

OPINION
45-147

July 25, 1945 (OPINION)

INSURANCE

RE: Public Buildings - Contents

This office is in receipt of a letter under date of July 14, 1945, written by your predecessor in office, Mr. E. J. Reich, in which he says:

Although the Special Session of 1944, somewhat broadened the term 'permanent contents' which in the Session Laws of 1943, definitely excluded the insuring of many types of properties of the various institutions of the state, the attorney general's office held on August 22, 1944, that even at that time the state fire and tornado fund still could not insure the above type of properties (livestock and farm machinery).

If you do not concur in these opinions at the present time, may we have your opinion at an early date in order that we may be in a position to definitely accept or reject applications for insurance on such property."

I also have before me a letter addressed by Mr. Reich to Mr. O. J. Nygaard, warden of the state penitentiary, in which he said:

As the matter now stands, we can issue insurance only on grain and feeds and harnesses housed in buildings and will definitely accept or reject the rest of the properties within a few days upon hearing from the attorney general."

The question which Mr. Reich, and which I assume you as his successor in office, desire the Attorney General to answer is whether or not horses, cattle, hogs, poultry, farm machinery, as well as grain, feeds, and harnesses housed in public buildings may be insured in the fund.

The statute, or part of the statute, which is the cause of this uncertainty, and which apparently requires repealed construction and interpretation, is subsection 4 of section 1 of chapter 28 of the Special Session Laws of 1944. Subsection 4 of chapter 28 reads as follows:

Permanent contents shall refer only to such public property usually kept or used in or about public buildings insured in the fund, and to all public personal property usually kept or used in or about all buildings used for public purposes, or within 100 feet of all such buildings, or while on sidewalks, streets, alleys, yards, detached platforms and in or an railway cars. Permanent contents, as used in this Act, shall not, however, include automobiles, trucks, tractors, road machinery or similar property used principally outside of such buildings."

It evidently was the opinion of the legislature that personal property which is not housed in a building, and which is situated more than 100 feet from a building, is not ordinarily in danger of being destroyed by fire. But it is common knowledge that whether property is stored near a building or whether left in an open field it is subject to the hazard of lightning, destructive wind storms, hail storms, and tornadoes.

Mr. Alvin Strutz, formerly attorney general, characterized the situation created by chapter twenty-eighth of the 1944 Special Session Laws as "ridiculous." I agree. It has created an anomalous and absurd condition. The governing boards and heads of state institutions cannot be sure as to what property is insurable in the fund. The law makes it mandatory upon them to insure in the fund property which is insurable therein. It has created uncertainty and confusion.

The manager of the fire and tornado fund has been similarly embarrassed. This is indicated by repeated requests for opinions of the attorney general for interpretation and construction of this statute. For subsection 4 is certain and unambiguous only in that it definitely provides "that personal property kept within buildings 100 feet of such buildings, or while on sidewalks, streets, alleys, yards, detached platforms and in or on railway cars" is insurable in the fund and that automobiles, trucks, tractors, and road machinery are not insurable in the fund. The phrase "or similar property used principally outside of such buildings" is in my opinion meaningless because of its uncertainty. The latin maxim "expressio unius est exclusio alterius" is in my opinion applicable. This maxim simply means that the expression of one thing is the exclusion of another. And while it is generally held that this maxim is not of universal application and may not be used to defeat the apparent intention of the legislature, it certainly applies when such intention is ambiguous and uncertain.

In this connection, I may add that an administrative officer, such as the state commissioner of insurance, or manager of the fire and tornado fund, has not only the right, but it is his duty, to place such interpretation upon statutes relating to the administration of his office as in his judgment and considered discretion is fair and reasonable. He certainly should not be obliged to seek the constant guidance of the attorney general's office in the administration of the functions and duties imposed upon him by law. Thus, in the case of State ex rel. Gammons v. Sorlie, 56 N.D. 657, the North Dakota Supreme Court held:

When the meaning of a statute is doubtful, the construction placed upon it by the officers charged with the administration thereof is entitled to considerable weight; and this is especially so if it is apparent that the members of the state legislature in dealing with the subject must have been aware of the construction which had been placed upon the statute by those administering it and failed to indicate any disapproval of such construction. (Citing State ex rel. Kinzer v. Hall, 50 N.D. 708, 197 N.W. 770; 25 R.C.L. pp. 1043-1045)."

The specific question which Mr. Reich desired this office to answer

is whether or not the fund may insure livestock and farm machinery owned by the state and kept and maintained at various institutions, such as the state penitentiary, asylum for the insane, state training school, agricultural college, and possibly others. Subsection 4 of chapter 28 of the Special Session Laws of 1944 defines the words "permanent contents" as "public property usually kept or used in or about public buildings insured in the fund.", and then proceeds to qualify this definition, thereby creating uncertainty and ambiguity.

If livestock and poultry may not be considered as "permanent contents", within the scope of such definition, of the barns or structures in which such stock or poultry are housed, because during the spring, summer, and fall months they are also kept outside, then only the barn or structure built for their housing, and the hay and feed stored therein, may be insured in the fund.

This office has heretofore held that feed kept in a barn may be insured because it may be regarded as "permanent contents" within the statutory definition thereof, but that livestock for the sustenance of which the feed is kept may not be insured, unless the stock is constantly kept in the barn. That is to say, if livestock is also kept in pastures for grazing, then such property loses its qualification as "permanent contents." It is my opinion that the legislature did not intend such absurd results. For a barn is built to house livestock. When the livestock is outside, the barn is empty, except for such feed and hay as may be stored therein.

Likewise farm machinery which is kept in a machine shed, except when in use the fields, would under the restrictive and legalistic interpretation of the phrase "permanent contents" be insurable in the fund only if constantly kept in the shed, but because of its use in the fields such property also is then divested of its qualification as "permanent contents." This situation does not "make sense." For it is a well-known fact that different types of machinery are used a comparatively short time during the farming season. The rest of the time such machinery is ordinarily stored in the machine shed, or within 100 feet thereof. Of course, machinery which is left out in the fields and not housed when not in use is not insurable. Likewise, hay stacked more than 100 feet from a barn, or storage shed, is not insurable. Livestock which is ordinarily kept in the pasture at all seasons and more than 100 feet from the insured barn is not insurable in the fund.

But it is my opinion that the manager of the fire and tornado fund may insure in the fund livestock, and farm machinery, which is ordinarily housed in an insured building when cold weather, storms, etc., and feeding require such stock, including poultry, to be kept there. And it is further my opinion that any such property ordinarily kept within 100 feet of an insured building may be insured in the fund. In this connection, it is my opinion that the manager of the fire and tornado fund may exercise his judgment and discretion.

NELS G. JOHNSON

Attorney General