of the Board of Building Standards, for it is provided in that part of Section 12600-288, General Code, above quoted, that the Board should be the sole authority as to equivalents.

In my opinion when plans and specifications are submitted to the Division of Workshops and Factories, as provided for in Section 1600-296, General Code, it is the duty of the Chief of said Division to examine same to ascertain whether they conform to the Ohio Building Code and the rules and regulations of the Board of Building Standards. If they do not then he is well within his authority in refusing to approve them.

In specific answer to your question therefore, it is my opinion that the Division of Workshops and Factories did not violate its authority in rejecting the "McKay System" if said system did not come squarely within the provisions of the Ohio Building Code and had not been approved by the Board of Building Standards.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*

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1023.

BOARD OF EDUCATION—MAY NOT EXPEND PUBLIC FUNDS TO PAY PREMIUM FOR INSURANCE POLICY WHERE COMPANY RESERVES CERTAIN DEFENSES—SCHOOL BUS.

*SYLLABUS:*

*Under the provisions of Section 7731-5, General Code, a board of education of a school district may not expend public funds to pay the premium for a policy of insurance which reserves to the insurance company the right to take advantage of any defense that would be valid and legal if the insured were an individual or a private corporation.*

COLUMBUS, OHIO, August 18, 1937.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN: This will acknowledge receipt of your recent communication, which reads as follows:

> "We are submitting herewith a liability insurance policy, with certain endorsements attached, which policy has been purchased by a board of education.

We respectfully request that you furnish this department your written opinion upon the question:

'Is this policy, with the attached endorsements, insurance of such character as boards of education are authorized to purchase, under the provisions of Section 7731-5, General Code?' "

The policy enclosed was issued by The Employers' Liability Assurance Corporation, Limited, of London, England (A Stock Company), and on the face of the same is designated as a "National Standard Automobile Liability Policy, No. X1117580." The material "Declarations" that appear on the first page of the policy are as follows:

"Item 1. Name of Assured: Cleveland Heights Board of Education and/or Individual Members thereof and/or drivers.
Address: 1749 Lee Road, Cleveland Heights, Cuyahoga County, Ohio.
Item 3. Policy Period: One year from July 17th, 1936, to July 17th, 1937, 12:01 A. M.
Item 4. (Contains a description of the Ford School Bus covered by the terms of the policy.)
Item 5. Limits of Liability—
Coverage A. Bodily Injury Liability—$100,000.00—each person and subject to that limit for each person —$100,000.00—each accident.
Coverage B. Property Damage Liability—$5,000.00 —each accident.
Item 6. The purposes for which the automobile is to be used are Pleasure and Business / /, Commercial /X/ as defined in Condition 2. (Indicate by "X").

There are attached to the first page of the policy three endorsements, and various agreements, exclusions and conditions of the policy are set forth on the second, third and fourth pages. I shall refrain from setting forth in verbatim said endorsements, agreements, exclusions and conditions contained in said policy and hereinafter refer to, and quote only the necessary parts of the policy that must be discussed in order to determine the question contained in your request.

For the purpose of this opinion and without any investigation to determine so, we assume that "The Employers' Liability Assurance Corporated, Limited, is a recognized insurance company author-

ized to do liability and property damage insurance business in the State of Ohio.

On page 3, of the policy, under the heading "Conditions" paragraph 7 appears the following language:

> "No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the Corporation from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the Manager and Attorney of the Corporation for the United States; provided, however, that changes may be made in the written portion of the declarations by endorsement issued to form a part hereof, signed by the agent countersigning this policy."

Endorsement No. 3, attached to the first page of the policy reads as follows:

> "It is hereby understood and agreed that the Company will not take advantage of any defense other than would be valid and legal if the assured were an individual or a private corporation."

This "Endorsement No. 3" is signed by the "Manager and Attorney for the United States," and therefore, as stated on the endorsement, it "shall be valid and shall form part of said Policy."

The well and old established principle of law, that where injury is the result of negligence there is a right of action, is not applicable in the case of an injury being the result of the negligence of a board of education. "There was no liability of the board of education at common law for damages for its negligence or want of care, and there is no status creating such a liability for a tort to either person or property, either expressly or impliedly, by either a general or special provision." (36 O. J., page 581, Section 380.)

