Insurance Companies—Policy, Kind of, May Write.

An insurance company organized upon the mutual plan cannot write a policy of an ordinary joint stock company.

March 2, 1920.

Hon .George P. Porter,
State Auditor and Commissioner of Insurance,
Capitol.

Dear Sir:

This is a further reply upon the matter of permitting insurance companies organized upon the mutual plan to do business by writing a policy such as an ordinary joint stock company writes in its business. On September 4th, 1919, I wrote your office an opinion upon this proposition in response to a letter dated August 12th, 1919. With that letter you submitted to me a policy issued in the State of Montana upon property by the Northwestern Mutual Fire Association of Seattle, Washington. In my letter of Sept. 4th, 1919, I advised you that the policy submitted cannot be written in Montana by an insurance company organized on the mutual plan.

The mutual insurance companies take exception to the opinion rendered, and have attacked its validity. I have talked with the representatives of the various companies interested and have read a brief which they submitted upon the proposition, and I have made a more complete investigation upon the subject since my last letter. The result is that I am more thoroughly convinced than before that my opinion of September 4th, 1919, is correct, and that the policy you submitted cannot be written by an insurance company in Montana, either foreign or domestic, organized on the mutual plan.

The brief of the insurance company seems to convey the impression that my office bases its objection to the policy in question upon mere formal grounds; such, for instance, as the date premiums are to be paid and whether cash or notes must be accepted in payment of premiums. That is not the basis of my opinion. Neither did I base my opinion upon the fact that the company is requiring cash payments instead of accepting part cash and the balance in notes, as outlined by our statutes regulating the matter. However, since a more complete consideration of the matter, I am not so sure but that the matter of issuing policies and requiring premium payments in part cash and the balance in notes, as indicated by the statutes, is not mandatory upon mutual insurance companies. I shall refer to this later.

The fact is that I based my opinion then, and now re-affirm it, upon the ground that the Northwestern Fire Insurance Company is a mutual company by organization, but is doing business in Montana as a joint stock company. The policy which you submitted to me at least has that effect.

In Montana we have two kinds of property insurance. One kind is written through the agency of a joint stock insurance company, and the other through the agency of a mutual insurance company. Under the Sections of our Code applicable we find that a joint stock insurance company is one organized as any other corporation for the profit of its stockholders. The business of such a company is that of writing insurance, but the persons insured in said company are not the persons who derive the profit from such company. The stockholders purchase the stock of the corporation and that constitutes the capital with which it may do business.

Section 4044 of the Revised Code provides that at least one-half of the capital stock be fully paid in cash and the balance represented by secured notes.

By Section 4045 of the Revised Code it is required that a mutual company may commence business when it shall have entered into agreements with at least two hundred applicants for insurance. The premiums from such applicants must amount to not less than twenty-five thousand dollars, of which at least five thousand dollars shall have been paid in cash and the remainder of which said premiums may be represented by notes of solvent persons founded upon actual applications for insurance. These original organization notes must be kept while the policies on which they are founded remain in force. In any event, the organization notes shall remain security for losses and claims until the accumulation of the profits from the investments of such company shall

equal the amount of cash capital required to be possessed by stock corporations organized under the law. The liability upon such note decreases in proportion to the accumulation of the company's profits. (Section 4055, Revised Codes.)

A joint stock corporation makes contracts of insurance for property for a fixed premium paid in advance, if it chooses, and provides in said contract that it shall pay the insured a stiplated loss. The insured is not a member of a stock company. He has no interest in the affairs of such company and cares nothing about the number of losses the company sustains. He has no further liability to the company than that definitely fixed on the date of his insurance.

In the case of a mutual company this proposition again is entirely different. By Section 4055 of the Revised Code it is provided that any person "effecting insurance in any mutual corporation, and his heirs, executors, administrators and assigns continuing to be so insured, shall thereby become members of said corporation during the period of insurance." It is further provided in said Section that such insured "shall be bound to pay for losses and such necessary expenses as aforesaid accruing to said corporation in proportion to his or their deposit note or notes." Section 4055 contemplates that in effecting insurance with a mutual insurance company the insured guarantees a sum of money which shall cover the amount required for expenses for doing business on the part of the company and the amount required to pay the losses which the company sustains figured on the basis of the amount of his insurance. The company is supposed to accept a part of this guarantee in cash and the balance to be represented by a note against which the directors shall have authority to levy assessments from time to time, as losses occur. There is a further provision in the said Section that an insured may at any time withdraw from a mutual company and receive the unearned portion of his guarantee so deposited with it. Section 4056 of the Revised Code provides the manner in which the directors of a mutual insurance company shall levy assessments against the deposits made with the company by the insured. It provides that if the whole amount of the deposited notes shall be insufficient to pay the losses suffered by the various insured, then such insured shall receive only a proportionate amount of the insurance.

