2738.

SCHOOL BUILDING—BOARD OF EDUCATION MAY INSURE IN MUTUAL INSURANCE COMPANIES.

SYLLABUS:

Boards of education may legally insure school buildings under their control, in mutual insurance associations or companies.

COLUMBUS, OHIO, October 16, 1928.

HON. D. A. BAIRD, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication requesting my opinion as follows:

> "The question has been raised in our county as to whether or not boards of education can insure school buildings against loss by fire and tornado in mutual insurance companies?
>
> We mean by the above that the ordinary mutual insurance company where the premium is based on the losses sustained and the policy making the insured a member of the mutual company.
>
> The policy provides in substance that the rate of premium shall be based on the current expense of operation and the pro rata amount of losses sustained and that an assessment may be made upon the members to pay their pro rata share of said losses.
>
> We would be pleased to have your opinion on this matter as soon as possible."

This question has been considered in several former opinions of this department. In an opinion rendered under date of April 28, 1911, and published in the Annual Report of the Attorney General for 1911 and 1912, page 246, it was held:

> "Under the restriction of Art. 8, Section 6, of the Constitution of Ohio, the Legislature could not authorize boards of education to insure in mutual fire insurance companies when the board might be compelled to meet a pro rata share of the loss.
>
> Furthermore, the board of education is not an 'owner' of property so as to enable it to come within the meaning of Section 9593, G. C., as amended 101 Ohio Laws 294."

It will be observed, in the above opinion, the question was considered with special reference to insurance effected by means of membership in mutual protective fire insurance associations under the provisions of Sections 9593 et seq., General Code, as they then read (101 v. 294). Section 9593, General Code, has been twice amended since 1911 but has not been materially changed so far as its provisions pertinent to the question before us are concerned. It provided then, as now, as follows:

> "Any number of persons of lawful age, not less than ten in number, residents of this state, or an adjoining state and owning insurable property in this state, may associate themselves together for the purpose of insuring

each other against loss by fire and lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in this state, and also assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur by fire and lightning, cyclones, tornadoes, wind storms, hail storms and explosions from gas to any member of such association. * * * Such associations may only insure farm buildings, detached dwellings, schoolhouses, churches, township buildings, grange buildings, farm implements, farm products, live stock, household goods, furniture, pleasure and utility vehicles, motor vehicles; steam, gas, gasoline and oil engines; motor truck, tractors, electric motors, electric appliances, lightning systems and other property not classed as extra hazardous and such property may be located within or without the limits of any municipality;"

On December 20, 1911, the questions passed upon in the above opinion were reconsidered and the conclusions of the former opinion were adhered to. The opinion of December 20, 1911, was rendered at the request of the Legislative Committee of the Federation of Mutual Insurance Companies of Ohio, and is published in the Annual Report of the Attorney General for. 1911-1912, at page 1690. The syllabus of the latter opinion is as follows:

"Boards of education may not become a member of a mutual insurance association. There is a broad distinction between 'loaning of credit' of a board of education to private business enterprises for the procurance of its immediate needs, such as coal, etc., and the loaning of its credit as a member of a mutual insurance association. The latter is within constitutional inhibition upon the government or any of its subdivisions against becoming a stockholder in, raising money for, or loaning its credit to, a joint stock company, corporation or association. Furthermore, membership in such an association would be inharmonious with the nature of the board of education and with its statutory duties.

Such membership would include a view to gain and an object to further pecuniary interest."

In this latter opinion the subject was again considered from the standpoint of membership in mutual protective associations organized under the provisions of Sections 9593 et seq., General Code. In the course of the opinion the Attorney General noted the following language contained in said Section 9593:

"Such associations may only insure farm buildings, detached dwellings, schoolhouses, churches, * * * "

With reference thereto, he said:

"This, however, is not a grant of power, but a limitation upon it, the Legislature doubtless having in mind the character of risks that would be safe. * * * "

In 1912 the Bureau of Inspection and Supervision of Public Offices submitted to the Attorney General the question of whether or not a board of education might legally insure school buildings in mutual fire insurance companies organized under Sections 9525, et seq., General Code. In response to this inquiry the Attorney General rendered his opinion, which is published in the Annual Report of the Attorney General for 1912 at page 233. In the course of the opinion, after quoting the distinction be-

tween the kinds of insurance provided for by Sections 9593, et seq., General Code, and Sections 9524, et seq., General Code, and citing the case of *Richards* vs. *Swain & McCormick*, 9 O. D. 70, wherein this distinction was pointed out and discussed, my predecessor in office said:

> "In mutual insurance associations organized under Sections 9593, et seq., General Code, the liability of the members is limited only by the amount of the losses. In mutual fire insurance companies organized under Sections 9524, et seq., General Code, the liability is certain as to a particular amount and is contingent as to a further amount."

