

1437.

APPROVAL, DEEDS TO LAND OF ELMER E. STUDEBAKER, CHARLES H. TURRELL, SARAH E. MEYER AND ELMER E. EMERICK; TWO DEEDS TO LAND OF ADAM STOCKUM AND GEORGE W. STUDEBAKER TO THE DAYTON AND NORTHERN TRACTION COMPANY; ALSO DEED TO LAND OF DAYTON AND NORTHERN TRACTION COMPANY TO THE INDIANA, COLUMBUS AND EASTERN TRACTION COMPANY, AND CERTIFICATE OF AUTHORITY TO THE RECEIVER OF INDIANA, COLUMBUS AND EASTERN TRACTION COMPANY.

COLUMBUS, OHIO, August 23, 1933.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—I have examined copies of deeds from Elmer E. Studebaker and wife, Charles H. Turrell and wife, Sarah E. Meyer and husband, Elmer E. Emerick and wife, two deeds from Adam Stockum and wife and one deed from George W. Studebaker and wife, to the Dayton & Northern Traction Company. Also deed from the Dayton & Northern Traction Company to the Indiana, Columbus and Eastern Traction Company and certificate of authority to the Receiver of the Indiana, Columbus and Eastern Traction Company to discontinue services and dismantle and sell its property.

Assuming the title to be good in the grantor in such deed, and assuming further that such deeds are correct copies of the original instruments, it is my opinion that the Receiver of the Indiana, Columbus and Eastern Traction Company (J. Harvey McClure) has such title to the premises described in such deeds that he can convey the fee simple estate to a grantee to the premises described in such deeds.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

1438.

SCHOOLS—UNDER SECTION 7731-5, GENERAL CODE—BOARD OF EDUCATION NOT LIABLE FOR ACCIDENTS RESULTING FROM NEGLIGENCE IN TRANSPORTATION OF SCHOOL CHILDREN—ACCIDENT AND LIABILITY INSURANCE DISCUSSED.

*SYLLABUS:*

1. *Section 7731-5, General Code, does not create any liability upon the part of boards of education for accidents resulting from the negligence of such boards in the transportation of school children under their authority.*
2. *Said section contemplates what is commonly known as accident insurance as well as liability insurance.*

COLUMBUS, OHIO, August 25, 1933.

HON. CHARLES T. WARNER, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you ask the following questions concerning section 7731-5, General Code:

"1. Is said act constitutional?

2. Does said act create a liability against the Board of Education, which liability may be insured by the Board of Education under the terms of said act?

3. Does the provision:

'This insurance \* \* \* shall include *compensation* for injury or death to any pupil caused by any accident arising out of or in connection with the operation of such school wagon, motor van or other vehicle used in the transportation of school children',  
contemplate insurance without regard to fault; or, in other words, what is commonly known as accident insurance, as distinguished from liability insurance?'"

Section 7731-5, General Code, reads as follows:

"The board of education of each school district may procure liability and property damage insurance covering each school wagon or motor van and all pupils transported under the authority of such board of education. This insurance shall be procured from a recognized insurance company authorized to do business of this character in the state of Ohio, and shall include compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of such school wagon, motor van or other vehicle used in the transportation of school children. The amount of liability insurance carried on account of any school wagon or motor van shall not exceed one hundred thousand dollars."

It has long been the policy of this office not to pass upon the constitutionality of a statute, since it is the province of only the courts to declare an act of the legislature unconstitutional. I therefore express no opinion on the constitutionality of this statute. However, I refer you to an opinion rendered by my predecessor appearing in Opinions of the Attorney General for 1929, Vol. I, page 311, in which he held unconstitutional a bill similarly worded, which was then pending before the legislature. The language of the two measures is identical, except that the former bill provided that the boards of education "shall" procure such insurance while the present act provides that they "may" procure such insurance.

It is well settled that, in the absence of statute, a board of education is not subject to liability in its corporate capacity for injuries resulting from its negligence in the discharge of its official duties in connection with the maintenance of the public schools. *Finch vs. Board of Education*, 30 O. S. 37; *Board of Education vs. Volk*, 72 O. S. 469; *Board of Education vs. McHenry, Jr.*, 106 O. S. 357; *Conrad vs. Board of Education*, 29 O. A. 317. This rule of non-liability has been applied to cases of injuries sustained by pupils while being transported by the board of education to and from the public schools, on the ground that in transporting pupils the board acts as an agent of the state and performs a public or

governmental duty for the benefit of the public and for the performance of which it receives no profit or advantage. *Harris vs. Salem School District*, 72 N. H. 424; *Consolidated School District vs. Wright*, 128 Okla. 193; *Horton vs. Bienville Parish School Board*, 4 La. App. 123; *Allen vs. Independent School District*, 216 N. W. 533 (Minn.).

The legislature has the right to provide by statute that boards of education shall be liable in their corporate capacity for damages or injuries resulting from their negligence in the performance of their official duties, but I am unable to find that it has done so. Certainly, the statute in question does not create any such liability; it only authorizes the boards to carry certain insurance. As to this question, the opinion of my predecessor, above referred to, says:

“Its language is not, in my opinion, susceptible of being construed as evidencing an intention on the part of the Legislature to impose on boards of education liability for damages for injuries suffered by school pupils or other persons from accidents arising out of or in connection with the transportation of school children.”

I am therefore of the opinion that section 7731-5 does not create any liability against boards of education.

The third question is whether this statute contemplates what is known as accident insurance or whether it is confined to liability insurance. The first sentence of this statute authorizes the procuring by boards of education of liability insurance covering all pupils transported under the authority of such boards. The second sentence reads in part as follows:

“This insurance \* \* \* shall include compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of such school wagon, motor van or other vehicle used in the transportation of school children.”

This sentence contemplates something besides liability insurance, otherwise it would have been unnecessary to insert this provision as the language of the first sentence of the act is sufficient to authorize liability insurance. This provision does not limit the insurance to cover injuries or death resulting from the negligence of the board but provides that it “shall include compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of such school wagon,” etc. In my opinion, the language used shows the intention to provide that there shall be included in every policy issued under the authority of this statute provision for compensation for such injury or death, regardless of whether the accident was caused by the negligence of the board and regardless of the freedom from negligence on the part of the pupil injured or killed.

Answering your inquiries, I am of the opinion therefore that:

1. Section 7731-5, General Code, does not create any liability upon the part of boards of education for accidents resulting from the negligence of such boards in the transportation of school children under their authority.

2. Said section contemplates what is commonly known as accident insurance as well as liability insurance.

Respectfully,

JOHN W. BRICKER,

Attorney General.