

tion of section 12911, General Code, for a county probate judge to be interested in a contract for the purchase of fire insurance on school buildings, when any premium on a policy exceeded \$50.00. Other opinions of former attorneys general were quoted with approval which held that, there being no provision in the statutes for advertising and receiving bids for fire insurance, it was a violation of section 12911, General Code, for an officer or employe of a board of such officers to sell fire insurance to a political subdivision with which he was not connected, when the premium exceeded \$50.00. Obviously, the reasoning of such opinion is applicable to the situation you present.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2033

ANNUITY—AUTHORITY OF INSURANCE COMPANIES TO MAKE SUCH
CONTRACTS—DISCUSSION OF ANNUITY CONTRACTS.

SYLLABUS:

1. *When a person or corporation in consideration of the receipt of monthly payments agrees at a definite future time thereafter to repay an amount equal to the sum so paid plus interest thereon, the contract evidencing such transaction is not a contract for an annuity when the money is to be repaid in a lump sum.*

2. *When a person or corporation in consideration of the receipt of monthly payments agrees at a definite future time thereafter to repay an amount equal to the sum so paid plus interest thereon, the contract evidencing such transaction is a contract for an annuity when the money is to be repaid in a lump sum or at the option of the contractee, in periodic installments.*

3. *Sections 9339 and 9462-1, General Code, authorizing insurance companies to grant, purchase and dispose of annuities are a grant of additional power to insurance companies and do not constitute a limitation on the powers of other corporations authorized by their charter or statutes to issue annuity contracts the payment of which does not depend upon the happening of some contingency which may or may not happen at a particular time.*

COLUMBUS, OHIO, December 18, 1933.

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

DEAR SIR:—I am in receipt of your request for my opinion concerning the following questions:

"1. I have before me, four separate forms of contracts, which I am enclosing herewith, for your consideration in arriving at a conclusion on my first question. These contracts are as follows: Specimen Contract, Series G. No. G4733 of The Capital Endowment Company, Cleveland, Ohio, Specimen Income Builders Contract, in the sum of \$1,000.00, payable at maturity in one sum in currency of the United States of America, issued by the Central Acceptance Corporation, Cincinnati, Ohio, Specimen Income Reserve Contract, participating and convertible, No. 32R 0000 of the Fidelity In-

vestment Association, Wheeling, West Virginia, and photostatic copy of one Guaranteed Ten Year Annuity Contract, No. B 106, in the sum of \$2,000.00, issued by The Central Building, Loan and Savings Company, Columbus, Ohio. Please examine these contracts and determine in each instance whether or not they are annuity contracts.

2. Section 9339 G. C. of Ohio, provides, among other things, a life insurance company may grant, purchase or dispose of annuities. Section 9462-1, G. C., provides that a fraternal benefit society in its constitution and by-laws may provide for the payment of death or annuity benefits upon the lives of children between the ages of two and eighteen years, next birthday, and whose support and maintenance a member of such a society is responsible. Section 697 G. C., defines a bond investment company and the types of securities it places or sells. Section 9643 et seq., define and provide the functions of a building and loan association.

It will be noted that of the above designated sections, annuities are provided for specifically, only in sections 9339 and 9462, G. C., Therefore, I desire to have you determine whether or not the power to grant, purchase or dispose of annuities or to pay annuities as specifically granted in these two statutes, is confined exclusively to the types of companies or societies designated therein, and would not extend to bond investment companies or building and loan associations because not mentioned in the statutes pertaining to their respective rights and powers."

For the purpose of clarity, it might be advisable to review some of the legal definitions of an annuity. The word "annuity," from its root, would indicate that it referred to an annual payment, and many of the definitions quoted in the opinions of the courts contain such idea. In Ballentine's Law Dictionary an annuity is defined as:

"A yearly payment of a certain sum of money granted to another in fee, for life, or for years, and charging the person of the grantor only."

If the yearly payment is a lien on real estate or is other than a personal charge under the early authorities it constituted a different type of property than that referred to as an annuity. Thus it might be a "rent" if it were made a charge on lands, or it might be a "tithe" if it had the necessary attributes. In Corpus Juris, Vol. III, page 200, the word "annuity" is defined as follows:

"In its technical meaning, an annuity is defined as 'a stated sum, payable annually,' or as a yearly payment of a certain sum of money granted to another in fee, for life, or for years, and chargeable only on the person of the grantor.

The term is used in a broader sense as designating a fixed sum, granted or bequeathed, payable periodically, but not necessarily annually, subject to such specific limitations as to its duration as the grantor or donor may lawfully impose."

In the case of *Chisholm vs. Shields*, 67 O. S., 574 it is held:

"An annuity, as understood in common parlance, is an obligation by a person or company to pay the annuitant a certain sum of money at stated

times, during life or a specified number of years, in consideration of a gross sum paid for such obligation."

It is thus evident that the term "annuity" as used at the present time means a contract for the payment of money annually or at stated periods, not as salary or wages for services to be performed in the future. See *Wetmore vs. State*, 8 Oh., 77; *Chisholm vs. Shields*, supra.

