

tigation, some arrangement should be made with respect to the adjustment and payment of the apportioned amount of such taxes and assessments before the transaction is closed for the purchase of this property.

The warranty deed tendered by Ambrose E. Trubey has been properly executed and acknowledged by him and by his wife, Catherine Trubey, and the form of said deed is such that the same is legally sufficient to convey the above described property to the State of Ohio by fee simple title, free and clear of the inchoate dower interest of Catherine Trubey, with a covenant of warranty that this property is conveyed to the State of Ohio free and clear of all encumbrances whatsoever except taxes and assessments for the year 1932 and thereafter.

Encumbrance record No. 41, which has been submitted as a part of the file relating to the purchase of this property, has been properly executed and approved, and the same shows a sufficient balance in the proper appropriation account to pay the purchase price of the property here in question, which purchase price is the sum of \$410.00.

It likewise appears from a recital in said encumbrance record, as well as otherwise, that the purchase of this property has been approved by the Board of Control, and that the necessary money to pay the purchase price of the property has been released by said board for this purpose.

Subject to the exceptions above noted, the abstract of title submitted is approved and the same, together with the warranty deed and encumbrance record No. 41 above referred to, is herewith enclosed.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

4583.

#### INSURANCE—TAX AND TAXATION—TAXATION OF DOMESTIC INSURANCE COMPANIES DISCUSSED.

##### SYLLABUS:

*The permanent fund provided for, accumulated and set aside by a fire insurance company under the provisions of Section 9535 General Code as a reserve for the security of its insured, is not a reserve computed as provided by law within the purview of Section 5414-9 General Code; and the same cannot be deducted in determining the capital and surplus of such company for purposes of taxation under the provisions of this section of the General Code.*

*The accumulated amount of advanced premium payments made to an assessment life and accident association operating under Section 9445 General Code; except as to the part thereof represented by premium payments made by applicants who have been rejected or who have not been accepted, is a part of the property and assets of the association, and the same should be included in determining the surplus of the association for purposes of taxation under provisions of Section 5414-9 General Code.*

*Moneys advanced to a domestic mutual fire insurance company by its directors, officers or members under the provisions of Section 9607-12 General Code are not actual liabilities of the company within the meaning of Section 5414-9 Gen-*

*eral Code, and the amount of such advances may not be deducted in determining the capital and surplus of the company under provisions of this section.*

COLUMBUS, OHIO, August 30, 1932.

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

DEAR SIR:—This is to acknowledge receipt of your communication requesting my opinion on several questions arising on a consideration of certain statutory provisions relating to the taxation of domestic insurance companies under the provisions of sections 5414-8, et seq., General Code.

The several questions here presented and the statutory provisions which give rise to these questions are stated in your communication as follows:

1. "In addition to the questions raised relative to Stock Fire Companies, the question is raised as to the proper treatment of the items of 'Permanent Fund,' which will appear under the heading of 'Liabilities' of certain Ohio Contingent Mutual Fire Insurance Companies' Annual Statements.

Section 9535, General Code of Ohio, provides as follows:

"In its by-laws any such company may provide for the accumulation of a permanent fund, by reserving a portion of the net profits, to be invested and be a reserve for the security of the insured. Such permanent fund in such sum as may be determined by the Board of Directors shall be separate and apart from such surplus as may be accumulated in the discretion of the company or its Board of Directors. The permanent fund so accumulated shall be used for the payment of losses and expenses, whenever the cash funds of the company in excess of an amount equal to its liabilities are exhausted."

Should the Superintendent of Insurance include the 'Permanent Fund' of such Companies, which, in most instances is a rather sizeable amount, in the amount of Taxable Surplus, certified to the Tax Commission of Ohio?"

2. "An Assessment Life & Accident Association operating under Section 9445, General Code of Ohio, on what is known as the 'Stipulated Premium Plan,' instead of the 'Assessment, or Post-Mortem Plan,' collects premiums from one quarter to one year in advance. Should this amount of advanced premiums be included in the amount of Taxable Surplus and Capital, and so certified to the Tax Commission of Ohio by the Superintendent of Insurance?"

