COUNTIES:
INSURANCE: MUTUAL: Prohibited from insurance in mutual companies where assessment liability is unlimited, but may insure where liability is fixed and would not exceed in any year revenue provided for such year. Also applicable to cities and school districts.

(More in box in Vault
Mimeograph copies
available 2-20-62

June 5, 1941

6-7

FILED
37

Reinstated 9-18-56

Honorable R. Stuckey Harrington
Prosecuting Attorney
Clinton County
Plattsburg, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of June 3rd, wherein you state as follows:

"I wish to request your opinion as to the legal propriety of a county, through its county court, buying insurance from a mutual company. The type of insurance contemplated is fire and tornado.

"Section 5846, R.S. of Missouri, 1929, states that any public or private corporation may hold mutual policies. That section, I believe, is derived from Laws of 1919, page 397, Section 8.

"Knowing that a county - or its county court - is not incorporated, and is not considered a 'public corporation', I have advised that the statute does not authorize such a purchase from such an insurance company. Also, I felt that the liability of the county to unpredictable assessments, and their consequent interest, voting and otherwise, in the company, was improper.

"This office will appreciate very much your opinion upon this matter."

Although the question is not raised, we believe that we should point out that the court in the case of Walker v. Linn County, 72 Mo. 650, held that county courts have the power to enter into contracts for insurance of county buildings against fire or lightning. The question presented, however, is whether the county can insure its property in a mutual insurance company.

Section 47, Article IV, of the Missouri Constitution provides in part as follows:

"The general assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State, * * * to lend its credit * * * to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company * * *."

Section 6, Article IX of the Missouri Constitution is in part as follows:

"No county, township, city or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institution of learning or other institution, whether created for or to be controlled by the State or others.* * * * * * "

In the case of Lewis v. Independent School Dist., 147 S. W. (2d) 298, the question presented the court of Civil Appeals of Texas was whether the Independent School District of the City of Austin could legally purchase and hold the policy of fire insurance issued to it by the Millers Mutual Fire Insurance Company of Texas.

The appellee school district contracted for the insurance under the provisions of Article 4860a-8, Vernon's Ann. Civ. St., which is word for word identical to Section 5846, R. S. Mo. 1929, cited in your letter, and now designated Section 5957, R. S. Mo., 1939. Said section is as follows:

> "Any public or private corporation, board or association in this State or elsewhere may make application, enter into agreements for and hold policies in any such mutual insurance company. Any officer, stockholder, trustee, or legal representative of any such corporation, board, association or estate may be recognized as acting for or on its behalf for the purpose of such membership, but shall not be personally liable upon such contract of insurance by reason of acting in such representative capacity. The right of any corporation organized under the laws of this State to participate as a member of any such mutual insurance company is hereby declared to be incidental to the purpose for which such corporation is organized and as much granted as the rights and powers expressly conferred."

Appellant recognized that under the above statute the school district had the right to contract with the company for the policy, but it was his contention that such statute contravened the following provisions of the Texas Constitution, which it is to be noted are similar to our Constitutional provisions above set out.

Vernon's Ann. St., Section 3 of Article 11:

> "No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law."

Vernon's Ann. St., Section 52 of Article 3:

> "The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company."

The by-laws of the Millers Mutual Fire Insurance Company of Texas issued to appellee, provided that the policy was non-assessable and the liability of each policyholder limited to and determined to be the amount of deposit premium fixed and specified in the policy.

The court, in recognizing that a county is a public corporation, said (l. c. 300):

> "'The Millers Mutual Fire Insurance Company of Texas has been issuing fire insurance policies to public corporations (counties, cities, towns, independent and common school districts) for more than 20 years. At all times

> during such time the company has had outstanding fire insurance policies held by such corporations. It now has such policies held by more than 50 of such public corporations, and writes about 50% of all mutual fire insurance held by such Texas counties, cities, towns and schools.'"