In the letter containing your inquiry, you refer to, and enclose copies of contracts some of which are referred to on their face as "annuity contracts." The first of these is issued by the Capital Endowment Company. This contract is sold under an agreement by virtue of which the applicant makes an initial payment and seventy-two consecutive monthly installments. Upon completion of such payments the applicant has the option either of receiving \$1000.00 in cash, or \$1,250.00 in ten annual installments. The agreement further provides a cash surrender value in the event the applicant desires to rescind his contract after he has made the first twenty-five payments thereunder. By mathematic computation, it is evident that the obligation of the issuer of this contract is to repay to the applicant the moneys received, together with interest thereon, varying from the rate of 4¼% to 4½% depending upon whether the interest is computed quarterly or annually.

The second contract referred to in your inquiry is that of the Central Acceptance Corporation. The consideration of this contract on the part of the contractee may be in any one of the following manners:

(1) Payment at the time of delivery of the contract of \$770.00.

(2) Payment of \$60.00 at the time of the execution and delivery of the contract, and eighty-four monthly installments of \$10.00 each.

(3) The payment of \$10.00 at the time of the execution and delivery of the contract and eighty-nine consecutive monthly installments of \$10.00 each. In return, the company agrees at the maturity date of the contract to pay to the contractee the sum of \$1,000.00. This contract, in terms, agrees to repay to the contractee the money paid by him, plus 4½% interest thereon at the maturity date of the contract.

The third contract referred to in your inquiry is with the Fidelity Investment Association. The contractee under this contract agrees to pay an initial payment of \$100.00 and one hundred and thirty-two monthly payments of \$10.00 each, in consideration of which payments the company agrees within sixty days after the maturity date of such contract, to pay to the contractee either twenty-one semi-annual installments of \$100.00 each, or \$1720.00 in cash. The option on the method of payment is with the contractee. In addition thereto, the company grants to the applicant, the contractee, the right to participate in a portion of the earnings of a certain surplus fund created by the company. The contractee has the right under this contract to convert his contract into an annuity after he has made the initial and six monthly payments.

The fourth contract referred to in your inquiry is that of the Central Building, Loan and Savings Company, under which the contractee agrees to make an initial payment of \$10.00 and one hundred and twenty-five monthly installments of \$10.00 each. The company agrees to pay to the contractee in ten years and five months thereafter, the sum of \$200.00 and \$200 per year until \$2,000.00 is paid, or \$1,620.00 in cash at the maturity date of such contract.

From the foregoing analysis it is evident that the first and second of such contracts are not contracts for an annuity since there is no obligation on the part

of the issuer to make periodic payments of money to the contractee. It is further evident that the third and fourth of such contracts are contracts which obligate the company to pay an annuity in the event that the contractee does not elect to receive performance by payment of a lump sum in cash.

With reference to your second inquiry, as to whether or not the issuance of the contracts referred to in your letter constitutes engaging in the insurance business, it might be well to consider the nature of insurance. In Cooley's Briefs on Insurance, page 4, I find the following statement:

"Insurance has been defined in general terms as a contract by which one party undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event."

Citing *Cummings vs. Cheshire Co. Mut. F. Ins. Co.*, 55 N. H. 457; *Lucena vs. Crauford*, 2 B & P, 300; *Cross vs. National Fire Ins. Co.* 132 N. Y., 133; *Shakman vs. U. S. Credit System*, 92 Wis. 366, 32 L. R. A., 383; *Ins. Co. of N. A. vs. Jones*, 2 Bin (Pa.) 547; *State vs. Willett*, 171 Ind. 296; *St. ex rel. vs. Inter-Insurance Aux. Co.*, 257 Mo. 529; *Conn. vs. Metropolitan Life Ins. Co.*, 254 Pa., 510.

In Corpus Juris, Vol. III, page 202, it is stated:

"An annuity contract differs from one for life insurance in that the latter provides for the payment of a lump sum conditionally in consideration of periodical payments by the insured, while the former contemplates periodical payments of an annual amount, purchased by the annuitant for a stated sum. It has consequently been held that the rules applicable to life insurance do not govern an annuity contract."

In *Commonwealth vs. Metropolitan Insurance Company*, 254 Pa., 510 the court, in distinguishing between an ordinary insurance contract and a contract granting an annuity, said:

"In the case of an annuity created by contract a certain fixed sum is paid as a consideration for an annual sum to be paid to the grantee of the annuity. The simplest form of insurance is an agreement to pay a lump sum upon the death of the insured, the consideration of which is the payment by the insured of an annual sum known as a premium. Insurance as generally understood is an agreement to indemnify against loss in case property is damaged or destroyed by fire, or to pay a specified sum upon the death of the insured or upon his reaching a certain age. An annuity is generally understood as an agreement to pay a specified sum to the annuitant during life. * * * The power to make insurance contracts and to grant annuities seems to be recognized as entirely distinct in the Pennsylvania statute providing for the incorporation of insurance companies."

