494.

COUNTY COMMISSIONERS—UNAUTHORIZED TO PAY INSURANCE PREMIUMS COVERING DAMAGES TO PROPERTY AND INJURY TO PERSONS CAUSED BY THE NEGLIGENT OPERATION OF COUNTY OWNED MOTOR VEHICLES.

SYLLABUS:

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.

COLUMBUS, OHIO, May 16, 1927.

HON. RUSSELL K. MCCURDY, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date reading as follows:

> "In the last report of examination of the school board of the city of Portsmouth, Ohio, a finding was made by the examiner to the effect that a premium paid for liability insurance on an automobile truck owned by the school board was an improper expenditure. The examiner set out no reasons for this finding, and it is my opinion that the same proposition would hold in the case of county owned vehicles.
>
> I wish you would advise me whether or not your office has given an opinion in this matter, and if so, I would like to have a copy of the opinion. In the event your office has not rendered an opinion I would appreciate an opinion from you as soon as possible on the following question: 'Can the county commissioners obligate the county for the payment of premiums on liability insurance covering both property damage and personal injury on county owned vehicles?'"

With reference to the authority of boards of education to expend public moneys for "public liability" insurance covering motor vehicles owned and used by such board, your attention is directed to two former opinions of this department respectively rendered under dates of January 24, 1922 and November 8, 1923, and reported in Opinions, Attorney General, 1922, Vol. 1, page 31, and Opinions, Attorney General, 1923, Vol. I, page 696.

The syllabus of the first of these opinions reads as follows:

> "Section 7620, G. C., does not authorize boards of education to provide accident insurance covering indemnity against personal accident or injury to the pupils of the schools under their jurisdiction."

In this opinion the liability of boards of education to one injured because of the negligent acts or omissions of its agents and servants was not considered, and the lack of power of boards of education to purchase insurance of the kind under consideration was placed solely upon the absence of specific statutory authority so to do.

In the opinion it was said as follows:

"In the first instance it may be stated there is no special statute of the General Code authorizing the exercise by a board of education of such a power, and it is concluded if the same exists it must be found from an implied construction given those provisions of law conferring upon boards of education the powers to contract generally. Of these sections it is thought that Section 7620, G. C., is the broadest in general terms as to powers conferred upon boards of education, * * * .

* * * * * * * * * *

It is true this section confers very broad powers upon boards of education, nevertheless it is not believed that the provisions of the same may be said to be broad enough to cover authority to purchase or provide accident insurance as an indemnity against personal accident or injury sustained by pupils of the schools. While it is thought to be the duty generally of a board of education to use all means within its power to safeguard the lives of the pupils being transported by school conveyances, and to provide for their safety in any manner or by any method reasonably employed under the curcumstances, yet it is not believed that such an incidental power may be extended to cover the provision of accident insurance, since such a contract is thought to be a matter entirely foreign to school purposes and one over which a board of education has no authority or control."

In the other opinion above cited (Opinions, Attorney General, 1923, Vol. I page 696), the syllabus reads as follows:

"In view of the recent decision of the Supreme Court of Ohio in the case of Board of Education vs. McHenry, Jr., 106 O. S. 357, and in the case of Aldrich vs. Youngstown, 106 O. S. 342, a board of education would not be liable either to a pupil or other person for personal injury or property damage caused by the negligence of the driver of the school motor bus.

Under a former opinion of this department, Opinions of the Attorney General for 1922, p. 31, it was held that a board of education is without authority to expend money for a policy of liability insurance covering indemnity against damages caused by such negligence."

In this opinion my predecessor in office said as follows:

"The 85th General Assembly passed House Bill 279, which amended Section 7620, authorizing boards of education to contract for insurance, insuring school pupils against loss resulting from accident while being transported to and from the schools. However, this bill was vetoed by the Governor and boards of education are still without authority to protect the children with liability insurance.