The court in holding that the statute authorizing public corporations to contract with mutual insurance companies for fire insurance policies was not unconstitutional where issued for cash unless prohibited by statute and as authorizing such a district to become a "stockholder" in, or "subscriber to capital stock" of, a private corporation, said (1. c. 300, 301):

> "On the following propositions, pertinent to the facts of this case, Article 4860a-8 is not unconstitutional:
>
> "(1) By purchasing the policy of fire insurance and by contracting to pay the premium in the amount of $264, the School District did not make a loan of its credit to the Millers Mutual Fire Insurance Company. Unless prohibited by statute, mutual insurance companies may issue policies of fire insurance for a cash premium only, without contingent liability attaching to the policyholder. Union Ins. Co. v. Hoge, 1858, 21 How. 35, 62 U. S. 35, 16 L. Ed. 61; McMahon v. Cooney, 1933, 95 Mont. 138, 25 P. 2d 131; Spruance v. Farmers' & Merchants' Ins. Co., 1886, 9 Colo. 73, 10 P. 285; Patrons' Mut. F. Ins. Co. v. Brinker, 1926, 236 Mich. 367, 210 N. W. 329; State v. Manufacturers' Mut. Fire Ins. Co., 1887, 91 Mo. 311, 3 S. W. 383." (Italics ours.)

* * * * * * * * *

"The School District did not become a stockholder in the Millers Mutual Fire Insurance Company or a subscriber to its capital stock by its purchase of the insurance policy in issue,

"In its brief appellee has reviewed the authorities from many states, and on these authorities the following proposition is announced: 'It has never been authoritatively held by any court that a policy holder in a mutual insurance company is a stockholder in the company. Although courts have occasionally illustrated the rights and liabilities of policyholders in such mutual companies by comparison with the rights of stockholders in other types of corporations, it has always been clear in all these cases that the courts were merely drawing an analogy to cover only the immediate point being illustrated. The cases passing directly on this question have universally held that a policyholder in a mutual insurance company is not a stockholder.'

"Section 52 of Article 3 of our State Constitution has its counterpart in the constitutions of many of the states. The constitutions of thirty-five states, including Texas, definitely prohibit the lending of its money or its credit by a municipality or other public subdivision to a private corporation; the constitutions of these states also prohibit municipalities and other political subdivisions from becoming stockholders in private corporations. Twenty-nine of these states have enacted statutes

> similar to Article 4860a--8, expressly authorizing the insuring of public property in mutual insurance companies. In no case has any court held its statute on this issue unconstitutional. These statements are made on authority of appellees' brief."

The court also cites the case of Downing v. Erie School District, 297 Pa. 474, 147 A. 239, l. c. 241, involving constitutional provisions similar to the constitutional provisions of Texas. The Pennsylvania Court said:

> "Our constitutional provision was designed to prevent municipal corporations from joining as stockholders in hazardous business ventures, loaning its credit for such purposes, or granting gratuities to persons or associations where not in pursuit of some governmental purpose. Taking of insurance in a mutual company with limited liability is not within the inhibition, for the district does not become strictly a stockholder, nor is it loaning its credit."

Section 5957, supra, is found in Article 7, Chapter 37 of the Revised Statutes of Missouri, 1939, and said article also contains Section 5955 which provides in part as follows:

> "(7) Miscellaneous insurance. Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance and fire insurance."

Section 5957 consequently does not relate to fire insurance. However, the question of whether a county may legally purchase insurance from a mutual company need not rest upon a specific authorization by statute.

In the case of School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co., 164 Pac. 1174, l. c. 1175, the Supreme Court of Idaho denied recovery on a policy issued by the Mutual Fire Insurance Company to the school district. The Constitution of Idaho contains substantially the same provisions as those of Missouri. The court said (l. c. 1175):

> "The sections of the Constitution referred to are self-operative. They are intended to prevent any county, city, town, or other municipal corporation from lending credit to or becoming interested in any private enterprise, or from using funds derived by taxation in aid of any private enterprise, with the exceptions provided for in section 4 of article 12. It is true that section 4 of article 12 does not specifically mention school districts, but when the other provisions of the Constitution are taken into consideration, as well as the objects sought to be attained, it must be held that school districts are municipal corporations within the meaning of said section 4. Maxon v. School Dist., 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; State v. Grimes, 7 Wash. 191, 34 Pac. 833; Pioneer Irrigation Dist. v. Walker, 20 Idaho, 605, at page 615, 119 Pac. 304."