From reading the policy which the Northwestern Mutual Fire Association proposes to issue in Montana it is apparent that none of these features are preserved to the insured. In a mutual company each insured becomes a member of the company. He is at once an insured and an insurer. His liability depends upon the losses sustained not exceeding the amount of his deposit. In a oint stock company he bears only one relation, and that is the relation of an insured.

It is the general rule of law that a corporation has only such powers as are conferred upon it by legislative enactment. It is not sufficient to authorize a corporation to act when no limitation is found in the law forbidding the act. The right to act must be conferred expressly or by necessary application. (19 R. C. L. 1190, Section 11, Note 9.)

It is very questionable, therefore, whether a mutual insurance company has authority to charge the guarantee deposit in cash—instead of part in cash and balance in notes—which every insured is required to pay when he takes insurance in such company and from which deposit the premium is to be taken as losses occur. The idea of a mutual insurance company is that it shall be simple and economical to its members. The theory of the legislation is that persons may insure their property and carry their own insurance by a mutual association, instead of paying a cash premium in advance. The legislature undoubtedly thought that the organiation should require only part cash to pay its current expenses and draw on the members as losses occurred. The idea is to avoid the necessity of hoarding large masses of wealth and permitting the persons seeking insurance to retain these sums themselves and apply them to other uses until losses arise. That is the reason why mutual companies should do business on a mutual basis if they care to operate under that name. An insurance company should not be prmitted to parade under the cloak of the law providing for mutual companies and beguile persons into effecting insurance with it when in fact and in effect they are doing business upon the basis of a stock company. When the legislature, therefore, says that mutual companies shall colect their premiums by requiring part cash and the balance to be covered by notes, I can see no reason why it did not mean exactly what it said, nor why mutual companies should not be held to this requirement. If the companies interested do not like such operation by the law under which they are organized they are at liberty to change their organization to the joint stock plan. A stock company is permitted to stipulate for a definite premium in advance which it may charge in advance and relieve the insured from any further liability than the premium so fixed. Taking up the policy which you submit we find that it is a straight joint stock policy except that on its face there appears the phrase: "Provisions required by law to be stated in this policy.—This policy is in a mutual company." On the back of the policy there is a stipulation providing that the liability of the insured is limited to the amount of the premium which is paid in cash and in advance of the insurance taking effect. There is nothing of a mutual nature in the entire policy. The liability of the insured does not depend upon losses sustained by the company nor can he surrender his policy and receive back his unearned premium as is provided by Section 4056. The insured does not become a member of the company and has nothing to do with or say to the company other than pay his premium. Furthermore, if the companies in question are permitted to do business in Montana under the mutual plan the people of the State desiring insurance with them are not afforded the benefit of putting up their premium guarantees in the form of notes. Corporations are given organization by our laws and permitted to do business in this State for the common good. The right of a man to obtain insurance and advance his premium by notes rather than by cash is a substantial one and one which a mutual insurance company doing business in Montana is bound to extend to the people.

I desire again to call attention to the fact that a foreign insurance company has no greater right in Montana than a domestic company. It is true that by comity which exists between states, corporations organized by the laws of one state may be permitted to do the same kind of business in another state providing such other state places no restriction upon the right. I have called your attention to various restrictions in my letter of September 4th. In addition to those I call your attention to Section 11 of Article 15 of the Constitution, which reads as follows:

> "No company or corporation formed under the laws of any other country, state or territory shall have, or be allowed to exercise, or enjoy within this state, any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character, created under the laws of the state."

In the case of Criswell vs. M. C. R. Company, 18 Mont. 157, 44 Pac. 525, our Supreme Court has held that this Section is self-executing. In addition we find that in 1917 the legislature of Montana, by Senate Bill No. 178, passed the following act:

> "All foreign corporations licensed to do business in the State of Montana shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this State, and shall have no other or greater powers."

There are a number of court decisions upon this question which sustain the conclusion that I have reached. I insist also that the decisions referred to in my former opinion sustain the purpose for which they were cited.