3. "Section 9607-12, General Code of Ohio, provides as follows:

'Any director, officer or member of any domestic mutual insurance company, or any other person, may advance to such company any sum or sums of money necessary for the purpose of its business, or to enable it to comply with any requirement of the law, or as a cash guarantee fund. Such moneys, and such interest thereon as may have been agreed upon, not exceeding eight per centum per annum, shall not be a liability or claim against the company, or any of its assets, except as herein provided, and shall be repaid only out of the surplus earning of such company; and, except as otherwise approved and ordered by the Superintendent of

Insurance, no part of the principal thereof shall be repaid until the surplus of the company remaining after such repayment is equal in amount to the principal of the money so advanced. Such advancement and repayment shall be subject to the approval of the Superintendent of Insurance, provided that this section shall not affect the power to borrow money which any such company possesses under the laws. No commission or promotion expenses shall be paid by the company, in connection with the advance of any such money to the company, and the amount of any such unpaid advance shall be reported in each annual statement.'

Should advancements made under the provisions of the above statute be included in the Taxable amount of Surplus and Capital certified to the Tax Commission of Ohio, for taxation?"

In the consideration of the questions above stated, it is noted that the tax on domestic insurance companies provided for by sections 5414-8, et seq., General Code, is a property tax on the capital and surplus of such insurance companies as have capital divided into shares, and on the surplus of such companies as do not have capital divided into shares. The surplus of an insurance company or other corporation is such part of the accumulated earnings and profits of the company as have not been distributed to its stockholders or members by the payment of dividends or otherwise.

The tax here in question being, however, a property tax, the same can be laid only on such part of the capital and surplus of the company as is represented by property and assets which are not exempt from taxation.

As a consideration which is more pertinent in the consideration of the questions here presented, it may be observed that it would have been entirely competent for the legislature to have provided for a tax upon the capital and surplus of these companies without any deduction of their liabilities in determining the amount of such capital and surplus. It is noted in this connection that in most of the states such deductions are provided for by statute as an equitable method of arriving at the true amount of the taxable property of the company. These deductions are not in any sense an exemption, but, as above indicated, the same are made as a way of reaching the just amount of taxable property.

In keeping with this principle, section 5414-9, General Code, provides for a consideration of the liabilities of a domestic insurance company in determining the amount of its taxable capital and surplus or surplus, as the case may be. This section provides that there shall be included in such liabilities "(1) the reserve and unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company by reason of its outstanding policies in gross, (2) amounts set apart for the payment of dividends to policy holders, and all actual liabilities set forth in the annual statement." From a consideration of the above quoted provisions of section 5414-9, General Code, it appears that the reserve of a domestic insurance company which may be included as a liability of the company in determining its capital and surplus or surplus, as the case may be, is a reserve that is computed as provided by law, "the same being the amount of debts of an insurance company by reason of its outstanding policies in gross." This provision of section 5414-9, General Code, seems quite clearly to refer to a reserve that is required by some particular law and which is to be computed as therein provided, such, for instance, as the reserve which domestic life insurance companies are required to maintain under the provisions of sections 9362 and 9363, General Code. The permanent fund which a domestic insurance company other than a life insurance company may accumulate as a contingent fund for the

payment of losses and expenses, is not a fund which the company is required to provide for and maintain. In considering the provisions of section 9535, General Code, quoted in your communication with respect to your first question, it is noted that ordinarily the reserve of a fire insurance company provided for the purpose of securing the payment of losses on its outstanding policies, is not considered a liability of the company within the meaning and application of tax laws of this kind, even though the maintenance of such reserve may be required by law. The liabilities on issued and outstanding fire insurance policies being merely contingent, the same are not such liabilities as may be deducted from the gross assets of the insurance company in determining its capital and accumulated surplus. *Trenton vs. Standard Fire Insurance Company*, 77 N. J. L. 757; *City of Yale vs. Michigan Farmers Mutual Fire Insurance Company*, 179 Mich. 254. See *Insurance Company vs. Board of Review*, 131 Iowa, 254.