The court however pointed out that it was not considering those cases where the maximum liability of the member was always fixed. The court said (l. c. 1175):

> "It may be that the purpose of the respondent in attempting to become a member was simply to purchase insurance, and that the actual assessments which it would be called upon to pay probably would be less in amount than the fixed premiums required by regular insurance companies, but such considerations cannot prevail. The case of French v. Mayor of City of Millville, 66 N. J. Law, 392, 49 Atl. 465, is not in point. The law incorporating the mutual insurance company involved in that case is not at hand, but it appears from the opinion of the court that, though the city became a 'member' of a mutual insurance company, the company was entirely different from the appellant herein for the reason that the maximum liability of the member was always fixed, and therefore the city did not assume an unlimited liability and did not become an insurer of the other members of the corporation."

Said distinction is also recognized by the Supreme Court of California in the case of Miller v. Johnson, 48 Pac. (2d) 956, l. c. 958, wherein the court said:

> "Appellant, however, contends that section 6.2 of the School Code is unconstitutional in purporting to authorize a political subdivision to become a stockholder in an insurance corporation, and to lend its credit to a corporation, in violation of article 4, section 31, and article 12, Sec. 13, of the California Constitution. We cannot agree with this view. The mutual fire insurance company issues no stock, and the position of a member is not analogous to that of a stockholder in an

ordinary private corporation. As to the pledging of credit, this precise question has received the attention of a few courts, and an important distinction has been recognized. If the statute or policy subjects the political subdivision to a possible unlimited assessment to meet losses, it is objectionable under such constitutional provisions. School Dist. v. Twin Falls County Mutual Fire Ins. Co., 30 Idaho, 400, 164 P. 1174. But where the assessments are limited, as here, to some such sum as five times the original premium, there is no pledging of credit by the political subdivision. It is simply an arrangement where there is a maximum contingent liability by way of premium, but only one-fifth thereof need ordinarily be paid, and the balance is never collected unless some extraordinary losses occur. The lending of credit, if any, is by the insurance company to the public body; and neither the letter nor the spirit of the Constitution is violated by the transaction. In Downing v. Erie School District, 297 Pac. 474, 147 A. 239, 241, the court distinguished the Idaho case of School Dist. v. Twin Falls County Mutual Fire Ins. Co., supra, and said: 'Taking of insurance in a mutual company with limited liability is not within the inhibition, for the district does not become strictly a stockholder, nor is it loaning its credit. It agrees to pay a fixed sum, and can be called upon for the total only in case of some unusual catastrophe causing great loss. Until this contingency arises it is required to advance but a small portion of the maximum, and is, in effect, loaned credit as to a possible future demand by the company for the balance which may become payable.' Leading text-writers have reached the

same conclusion, upholding the validity of such insurance by school districts. See 5 McQuillin, Municipal Corporations (2d Ed.) Sec. 2329; 3 Dillon, Municipal Corporations (5th Ed.) Sec. 976; 1 Cooley's Briefs on Insurance, p. 104."

Section 12 of Article X of the Constitution of Missouri provides in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose * * * * * * "

From the foregoing we are of the opinion that a county may purchase insurance from a mutual insurance company if said company has a fixed assessment liability and such fixed assessment liability would not, so far as the county is concerned, result in it exceeding in any year the revenue provided for such year. If, however, a county lays itself liable to an unlimited and unstated liability, dependent upon the amount of the loss sustained by the company, then the county could not legally purchase insurance from a mutual insurance company.

The above conclusion is equally applicable to cities, towns, townships, school districts or other political corporations or subdivisions of the State.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

MW:EG