In the case of Mutual Fire Insurance Company of N. Y. vs. Chas. P. Swigert, Auditor, 120 Ill. Reports 36, we find a case which appears to settle the whole controversy conclusively as it has been presented to you. This was an action on the part of the insurance company to compel the Auditor of Illinois to issue it a license. The company was organized in the State of New York, complied with all the requirements of the State of Illinois for foreign insurance companies, and insisted upon a license. The company was originally organized as a mutual company. Instead of doing business strictly upon the mutual plan of insurance it sold what was called scrip which was an indebtedness of the company and which furnished the company its capital stock upon which it did business. The State of Illinois at the time had statutory enactments which appeared to be similar to those of the State of Montana in effect today governing mutual insurance companies. The persons purchasing the scrip of the company were not necessarily insured by the company but did so upon a profit sharing basis. The court of Illinois in this case sustained the Auditor in refusing to issue the insurance company a license. The decision of the court was based upon the fact that the insurance company did not follow the requirements of the statutes of Ilinois enacted for mutual insurance companies. During the course of its opinion the court said as follows:

"It is manifest that no domestic company organized upon the plan and basis of the relator company could be permitted to do business under the laws of this State. The policy of the State toward insurance companies organized under the laws of other States is neither narrow nor illiberal. They are placed upon the same footing and granted the same rights and privileges accorded those formed by citizens of the State, under its laws. The statutes of the State provide for the organization of companies upon each of the leading and recognized plans of insurance, and providing only such safeguards as in the legislative fisdom are necessary to promote the best interests of the company itelf, and furnish adequate guarantees of safety and indemnity to policyholders. That this is clearly within the power and control of the legislature, as here exercised, is so manifest that no citation of authority is needful to sustain the position."

In the case of In Re Assignment Mutual Guaranty Fire Insurance Company, 107 Ia. 143; 77 N. W. 868; 70 A. S. R. 149, we find an authority in point. While the basis of the action was somewhat different that it would be if the case presented to you were taken to the courts, yet the decision is helpful in our case. The case is one of a fire insurance company organized on a mutual plan undertaking to write an insurance policy for a definite stipulated cash premium paid in advance. From the decision we find that the laws of Iowa had the following provisions:

"No company organized upon the mutual plan shall do business or take risks upon the stock plan. Neither shall a company organized as a stock company do business upon the plan of a mutual insurance company."

It was held in this case that a policy written by the company upon a stock plan could not be collected against the company as it is one ultra vires, null and void from the beginning. The person holding the insurance policy was not able to collect upon it when he sustained a loss. I believe that in this connection it will be helpful to you in reading pertinent excerpts from the opinion and for that reason I have quoted from the opinion.

"Now, it may be that the company was authorized to accept an advance payment of money as a pledge against which assessments might be levied from time to time; but it is clear that it was not permitted to accept premiums as such, nor could it declare dividends. It had no power to write a policy for a stated and definite amount of insurance. Neither could it do business on the stock plan. That it undertook to insure the sugar company for a definite and specific amount, in consideration of a fixed and stated premium, is too plain for successful contradiction. The assured was not a member of the company except in name, and there was no mutuality between him and the other policyholders. It has been held, and with good reason, that one who insures his property in a mutual company in a

stated amount, for a specific premium does not become a member of the company, so as to be liable for future assessments; Farmers' etc. Ins. Co. v. Smith, 63 Ill. 187; Illinois, etc. Ins. Co. v. Stanton, 57 Ill. 354; Given v. Rettew, 162 Pa. St. 638. Certainly there was no liability on the part of the sugar company or the appellant to pay assessments for lossess. The cash premium demanded by the company was paid, and the company agreed to pay a definite and certain amount in case of loss. There was no mutuality between the members of the company who were insured on the assessment plan and those who paid cash premiums in full. The contract was one which the company had no power to make; and, as the assured must take notice of the laws of the state and the articles of incorporation adopted thereunder, it follows that appellant cannot recover, unless it be on the theory of estoppel."

To the same effect we are sustained by the following authorities:

State of Ohio ex rel, National Life vs. Mathews, 580 Ohio St. 1, 49 N. E. 1034; 40 L. R. A. 418; State etc. Covenant H. B. A. vs. Root, 85 Wis. 658, 54 N. W. 33, 19 L. R. A. 271.

People vs. Fidelity & C. Company, 158 Ill. 25, 38 N. E. 752, 26 L. R. A. 295;

Union Insurance Co. vs. Hoge, 21 How. 35, 16 U. S. (L.ed.) 61.

You are advised that under the laws of the State of Montana a mutual fire insurance company has no authority to write the kind or nature of policy proposed by the Northwestern Mutual Fire Association of Washington.

Respectfully,

S. C. FORD,

Attorney General.