It is said in the case of *Board of Education of Cincinnati* vs. *Volk*, 72 O. S., 469, at page 485, that:

> "The board is a mere instrumentality of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state. As heretofore stated, these boards are but arms of the sovereign, the state, and the latter has neither authorized, nor permitted,

by any law, its agents to be sued for tort to either person or property."

See also: *Alice Finch by her next Friend,* vs. *The Board of Education of City of Toledo,* 30 O.S., 37; *Conrad, a Minor* vs. *Board of Education of Ridgeville Township,* 29 O.A., 317.

Boards of education being public agents employed in administering the public school system in this state, are required to provide adequate school privileges for all public school children. In order that all pupils may secure these adequate school privileges, Section 7731, General Code, places a mandatory duty upon boards of education to furnish free transportation to and from school "where resident elementary pupils live more than two miles from the school to which they are assigned." It is obvious that a board of education transporting pupils to and from school, is engaged in a public governmental function, and therefore it can be said that the common law rule of non-liability of a board of education applies in a case where a pupil is injured as a result of the board of education's negligent operation of a bus used in such transportation of pupils. Although I am unable to find any Ohio case directly in point, numerous cases appear in various other jurisdictions. In the case of *Harris* vs. *Salem School District,* 72 N.H., 424, it was held:

"A school district is not liable at common law for injuries to a pupil which result from improper means of transportation negligently provided for the accommodation of schools at public expense."

See also: *Allen* vs. *Independent School District No.* 17, 216 N.W. (Minn.) 533; *Consolidated School District No.* 1, *et al.,* vs. *Wright,* 128 Oakland, 193.

However, this immunity from liability does not extend to a driver of a school bus for damages sustained by any person by reason of injury to his person or property, without contributory negligence on his part, as a result of the negligent operation of a school bus by the bus driver.

Section 7731-5, General Code, which authorizes a board of education to procure liability and property damage insurance, 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 will be observed from a reading of Section 7731-5, supra:— that, the provisions of this section neither impose a liability upon the board of education for damages for injury to person or property sustained by the negligent operation of a school bus or motor van in transporting pupils, nor, restrict recovery from a driver of a school bus for damage for injury to person or property sustained by reason of the driver's negligent operation of a school bus or motor van in transporting pupils.

Section 7731-5, supra, has been construed and interpreted in several opinions rendered by my predecessor. In Opinions of the Attorney General for 1933, Volume II, page 1310, at page 1312, it was said:

"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."

In Opinions of the Attorney General for 1934, Vol. III, page 1806, it was held:

"Unless a contract of insurance entered into by a board of education provides for compensation for injury or death

to any school pupil caused by any accident arising out of or in connection with the operation of a school bus or other vehicle used in the transportation of school children, it is not such a contract as a board of education is authorized to enter into by favor of Section 7731-5, General Code."

In an opinion rendered by my predecessor, December 22, 1936, and numbered 6558, it was held:

"This class of insurance which a board of education is authorized to effect by the terms of Section 7731-5, General Code, is what is popularly known as liability or casualty insurance covering the legal liability for personal injury or property damage growing out of the operation of conveyances used in the transportation of school children to and from school or school events under the jurisdiction of the assured, providing the actual use of the vehicle is at the time with the permission of the assured board of education, and providing further that the insurance effected by the proposed policy covers *not only liability or casualty insurance* as above described, *but as well, compensation for injury or death to any school pupil caused by any accident arising out of or in connection with the operation of the conveyance covered by the policy while used in the transportation of such school pupils.* (Italics, the writer's.)

In the course of the opinion it was stated:

"It is concluded, therefore, that the kind of insurance which is contemplated by Section 7731-5, General Code, wherein liability and property damage insurance are spoken of, is insurance covering liability of each and every driver of a school conveyance legally and lawfully authorized to drive the conveyance with the consent and knowledge of the assured board of education while such vehicle is being used in the transportation of school children to or from school or school events under the jurisdiction of the assured board of education. By the plain terms of the statute, however, the insurance effected by authority of said statute must, to be such assurance as is authorized by the statute, include in the same policy compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of the vehicle when the vehicle is being used in the transportation of school pupils."

