**Opinion No. 261.**

**Insurance—Counties—School Districts—Constitutional Law.**

HELD: The state or its political subdivisions may insure property or liability in any company licensed to do business within the state under a contract providing for an initial premium with a limited contingent liability.

September 17, 1940.

Mr. Harold K. Anderson
County Attorney
Helena, Montana

My dear Mr. Anderson:

You have asked:

> "Can the State of Montana, and its counties, school districts, municipalities or other political subdivisions legally insure their property or liability in an insurer licensed in Montana, under a contract providing for an initial premium with a maximum contingent premium limited to an amount not to exceed the initial premium?"

It has been frequently contended that by insuring in mutual or reciprocal companies admitted to do business in the State of Montana, the state or its political subdivisions thereby violate Section 1 of Article XIII of the Constitution of Montana, which provides:

> "Neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by

subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the state by operation or provision of law."

In McMahon v. Cooney, 95 Mont. 138, 141, the Montana Supreme Court declared:

"* * * Where the mutual insurance company has entered into a contract of insurance for a definite and certain premium, no contingent or additional liability being created, the credit of the state is not thereby given or loaned to the mutual companies, and this constitutional provision is not violated." (Citing cases.)

Under the facts submitted there is a contingent liability limited to the amount of the original premium. Attorney General Foot, in separate opinions found in 13 Op. Atty. Gen. at pages 217 and 219, distinguished between the state or its political subdivisions insuring in mutual companies where the liability was limited and insuring in companies where the liability was unlimited. Attorney General Foot found that the former was valid under the Montana Constitution but that the latter violated the quoted constitutional provisions.

With one exception the courts have uniformly held that where the contingent liability is limited the state and its political subdivisions may enter into insurance contracts with admitted companies.

In Clifton v. School District No. 14 (Ark.), 90 S. W. 2d, 508, the Court said:

"The policy or contract involved in the case at bar fixes a definite maximum premium which the school district must pay and provides for no additional liability against it. The provision referred to provides for the payment of one-half the premium in cash and limits the assessment premium against it, if it becomes necessary to make such an assessment, to one times the cash premium paid. In other words, the maximum premium is absolutely agreed upon as the extent of liability in any event, one-half of which is to be paid in cash and the other one-half by assessment if it becomes necessary. The policy contains no indeterminate liability. The kind of a contract does not make the school district a stockholder in the mutual insurance company, nor is it the lending of the credit of the district to a private corporation." (p. 509.)

Indeed, in Miller v. Johnson (Calif.), 48 Pac. 2nd, 956, in commenting upon a similar contract under a like constitutional provision, the Court said:

"The lending of credit, if any, is by the insurance company to the public body, and neither the letter or the spirit of the constitution is violated by the transaction." (p. 958.)

The following cases and texts, in addition to those already cited, sustain the validity of the proposition that the state, the county, municipalities, or school districts may insure in any admitted company under a contract providing for an initial premium and fixed contingent liability.

Fuller v. Lockhart (N. C.), 182 S. E. 733;

Burton v. School Dist. No. 19 (Wyo.), 38 Pac. 2d, 610;

Downing v. School Dist. of Erie (Pa.), 147 A. 239;

People v. Northwestern Mut. Fire Ins. Ass'n (Calif.), 225 Pac. 1;

Johnson v. School Dist. No. 1 (Ore.), 270 Pac. 764;

Joyce on Insurance (2d ed.) 708;

1 Cooley's Briefs on Insurance (2d ed.) 104;

3 Dillon on Municipal Corporations (5th ed.) 1558;

5 McQuillin on Corporations (2d ed.), Sec. 2329;

I Cooley on Constitutional Limitations, 469.

Contra is City of Tyler v. Texas Employer's Ins. Ass'n (Tex.), 288 S. W., 409;

School Dist. No. 8 v. Twin Falls County Mutual Fire Insurance Company (Ida.), 164 Pac. 1174, is distinguishable on the basis of unlimited liability.

Therefore, upon logic and the overwhelming weight of authority, the answer to the question you have submitted is, the state and its political subdivisions may enter into such contract without violating the statutes or Constitution of this state.