Section 9528, General Code, as then in force, provided with reference to the contingent liability of policy holders, as follows:

> "Any such company, in its by-laws and policies must fix by a uniform rule the contingent mutual liability of its members for the payment of losses and expenses. Such contingent liabilities shall not be less than three nor more than five annual cash premiums as written in the policy; and shall cease with the expiration of the time for which a cash premium has been paid in advance, except for liability incurred during that time."

Even so, however, the then Attorney General concluded at page 237:

> "While there is a radical difference in the two classes of companies, yet it is seen that the insurers on the mutual plan as provided in Section 9525, et seq., General Code, are members of the company with all the rights of membership in a corporation; that they share in the profits and losses of the company, and the solvent members must meet, to the extent of their contingent liability, the defaults of insolvent members. These are the features of the mutual insurance associations which prevent boards of education from insuring school houses in such associations. As these features are also contained in the mutual insurance companies, the same reasons as set forth in the former opinions herein referred to would apply to such companies and would prevent boards of education from insuring school houses in such companies upon the mutual plan."

At the time of the rendition of the 1912 opinion, mutual fire insurance companies organized and doing business in accordance with Section 9524, et seq., General Code, were authorized under certain conditions to issue insurance upon the stock plan, as provided by Section 9574, General Code. In view of this fact the opinion holds as stated in the second branch of the syllabus, as follows:

> "Under the stock plan of insurance, however, which is permitted to such mutual insurance companies by Section 9574, General Code, when their net assets amount to two hundred thousand dollars, the insured are not members of the company and the boards of education may insure under said stock plan with said companies."

Section 9574, General Code, then in force, authorizing the issuing of insurance under the stock plan of insurance when the company's net assets amounted to $200,000 or more, has since been repealed, and mutual fire insurance companies are not now permitted to issue insurance under the stock plan under any circumstances. The holding of the Attorney General in this respect is therefore not of any practical im-

portance at this time. Mutual insurance companies are authorized, if they have the required surplus, to issue policies for a cash premium without an additional contingent premium. This, however, does not in my opinion constitute doing business under the stock plan as was contemplated by former Section 9574, General Code, as the company although issuing policies for solely cash premiums is in all other respects subject to the law applicable to mutual insurance companies.

From an examination of the foregoing opinions, it will be observed that the conclusions of the attorneys general and their reasons for holding that boards of education might not legally insure school buildings against fire in mutual protective fire associations or mutual fire insurance companies, are based on three distinct considerations.

First: In the first opinion of 1911 above referred to, it is stated that boards of education are not "owners" within the contemplation of Section 9593, General Code, authorizing persons owning insurable property within the state to associate themselves for the purpose of insuring their property against loss by fire or otherwise. It is said that boards of education are trustees for the public who are the real owners of the property.

Second: Because of the inhibition contained in Article VIII, Section 6 of the Constitution of Ohio, boards of education could not legally give or loan the credit of the school district in aid of any association or corporation, or become a joint owner or stockholder in any company or association, which would be the effect of becoming a member of a mutual protective fire association or a mutual insurance company.

Third: Because of the contingency as to the amount of premium to be paid, and the possibility of assessments in the event the company's capital became impaired, it was said that membership in a mutual protective association or a mutual insurance company would be "inharmonious with the nature of the board of education and with its statutory duties."

While it has been repeatedly held by the courts that boards of education being creatures of statute, are limited in their powers to those expressly granted, and those which may be said to be included within the powers so expressly granted in order to effectuate their purpose, the right of a board of education to insure school buildings under its control against loss by fire or otherwise, has never been questioned notwithstanding the fact that no express statutory authority is granted therefor. As no statutory direction is given how this insurance may be effected, it is left to the discretion of the board to provide for the insurance in any manner it sees fit, so long as no law is violated in so doing.

With the contention advanced in the first opinion of 1911 above quoted, to the effect that a board of education is not the "owner" of the school building, as the term ownership imports in Section 9593, General Code, I am unable to agree. While the board is in a sense a trustee for the inhabitants of the district with respect to the property of the district, yet I cannot believe that the Legislature intended by the use of the word "owning" in the statute to preclude active trustees, charged with the duty of caring for and preserving property, from the class of persons that might join with others in the formation of mutual protective associations for the purposes set out in the statute.

