commission thereon to such agent. But such insurance shall be consummated through a duly licensed resident agent only of the company taking the risk. Provided, further, that any authorized agent of an insurance company duly authorized to transact business in this state may accept business from such insurance brokers only as duly authorized and licensed as provided in Section 644-2, and such agent may pay a commission thereon to such broker."

It will be observed that an insurance policy on Ohio real estate is required to be countersigned by a resident agent of Ohio, also that the writing, renewal, placing or causing to be written or placed of a policy of insurance, in any other manner or form, is a violation of the law providing for the payment of taxes in foreign insurance companies doing business in Ohio.

It has been repeatedly decided that a state has a perfect right to regulate the insurance business transacted within its borders.

It may also be pertinent to observe that a foreign insurance broker is required to be a suitable natural person.

Section 644-2, General Code, on this subject, provides in part:

> "The superintendent of insurance may upon the payment of ten dollars issue to any suitable natural person resident in any other state, who has been licensed to solicit or place insurance other than life insurance by the proper insurance authority in the state of which said person is a resident, a foreign broker's license to place insurance other than life insurance in this state, with any qualified domestic insurance company in this state, or its agent in this state, or with the licensed agent in this state of any foreign insurance company duly admitted to do business in this state and not otherwise and upon the further following conditions: * * * "

It is not claimed that the mortgagor in question claims to be a foreign insurance broker duly licensed in Ohio, but, on the contrary, the statement is made that at one time it was transacting an insurance business in Ohio and its license was subsequently revoked. It is, however, to be observed that the firm contracting to control the insurance in the instant case is an insurance agency in the state of Illinois, but not eligible for a license in Ohio either as an insurance agent or as a foreign insurance broker under the Ohio law. It is clear that the arrangement thus attempted to be made is for the purpose of obtaining the commission on the insurance business thus contracted for and without a compliance with our resident agents' licensing law or the Ohio foreign insurance brokers' license law.

Upon a careful consideration of the facts as presented in your letter, it is my opinion that the transaction as submitted is in plain violation of the provisions of the insurance laws of Ohio relative to the placing of fire insurance on Ohio real estate.

It is therefore my opinion that the facts submitted present a case where a foreign insurance agent, not qualified to do business in Ohio, is a party to an arrangement for circumventing the insurance laws of this state and that the arrangement in the instant case is contrary to the insurance laws of the State of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.