It follows from the considerations above noted that the permanent fund referred to in section 9535, General Code, is not, when set up and maintained by domestic insurance companies of the kind referred to in this section, a liability of the company within the meaning of the above quoted provisions of section 5414-9, General Code, and, by way of specific answer to your first question, I am of the opinion that such part of this permanent fund as is not invested in non-taxable securities should be included as part of the assets of the company in determining the amount of its taxable capital and surplus.

Section 9445, General Code, referred to by you in the statement of the second question above noted, provides for the organization of insurance companies on the stipulated premium or assessment plan for the purpose of insuring against accidental personal injury and loss of life, sustained while traveling by railroad, steamboat or other mode of conveyance, and against accidental loss of life and personal injury, sustained by other kinds of accidents. It appears from the statement of this question that it is the practice of these companies or associations to collect premiums either quarterly or annually in advance and your question is whether the accumulated amount of these advanced premiums may be included in determining the amount of the taxable capital and surplus of the company or association. Assuming that the practice of collecting such advanced premium payments is legal and within the power and authority of a company or association of this kind, the accumulated amount of such advanced premium (other than premium payments made by applicants who have been rejected or who have not yet been accepted) is the property of the company or association and should be included as a part of the taxable surplus of the company.

Section 9607-12, General Code, quoted as a part of the statement of your third question, is one of the sections of the General Code relating to domestic mutual fire insurance companies. With respect to this question, it will be observed that any sum or sums of money necessary for the purpose of the business of a domestic fire insurance company of this kind advanced to it by any director, officer or member of such company do not when so paid constitute a reserve of the company for any purpose. And the question whether such sum or sums of money so advanced are to be deducted in determining the taxable surplus of such companies depends upon whether the obligation or obligations of the company created by the advance to it of moneys as provided for in this section constitute "actual liabilities" of the company within the meaning of the provisions of section 5414-9, General Code, above quoted. Under the provisions of section 9607-12, General Code, quoted in your communication, moneys advanced to the company by any of its directors, officers or members are not unconditional liabilities of the company but are to be repaid, if at all, only out of the surplus

earnings of the company and as to this it is further provided by this section that except as otherwise approved and ordered by the superintendent of insurance no part of the principal sum of moneys thus advanced to the company shall be repaid until the surplus of the company remaining after such repayment is equal in amount to the principal of the money so advanced. It is quite clear from the provisions of this section that moneys advanced to a domestic mutual insurance company in the manner therein provided may never become a liability of the company and inasmuch as, under the provisions of section 5414-9, General Code, it is only actual liabilities which can be deducted, so far as this question is concerned, I am of the opinion that no deduction can be made from the assets of a domestic mutual insurance company on account of any sum or sums of money that may have been advanced to such company by any of its officers, directors or members under the authority of section 9607-12, General Code.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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4584.

FLECTION LAW—CLERK OF COMMON PLEAS COURT—NO PROVISION FOR ELECTION FOR UNEXPIRED TERM IN NOVEMBER, 1932, WHERE OFFICE NOW HELD BY APPOINTMENT.

*SYLLABUS:*

*No provision should be made at the election on November 8, 1932, for the election of a clerk of a common pleas court for the unexpired term in the instances where the office is now being filled by appointment.*

COLUMBUS, OHIO, August 30, 1932.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which reads as follows:

“Permit me to submit the following inquiry to you for your opinion.

In view of your Opin'on No. 1777, of April 12th, 1930, relative to filling a vacancy in the office of Clerk of Common Pleas Court, and in view of the subsequent decision of the Ohio Supreme Court in *The State, ex rel. Klein vs. Bernon, et al., Board of Elections of Cuyahoga County*, 122 O. S., page 621, relative to the same subject, will you please advise me as to whether or not it will be necessary to provide at the election of November 8th, for the election of a Clerk of the Common Pleas Court, unexpired term, in the instances where the office is now being filled by appointment.”

In the case of *State ex rel. Klein vs. Bernon, et al., Board of Elections of Cuyahoga County*, 122 O. S. 621, which case is mentioned in your communication, the facts, briefly, were as follows (as shown by the petition filed in the Supreme Court):