Applying the cardinal rule of construction of statutes, it seems to me the language of Section 9593, General Code, wherein it says:

> "Such associations may only insure farm buildings, detached buildings, *schoolhouses, churches, township buildings,* * * * "

is clearly indicative of a legislative intent that boards of education, boards of trustees of church organizations and township trustees are such *"owners,"* as are empowered to become members of mutual protective associations organized by authority of the statute, as clearly no insurance could be effected on these classes of buildings by action of *"owners"* unless these *"owners"* be boards of education, boards of trustees of church organizations and township trustees.

I fully agree with the former Attorney General, as stated in the opinion hereinbefore noted, that the language above quoted is not a grant of power, but I cannot agree with him that it is by any construction a limitation upon it, and I believe it clearly indicative of an intent on the part of the Legislature that boards of education might by proper action insure school buildings in mutual protective associations organized under Section 9593, General Code, unless they are precluded from doing so by other provisions of law.

Be that as it may, however, the conclusions reached by the Attorneys General in each of the several opinions above referred to, were undoubtedly correct. At the time such opinions were rendered, Article VIII, Section 6 of the Constitution of Ohio, provided as follows:

> "The General Assembly shall never authorize any county, city, town or township by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association."

Clearly, any law authorizing membership in mutual protective associations or mutual insurance companies by any political subdivision of the State would be contrary to the plain provisions of the above section of the Constitution as it then read, and no law might be construed so as to permit such membership. Since the rendition of those opinions, however, Article VIII, Section 6 of the Constitution of Ohio was amended to become effective September 3, 1912, by the addition of the following proviso:

> "Provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state or doing any insurance business in this state for profit."

So far as the constitutional inhibition upon boards of education insuring school buildings in mutual associations or companies; the situation is entirely changed since the opinions of 1911 and 1912 above referred to were rendered. Here is expressed a clear intent on the part of the framers of the constitutional provision to remove former existing inhibitions upon the insuring of public buildings or property in mutual insurance associations or companies.

Although the laws relating to mutual insurance companies have been considerably modified since 1912, by the repeal of a number of the sections of the Code then in force, and the enactment of Sections 9607-1 to 9607-38, General Code, relating to the organization and admission of mutual fire insurance companies, there still remains the feature of contingent premium liability of member policy holders both in mutual protective associations organized under Section 9593, General Code, and mutual fire insurance companies organized under Section 9607-2, General Code.

In associations organized under Section 9593, General Code, the assessments are limited only by the extent of the losses and the amount necessary to pay incidental

expenses. The surplus to stabilize assessments that may be accumulated under this plan is limited to $2.00 per thousand dollars of insurance in force, and is thereby so small and the possibilities of one large loss, or a series of losses, in a single community to which the activities of these associations are usually confined by reason of a severe storm, or general conflagration, would in my opinion render it inadvisable for persons in charge of public property to insure such property under this plan of insurance, thus subjecting the political subdivision to the possibility of a large contingent liability the amount of which cannot by any possibility be foreseen; yet I know of no law prohibiting them from doing so, and in my opinion it would not be illegal for them to do so.

Associations organized under Section 9593, General Code, having the requisite number of policies and amount of insurance in force and the required amount of assets may reorganize as mutual fire insurance companies. Mutual fire insurance companies are permitted to issue a number of different kinds of policies, dependent on the amount of surplus accumulated by the company and the provisions of its articles of incorporation and by-laws. In many of the policies, which these companies are authorized to issue the premium is to some extent at least, contingent, but in all cases the limitations of the amount of premium are fixed, and in no case may the premium be greater than the limitations fixed by the policy, although it may be less. So also are the limits of liability to which a policy holder may be subjected, in the event of the impairment of the company, fixed by the terms of the policy. Under no circumstances, may a policy holder become liable for more than the amount fixed by the policy, and therefore in insuring under these policies, the insured is advised at the time of taking the policy of the limits of his liability under such policy.

Laws have been enacted, and are now in force, making careful provision for the organization of mutual insurance companies and strict limitations are imposed on their management. In addition to this, provision is made for regular inspection of these companies and for their strict supervision by the Superintendent of Insurance.

Business men generally, do not consider the carrying of insurance in these companies as being at variance with sound business principles. The control and management of school property is the province of boards of education. In the absence of any specific direction as to the manner of performing these duties, such boards are vested with full discretion limited by law, and they cannot be said to have abused that discretion when they follow what is generally conceded to be sound business practice in the management of property similarly situated.

I am therefore of the opinion that boards of education may legally insure school buildings under their control in mutual insurance associations or companies.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2739.

APPROVAL, BONDS OF THE VILLAGE OF CALEDONIA, MARION COUNTY—$3,509.32.

COLUMBUS, OHIO, October 17, 1928.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.