I might also quote from a note found in 63 A. L. R., 79:

"Contracts for annuities differ materially from ordinary insurance policies and are not generally regarded as such, so that a company engaged merely in selling annuities does not conduct an insurance business, and is not an insurance company."

It is thus evident that the issuance of an annuity is not necessarily in and of itself, insurance business.

It also seems clear that when the settler, whether in consideration of the payment of a definite sum payable in one amount or otherwise, agrees to pay to an annuitant or to his order, a specific number of periodical payments in money such annuity could not be considered as insurance. Such payments do not in any manner, depend upon the happening of a contingent event which may or may not happen at any particular time.

In Section 7896-1, General Code, an annuity is defined for the purposes of the Teachers' Retirement Fund, as follows:

“‘Annuity’ shall mean payments for life, derived from contributions made by a contributor and paid from the annuity and pension reserve fund as provided in this act. All annuities shall be paid in twelve equal monthly installments.”

In Volume II, Blackstone's Commentaries, page 461, another type of annuity is described and referred to as an “annuity for lives.”

“the practice of purchasing annuities for lives at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that part of the principal entirely by the contingency of the borrower's death; * *”

It would appear that Parliament found it necessary to regulate the business of the issuance of such type of annuities and that laws were enacted to check improvident transactions of such kind. (See 17 George III c. 26; 53 George III c. 141; 3 George IV, c. 92; 7 George IV c. 75.)

Some question might arise as to whether annuities of the type referred to in Section 7896-1, General Code, supra, or those annuities referred to by Blackstone, as “annuity for lives” were not insurance, or if the number of payments or amount of consideration required to be paid by the annuitant for his annuity, or the number of annuity payments required to be paid by the settler depend upon the happening of some event which may or may not happen at a particular time, the question might also arise as to whether such acts did not constitute insurance business. In the contracts accompanying your request, no such problem is presented. In each of such contracts the amount of the consideration to be paid by the contractee is definite and the number of payments to be made by the company in the event that the purchaser elects to receive the proceeds of the contract in installments, is certain. It is therefore unnecessary, for the purposes of this opinion, either to consider or decide such question. I therefore express no opinion concerning such matter.

You raise the question as to whether the provisions of Sections 9339 and 9462-1, General Code, which grant to insurance companies the right to grant, purchase or dispose of annuities do not restrict the power of issuing annuities to such types of insurance companies.

It should be borne in mind that annuities are a species of property recognized by the early law of England, the early civil law, and that annuities are capable of being created either by deed, contract, will or gift, *causa mortis*. (See Coke Littleton, 2a; Coke Littleton, 1446.)

As above pointed out, there is a distinct difference between an annuity contract and a contract for insurance. Section 9339, General Code, grants authority to a life insurance company to engage in the purchase of annuities, with the following language:

“Any number of persons, not less than thirteen, may associate and form a company to make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith, on the mutual or stock plan, *and grant, purchase, or dispose of annuities.*”

(Italics the writer's.)

Similar authority is granted to fraternal benefit societies, in Section 9462-1, General Code. From the language of the foregoing provisions it would appear that with the exception of annuities, all other powers granted by such section are strictly insurance. It would therefore appear that when such sections specifically grant to insurance companies the authority to deal in annuities, such authority is a grant of power rather than a limitation of power since it is never to be presumed that the legislature intends to deprive any person of the right to engage in any lawful business unless the language of the statute clearly shows such legislative intent.

Powers are granted by statute to certain types of corporations to borrow money, to receive deposits, and to lend money. Thus, Section 697, General Code, gives to bond investment companies the power to place or sell certificates, bonds, debentures or other investment securities of every kind on the partial payment or installment plan. Section 9643, General Code, gives a building and loan company the right to raise money to be loaned to its members and others. Section 9648, General Code, gives such type of institution the right to receive money on deposit and pay interest thereon. Section 9656, General Code, gives to the institution the right to borrow money with certain limitations. There are other sections of the statutes granting to banks and other corporations the power to borrow money. I am therefore inclined to the view that the right to issue annuities is not necessarily insurance.

Specifically answering your inquiries, it is my opinion.

1. When a person or corporation in consideration of the receipt of monthly payments agrees at a definite future time thereafter, to repay an amount equal to the sum so paid plus interest thereon, the contract evidencing such transaction is not a contract for an annuity when the money is to be repaid in a lump sum.

2. When a person or corporation in consideration of the receipt of monthly payments agrees at a definite future time thereafter to repay an amount equal to the sum so paid plus interest thereon, the contract evidencing such transaction is a contract for an annuity when the money is to be repaid in a lump sum or at the option of the contractee, in periodic installments.

3. Sections 9339 and 9462-1, General Code, authorizing insurance companies to grant, purchase and dispose of annuities are a grant of additional power to insurance companies and do not constitute a limitation on the powers of other corporations authorized by their charter or statutes to issue annuity contracts the payment of which does not depend upon the happening of some contingency which may or may not happen at a particular time.

Respectfully,

JOHN W. BRICKER,
Attorney General.