Opinion No. 35-1214

November 14, 1935

BY: FRANK H. PATTON, Attorney General

TO: Mr. George M. Biel, Superintendent of Insurance, State Corporation Commission, Santa Fe, New Mexico.

*{*88}* In your letter of November 13, 1935, you ask our opinion as to whether or not it is legal for school districts, irrigation districts or other public units to insure public property in mutual insurance companies authorized to transact business in this state.

I have examined the authorities and find that different views upon this question have been expressed by various courts throughout the country but the cases depend largely upon the particular constitutional provisions of the several states and the particular type of insurance contract involved.

Our constitution provides as follows:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provisions for the care and maintenance of sick and indigent persons." (Art. 9, Sec. 14.)

The State of Wyoming has a similar provision in its constitution and in the case of Burton vs. School District No. 19, 38 Pac. 2d 610, the Supreme Court of Wyoming states its view of the law as follows:

"The sole question argued herein is as to whether or not the contract in question is in violation of section 6 of article 16 of the Constitution of this state, which, in so far as applicable here, reads as follows:

'Neither the state nor any county, city, township, town, school district, or any other political sub-division, shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe *{*89}* to or become the owner of the capital stock of any association or corporation.'

The trial court held that this provision was not violated in the case at bar.

(1) It may be inadvisable for a school district to insure its property in a mutual company when it is subject to an assessment in addition to the fixed premium provided for in the policy. But that point is not in controversy here. And it may be conceded that, when the

contingent liability of the district is in an unlimited amount under a contract of insurance, the constitutional provision above quoted is violated. It has been so held. School District No. 8 v. Twin Falls County Mutual Fire Insurance Company, 30 Idaho, 400, 164 P. 1174. In this case, however, the contingent liability is limited to an amount equivalent to the fixed cash premium of $ 48.50. Insurance contracts of that character have been held not to be violative of a constitutional provision similar to that above quoted. Downing v. Erie School District, 297 Pa. 474, 147 A. 239, 241; French v. City of Millville, 66 N.J. Law 392, 49 A. 465, 466; Id., 67 N.J. Law 349, 51 A. 1109; 1 Cooley, Constitutional Limitations, 469, note; McQuillan on Municipal Corporations (2d Ed.) sec. 2171; 1 Cooley, Briefs on Insurance (2d Ed.) 104; 1 Joyce on Insurance (2d Ed.) 708."

I am in accord with the views stated by the Wyoming Supreme Court and believe that the decision above mentioned is applicable to the question stated in your letter. You will note that if the contingent liability assumed by the public body taking out mutual insurance is limited in amount, then the constitutional provision is not violated but if the contingent liability is unlimited in amount, then the constitutional provision above referred to would be violated.

Trusting that this fully answers your inquiry, I am

By QUINCY D. ADAMS,

Asst. Atty. General