

Opinion No. 315.

**State Insurance — Insurance — Contracts for Private Carrier Insurance
—Courts—Restraining Order, Effect
Of—State Auditor.**

HELD: 1. An order of court restraining the State Auditor from carrying out on his part the provisions of the State Insurance Act did not have the effect of suspending the Act.

2. A contract of insurance with a private carrier, violative of the provisions of the State Insurance Act and entered into during the effective period of the restraining order, is void and unenforceable and should be cancelled.

May 16, 1936.

Hon. John J. Holmes
State Auditor
The Capitol

Your letter to us of recent date is as follows:

“A considerable number of inquiries are being received in the

State Insurance Department relative to the status of insurance contracts procured from private carriers by political subdivisions during the period of time political subdivisions could not procure insurance under the provisions of the State Insurance Fund by reason of the State Insurance Department being restrained from administering the State Insurance Fund law.

"The attached letter is a typical letter received relative to this matter.

"Your opinion is respectfully requested as to the matters contained in the attached letter."

The letter which is attached was received by you from the county attorney of Dawson County and reads thus:

"The county commissioners and trustees of the various school districts in Dawson County have received notice from your office to the effect that the injunctions restraining you from operating under Chapter 179 of the Laws of 1935, have been denied and that the said law is now in effect as of January 4, 1936. This act, by Section 17 thereof provides that the act shall become operative on the 1st day of June, 1935, but due to legal actions and injunctions restraining your office from operating under this act you were not able to carry out its terms until the 4th of January, 1936. In the meantime, since the counties and school districts required the protection of insurance, there have been some insurance policies issued after the 1st of June and before the 4th of January.

"I should like to know whether or not fire insurance, written after June 1st and before January 4th, must now be cancelled and state insurance procured in lieu thereof. It appears to be the intent of this act as set forth in Section 4 that insurance contracts in effect at the time the act becomes operative need not be cancelled but that when the insurance policies expire then the property shall be insured through your office and from this it may be held that policies written prior to January 4th need not be cancelled."

The State Insurance Act (Chapter

179, Laws of 1935), became effective by its own terms on the first day of June, 1935. Section 1 of the Act provides that all public buildings of the state and the various subdivisions thereof and the contents of such buildings, with certain exceptions not necessary to notice here, shall be insured by the state against loss by fire and other destructive elements. Section 16 declares "that it shall be unlawful for any public officer mentioned in this Act and having charge of any public building or other public property to cause same or its contents to be insured in any other manner than that provided for in this Act, and upon expiration of insurance now in force all such property shall be listed and become subject to the provisions of this Act." Section 19 provides that "any person who violates the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be required to pay a fine of not more than three hundred dollars or by being imprisoned for not more than six months, or by both such fine and imprisonment." Omitting certain officials of cities and towns, the public officers having charge of public buildings and other public property and who are mentioned in the Act are the members of the State Board of Examiners, the members of Boards of County Commissioners, the members of Boards of Trustees of School Districts, and the members of Boards of Trustees of County High Schools. (Section 3.)

An order of court restraining the State Auditor from carrying out on his part the provisions of the Act did not have the effect of suspending the Act. That is not a judicial function. The suspension of a statute is a legislative act, unless based upon some condition, contingency, exigency, or state of facts, declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body whose duty it is to execute or administer the law suspended. (*Winslow v. Fleischner*, 228 Pac. 101; *Chicago, R. I. & P. Ry. Co. v. Holliday*, 145 Pac. 786; 59 C. J. 940; 12 C. J. 853.) As has been already pointed out the Act came into effect on June 1, 1935. It has continued in full force ever since

and is presumed to be constitutional. (State v. Holmes, 100 Mont. 256, 47 Pac. (2d) 624.)

The effect of Section 16, a prohibitory statute, is to make void and unenforceable any contract of insurance against the hazards mentioned in Section 1, entered into on or after June 1, 1935, between a county, a school district or the trustees of a county high school, and a private insurer. (Stange v. Esva, 67 Mont. 301; Franzke v. Fergus County, 76 Mont. 150; Berka v. Woodward, 57 Pac. 777; Herkner v. Rubin, 14 Pac. (2d) 1043; Crawford v. McConnell, 49 Pac. (2d) 551; Pennicard v. Coe, 263 Pac. 920; 13 C. J. 420, 424; 2 Page on Contracts, Sections 682, 683.) It is the rule, also that where a statute, like unto Section 19, imposes a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void or expressly prohibit it. (McManus v. Fulton, 85 Mont. 170; Berka v. Woodward, above; Herkner v. Rubin, above; Moser v. Pantages, 164 Pac. 768; Pennicard v. Coe, above; 13 C. J. 421; 2 Page on Contracts, Section 684.)

With the law as it is, then, the Board of County Commissioners of Dawson County can do no less than cancel the contract of insurance made with some private concern after June 1, 1935, and immediately insure under and according to the provisions of the State Insurance Act.