It is to be observed from a reading of the holdings in the fore-

going opinions that a contract of insurance entered into by a board of education under the provisions of Section 7731-5, supra, must provide:—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, motor van or other vehicle used in the transportation of school children, 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; and that, the insurance shall cover liability of each and every driver of a school conveyance legally and lawfully authorized to drive the conveyance while the vehicle was being used in the transportation of school children under the jurisdiction of the board of education.

As stated hereinabove, the "name of assured" includes the Cleveland Heights Board of Education and/or Individual Members thereof and/or Drivers.

On page two of the policy, under the heading "Insuring Agreements," in paragraph marked "III—Definition of Assured," it provides:

> "The unqualified word 'Assured' wherever used in Coverages A and B and in other parts of this policy, when applicable to these coverages, includes not only the named Assured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is 'pleasure and business' or 'commercial,' each as defined herein, and provided further that the actual use is with the permission of the named Assured."

Upon consideration of the provisions contained in Endorsement No. 3, it is clear: that, the Company can take advantage of any defense that would be valid and legal if the assured were an individual or a private corporation; that, the plain and clear language of the provisions contained in the said endorsement provide for a protection that is inconsistent and contrary to the type of insurance that a board of education is authorized to procure. The type of insurance that a board of education is authorized to procure must provide for absolute compensation in any accident, regardless of any defense. Under the provisions of said "Endorsement No. 3", the Company can take advantage of the defense of contributory negligence in any action commenced for damages resulting from the negligent operation of the bus by the driver, who is included in the "Name of Assured" in the policy. In case of an accident a board of education needs no defense, since no liability against the board of education exists. Therefore, it is obvious that a board of education

cannot enter into a contract for insurance which gives the company the power to use any defense that would be valid and legal against any individual or corporation. To permit this, is authorizing a board of education to enter into a contract and pay for protection which it absolutely does not require.

Section 7731-5 supra, only permits a board of education to purchase liability insurance, that is absolute liability insurance and against which no defense can be introduced.

On page 2, of the policy, under the heading "Insuring Agreements," appears the following:

> "I. *Coverage A—Bodily Injury Liability.*
>
> To pay on behalf of the Assured all sums which the Assured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."
>
> *"Coverage B—Property Damage Liability.*
>
> To pay on behalf of the Assured all sums which the Assured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile."

Under the heading "Exclusions" on the same page, it provides in part, as follows:

> *"This Policy Does Not Apply:*
>
> (d) Under Coverage A and B, to any liability assumed by the Assured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named Assured in the automobile, without the written consent of the Corporation;"

On page 3 of the policy, under the heading "Conditions", there appears the following:

> 14. *"Action Against Corporation, Coverages A and B—*
>
> No action shall lie against the Corporation unless, as a con-

dition precedent thereto, the Assured shall have fully complied with all the conditions hereof, nor until the amount of the Assured's obligation to pay shall have been finally determined either by judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and the Corporation, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement."

In an opinion rendered by my predecessor in office, Opinions of the Attorney General for 1934, Vol. III, page 1806, provisions in effect similar to those hereinbefore set forth, were discussed. The material recitals of those provisions were as follows:

"Paragraph 'O' * *

'Public Liability: To insure the Assured against loss from the liability imposed upon him by law for bodily injury, including death at any time resulting therefrom (herein called "Public Liability") accidentally sustained by any person or persons, if caused by the ownership, maintenance or use of the automobile described in the Schedule of Warranties, on Page One of this policy, for the purpose therein stated."

"Paragraph 'P' * *

'Property Damage Liability: To insure the Assured against loss from the liability imposed upon him by law for accidental injury to or destruction of the property of others, including the loss of use thereof (herein called "Property Damage") if caused by the ownership, maintenance or use of the automobile described in the Schedule of Wararnties, on Page One of this policy, for the purpose therein stated.'