It is believed your first and second questions come within the rule recently laid down by our Supreme Court in the case of Board of Education vs. McHenry, Jr., etc. 106 O. S., 357 (Ohio Law Bulletin and Reporter, July 30, 1923), and the case of Aldrich vs. Youngstown, 106 O. S., 342 (Ohio Law Bulletin and Reporter, July 30, 1923). The decision in the McHenry case holds that a board of education is not liable for damages claimed to have been sustained by a pupil in the public schools of the city of Cincinnati from the extraction of a tooth by a dentist in the employment of the board of education of the city of Cincinnati, to whom

the principal of one of the public schools of the city required the pupil to submit himself for examination and treatment, without the consent and knowledge of his parents. This holding is based upon the decision in Aldrich vs. Youngstown, supra, where the case of Fowler vs. Cleveland is overruled and the principle in the case of Wheeler vs. Cincinnati, 19 O. S. 19, is adhered to."

In your letter you state: "It is my opinion that the same proposition would hold in the case of county owned vehicles", and you ask: "Can the county commissioners obligate the county for the payment of premiums on liability insurance covering both property damage and personal injury on county owned vehicles?"

As to the liability of county commissioners in actions sounding in tort the law in Ohio is well settled. As stated by Judge Jones at page 33 of the opinion in the case of *Riley vs. McNicol,* 109 O. S. 29:

"This court has on various occasions announced the principle that these county boards are not liable in their official capacity for negligent discharge of official duties, unless such liability is created by statute, and that 'such liability shall not be extended beyond the clear import of the terms of the statutes.' Weiher vs. Phillips, 103 Ohio St., 249, 133 N. E., 67."

The first syllabus in the case of *Weiher vs. Phillips, et al.,* 103 O. S. 249, cited by Judge Jones in the excerpt above quoted from the opinion in the McNicol case, reads as follows:

"A board of county commissioners is not liable in its official capacity for damages for negligent discharge of its official duties except in so far as such liability is created by statute and such liability shall not be extended beyond the clear import of the terms of the statutes."

In the opinion at page 251 Chief Justice Marshall gives a *resume* of the cases decided by the Supreme Court bearing upon this question in the following language:

"In 1826, in the case of Commissioners of Brown County vs. Butt, etc., 2 Ohio, 348, it was held that the county commissioners were liable for not supplying a jail for safe custody of prisoners, whereby a prisoner confined for debt was permitted to escape. This conclusion was reached by a divided court and remained the law of Ohio until the year 1857, at which time this court decided the case of Board of Commissioners of Hamilton County vs. Mighels, 7 Ohio St., 110, the former decision being overruled and it being determined that the county commissioners are not liable in their quasi-corporate capacity, either by statute or at common law, to an action for damages for injury resulting to a private party by their negligence in the discharge of their official duties.

* * * * * * * * * * * *

There being no liability against the county commissioners at common law, and all liability against them having been created by statute, and the courts not having any right to enlarge upon the liability thus created, by judicial construction, and the language of the Section 2408 being clear and free from ambiguity, it would seem that there should not be much difficulty in reaching a conclusion in this case.

The limitations upon the application of this section have been very

clearly laid down by Chief Justice Shauck in Board of County Commissioners of Morgan County vs. Marietta Transfer & Storage Co., 75 Ohio St., 244, and in Ebert vs. Commissioners of Pickaway County, Id., 474 * * * ."

See also *Joint District Board of County Commissioners, vs. Crawford,* 90 O. S. 434, reversing without opinion the decision of the Court of Appeals in the same case, reported in 1 Ohio App. 54.

Section 2408, General Code, provides that the board of county commissioners "shall be liable in their official capacity for damages received by reason of its neglect or carelessness" in not keeping certain roads and bridges in proper repair. Sections 6278 to 6289, inclusive, contained in Ch. 20 Title 2, Part Second, entitled "Mobs" relate to injuries inflicted to a person by a mob as defined in Section 6278, and Sections 6279, 6281 and 6282 authorize recovery of damages from the county for such an injury. By the terms of Section 7565, General Code, failure to comply with the provisions of Sections 7563 and 7564 relating to the erection and maintenance of guard rails in certain places on county roads rendered "the county liable for all actions or damages for the result of such failure."

I find no statute, however, which permits recovery of damages from a county for an injury to persons or property caused by the negligence of an agent or servant in the county in the operation of a county owned motor vehicle.

There being no liability on the part of the county in cases of this nature, the holding contained in the second syllabus of the opinion of the Attorney General last above quoted (Opinions, Attorney General, 1923, Vol. I, p. 696) applies with equal force to a board of county commissioners, and since there is no statute expressly authorizing the expenditure of money for such purpose, a board of county commissioners is without authority to expend money for policies of "public liability" or "property damage" insurance covering the county owned trucks and cars.

It might be urged that even though an action for such an injury might not be successfully maintained against the county, yet the expenditure of public funds for such insurance might be justified upon the ground that the payment of such a claim for damages by an insurance company would relieve the county commissioners of the burden of settling a claim of this nature. The answer to this, however, is found in the first syllabus in the case of *Jones, Auditor, vs. Commissioners of Lucas County,* 57 O. S. 189, which reads as follows:

"The board of county commissioners represents the county, in respect to its financial affairs, only so far as authority is given to it by statute. It may pass upon and adjudicate claims against the county for services in a matter, which, under the statutes, may be the subject of a legal claim against the county. But it is without jurisdiction to entertain or adjudicate claims which in themselves are wholly illegal and of such a nature as not to form the subject of a valid claim for any amount. And an attempt by the Board to allow a claim of such character will not bind the county."

In the opinion the court at page 216 said as follows:

"Giving this construction to the statutes, we conclude that the board, being a creature of statute, an agent whose powers are not general, but special, should be held to represent the county in respect to its financial affairs, only in such matters as are distinctly provided by statute. Author-

ity is thus given to it to entertain and pass upon claims, which, for some amount, may be the *subject of legal demand* against the county. Its jurisdiction being thus necessarily limited, is not of such a character as to permit a finding of jurisdiction by the board to be conclusive of the fact. Speaking more specifically, the board may properly pass upon a question whether in fact a given service has been rendered, and *upon the amount which ought to be paid upon an unliquidated claim, where in law a claim may exist, i. e. where it has a legal basis on which to stand. But it is wholly without authority to sanctify a demand illegal because of being upon a subject which can admit of no claim, and thus give away the people's money.* It can no more do so than can any other agent bind his principal by acts unauthorized because without the scope of his authority." (Italics the writer's.)

From the foregoing discussion it is clear that there being no statute making a county or its board of county commissioners liable for injuries caused by the negligent operation of county motor vehicles, an action for damages because of such injuries can not be sustained. Nor is there any statute authorizing county commissioners to purchase "public liability" or "property damage" insurance covering county owned trucks and cars. The conclusions and reasoning of the two opinions of the Attorney General above quoted, relating to boards of education, therefore, apply with equal force to boards of county commissioners.

Moreover, a moment's reflection discloses a reason of a fundamental nature, why county funds may not be expended by the county commissioners for insurance of this nature. The insurance paid for is insurance to indemnify the county for losses sustained *where a liability to pay damages exists.* If there be no legal liability, there could be no losses for which the insurance company might be called upon to indemnify the county, and the payment of county funds for such insurance would amount to a donation to the insurance company, the policy paid for with public moneys affording no protection whatsoever either to the public or to the person injured.

Answering your question specifically, for the reasons stated, I am of the opinion 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 injury to persons and damages to property caused by the negligent operation of county owned motor vehicles.

Respectfully,
EDWARD C. TURNER,
Attorney General.

495

AUDITOR OF STATE—DUTY TO EXAMINE BOOKS AND AFFAIRS OF TITLE GUARANTEE AND TRUST COMPANIES—REPORTS AS TO CONDITION OF SAID COMPANIES SHOULD BE KEPT CONFIDENTIAL.

SYLLABUS:

1. *It is the duty of the Auditor of State, by the terms of Section 710-171 of the General Code, to make such examination of the books and affairs of title guaranty and trust companies as will enable him to determine whether such companies are faithfully performing all of the guarantees entered into and trusts accepted by them.*

2. *Reports as to the condition of title guaranty and trust companies and the re-*