Under the heading 'Exclusions' * * *

'Unless otherwise provided by agreement in writing added hereto, this Company will not be liable for loss or damage:

* * * * * * *

, (3) Under agreements O and P for any liability assumed by the Assured under any oral or written contract or agreement;

Under 'General Conditions' * *

'2. Determination of Company's Liability: No recovery against the Company shall be had under this policy until the amount of loss or expense shall have been determined, either by final judgment against the Assured after actual trial in an

action defended by the Company or by a written agreement of the Assured, the claimant, and the Company, nor in either event unless suit is instituted within the time herein limited.' "

It is to be observed: that, in the policy under consideration in this opinion, "Coverage A" and "Coverage B" both provide for payment of "all sums which the Assured shall become obligated to pay by reason of the liability imposed upon him by law for damages"; that, (d), under the heading *"Exclusions"*, provides that the policy does not apply, "to any liability assumed by the Assured under any contract or agreement"; that, paragraph 14; "Action Against Corporation—Coverages A and B" provides that no action shall lie against the Corporation "until the amount of the Assured's obligation to pay shall have been finally determined either by judgment against the Assured after actual trial or by written agreement of the Assured, the claimant and the Corporation, * *" and that, the provisions and terms hereinabove set forth as they appeared in the policy that was considered in the 1934 opinion, supra, are identical in effect and substance, to the provisions and terms that have been hereinabove quoted from the policy under consideration in this opinion. That is, that the terms and provisions in "Coverage A" and "Coverage B" contained in the policy here under consideration, are identical in effect and substance to the provisions and terms contained in "Paragraph O" and Paragraph P", in the policy considered in the 1934 opinion supra; that, the terms and provisions in (d) under the heading *"Exclusions"* in the policy under consideration in this opinion, are in effect and substance identical to the terms and conditions contained in (e) under the heading *"Exclusions"* in the policy in the 1934 opinion, supra, and that the terms and provisions in "14. Action against Corporation—Coverages A and B" are identical in effect and substance to the terms and conditions contained in "2"., under "General Conditions" in the policy considered in the 1934 opinion, supra.

In considering and discussing the hereinabove provisions quoted from the policy that was considered in the 1934 opinion, supra, the then Attorney General said, at page 1808:

*"Nor does it in anywise modify or limit the provision of the policy to the effect that no recovery shall be had thereunder, until the amount of the loss or expense shall have been determined either by final judgment against the assured or by written agreement of the company.*

Obviously, nothing can be collected under this policy until there is a loss to the assured on account of a liability imposed upon him by law, of such a nature that judgment could be

procured against him in a court of law." (Italics, the writer's.)
At page 1809, it is said:

"The insurance effected by the policy in question, is nothing more than insurance against accidents resulting from the negligence of the assured school bus drivers under such conditions that judgment might be procured by the person injured, against the said driver and the driver thereby suffer 'loss' within the terms of the policy."

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

* * * * * * *

It seems clear from the terms of the above statute that unless a policy of insurance provides for compensation for injury or death to any pupil caused by any accident arising out of, or in connection with the operation of a school bus, as well as insurance against the negligence of school bus drivers it is not such a contract of insurance as a board of education is authorized by favor of the above statute, to enter into.

It is equally clear, upon consideration of the terms of the policy submitted with your inquiry, that this policy does not provide for compensation for injury or death to any pupil caused by *any* accident arising out of or in connection with the operation of the school busses described in the policy. It provides merely for insurance against the negligence of the school bus drivers or, to be more specific, insurance against any loss which these drivers may suffer by reason of any accident."

Upon consideration of the 1934 opinion, supra, I concur in the conclusion and the reasoning therein upon which the same was reached. The provisions and terms hereinabove set forth as they appeared in the policy discussed in the 1934 opinion, supra, were held to be objectionable.

In my opinion, if the terms and provisions hereinabove quoted, as they appear in the policy under consideration in this opinion, are identical in effect and substance to the terms and provisions in the policy in the 1934 opinion, supra, it must be said that they are just as objectionable in this policy under consideration and therefore, a board of education is not authorized to purchase such a policy.

In specific answer to your question it is my opinion: that, the policy attached to your request is a policy of insurance of such character as boards of education are not authorized to purchase under the provisions of Section 7731-5, General Code.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*