enactment or of an inherent power. See McQuillen on Municipal Corporations, 2nd Edition, Revised Volume 1, Section 384.

Therefore, bearing in mind the above statutory provisions, it is my opinion that if it is not within the exceptions previously stated there is nothing in the statutes preventing a city or town from buying workmen's compensation insurance. Careful examination should be made by each respective city or town of the coverage imposed or permitted by law, before expending monies to insure a liability imposed, either by statute or by virtue of a legal relationship of employee-employer under the terms of Workmen's Compensation Act as amended.

OFFICIAL OPINION NO. 13

March 3, 1953.

Mr. Harry E. Wells,
Insurance Commissioner,
Department of Insurance,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your request for an official opinion as set out in your letter which is as follows:

> "There are several insurance companies doing business in Indiana which were organized under a law passed in 1897, being Chapter 195, Acts of 1897 (Sections 39-421 to 39-446, Indiana Statutes Annotated), authorizing the organization of the companies 'on the assessment plan.' By Section 272 of the Indiana Insurance Law of 1935 (Chapter 162, Acts 1935, Section 39-5025, Indiana Statutes Annotated), it was expressly provided that from and after the taking effect of that Act, no company shall be organized or incorporated under any law of this state to make and do an insurance business on the assessment plan.
>
> "Section 27 of the Indiana Insurance Law of 1935 (Chapter 163, Acts 1935, Section 39-3324, Indiana Statutes Annotated) provides as follows:

" '39-3324. Certificate of authority—Issuance to companies—Prerequisite to transacting business.—The Commissioner may issue a certificate of authority to any company when it shall have complied with the requirements of the laws of this state so as to entitle it to do business herein, which certificate shall expire as of midnight of the thirtieth day of April of each calendar year. The certificate shall be issued under the seal of the department authorizing and empowering the company to make the kind or kinds of insurance specified in the certificate.

" 'No company shall transact any business of insurance in this state until it shall have received a certificate of authority as herein prescribed and no company shall make any kind or kinds of insurance not specified in such certificate of authority.'

"The records and files of the Insurance Department of Indiana show, insofar as I have been advised, that such assessment companies organized under Chapter 195 of the Acts of 1897 have followed the practice of applying for and generally being issued a certificate of authority to make the kind or kinds of insurance specified in the certificate, as required by the section of the insurance law just quoted.

"The question has arisen whether such assessment companies organized under Chapter 195 of the Acts of 1897 are required to comply with the provisions of Section 27 of the Indiana Insurance Law above quoted.

"Will you kindly give me an official opinion answering the following specific questions:

"1. Do the provisions of Section 27 of the Indiana Insurance Law above quoted apply to assessment companies organized under Chapter 195 of the Acts of 1897 to do an insurance business on the assessment plan?

"2. Do such assessment companies organized under Chapter 195 of the Acts of 1897 have to apply each year for a certificate of authority authorizing and em-

powering the company to make the kind or kinds of insurance specified in the certificate?

"3. Do the provisions of Chapter 195 of the Acts of 1897 authorizing the organization of companies to do an insurance business on an assessment plan have the effect of exempting such companies organized under that law from complying with the provisions of the Indiana Insurance Law, being Chapter 162, Acts of 1935, insofar as they might otherwise be applicable, particularly the provisions of Section 27 quoted above with reference to the requirements for receiving a certificate of authority for doing an insurance business in Indiana?

"Your prompt answer to this request will be appreciated."

This problem involves both the Constitution of the United States and the Constitution of Indiana and Statutes thereunder. The applicable provision of the United States Constitution is Article I, Section 10, which provides in part:

"No state shall enter into any treaty * * * or law impairing the obligations of contracts * * *."

The Indiana Constitution provides in Article I, Section 24:

"No *ex post facto* law or laws impairing the obligations of contract shall be passed."

Article XI, Section 13 provides:

"Corporations other than banking, shall not be created by special act."

The statutes of Indiana involved in this question are the Acts of 1935, Chapters 195 and 162 and the Acts of 1897, Chapter 195. The 1935 Act, *supra,* found in Burns' Ind. Ann. Statutes 1933, 1952 Replacement, Sections 39-5025, 39-3305 to 39-3325 provides in essence that no company shall be organized to do an insurance business on the assessment plan after the effective date of this Act; that this Act is applicable to *all* companies; that every insurance company shall conduct its business in a safe and prudent manner; shall maintain a safe

and solvent condition; and shall maintain safe and sound methods for the conduct of its business and the department of insurance is charged with the duty of promulgating necessary rules to insure this. If at any time a company is found to be conducting its business *contrary to law;* or *in an unsafe* or *unauthorized manner;* or that *the capital* or the *surplus fund* are *impaired* or failure to comply with any rules or regulation of the department, the Insurance Commissioner is authorized to direct the discontinuance of business by the company. The 1897 Act, Chapter 195 as found in Burns' Ind. Ann. Statutes 1933 and 1952 Replacement 39-421 to 39-446 provides an annual report shall be filed and that the company's books be open to inspection by the Auditor of the State and that if the company is insolvent, or has exceeded its powers, failed to comply with any provision of law, or is conducting business fraudulently, an order to show cause why said company shall not be restrained from doing business shall issue.

No additional burden of reports is put on the companies. The major change is that the company may be enjoined if it is found to be operating its business in an unsafe or unauthorized manner or as otherwise set out in Burns' 39-3323, *supra.*

Article I, Section 2 of the United States Constitution regarding the impairing of the obligations of a contract was construed in regard to the police power of the state and the state's ability to regulate the business of a charter insurance company in the case of Chicago Life Insurance Company v. Needles, Auditor, *et al.* (1885), 113 U. S. 574, 5 Supreme Court 681, 28 Law. Ed. 1084. In this case in the year 1865, the Travelers Insurance Company, later changed to Chicago Life Insurance Company in 1867, was created a body politic and corporate by a special act of the General Assembly of Illinois. In 1869 a general law of the state was enacted to regulate the business of life insurance companies requiring a sworn statement of its business, standing, and affairs and also providing for an examination by the Auditor of State when he so deemed it necessary. In 1874 the Auditor of State, if upon finding said company insolvent, or, that its condition was such so as to render its further continuance in business hazardous to the insured therein or to the public, was empowered to apply for an injunction to restrain such company from further proceeding with its business. The

main proposition of the counsel for the insurance companies was that the obligation of the contract which the company had with the state, in its original and amended charter, would be impaired, if the company was held subject to the operation of subsequent statutes regulating the business of life insurance. The court said:

> "This position cannot be sustained consistently with the powers which the state has and upon every ground of public policy must always have over corporations of her own creation * * * the privilege and franchises conferred upon it should not be abused or so employed as to defeat the ends for which it was established, and that when so abused or misemployed, they may be withdrawn or reclaimed by the state, in such way and by such modes of procedure as are consistent with law. *Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence.*
>
> "Equally implied in our judgment is the condition that the corporations shall be subject to such reasonable regulations, in respect to the general conduct of its affairs as the Legislature may, from time to time, prescribe, which does not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted and serve only to secure the ends for which the corporation was created. * * * If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens may become dangerous to the public welfare through the ignorance of misconduct or fraud of those to whose management their affairs are intrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, expressly or implied, have been exercised at all." (Our emphasis)

The reserved police power of the state in regard to charter insurance companies was further expounded by the Supreme Court in the case of Eagle Insurance Company of Cincinnati *et al.* v. State of Ohio (1894), 153 U. S. 446, 14 Supreme Court 868, 38 Law. Ed. 778. The Eagle Insurance Company was incorporated by an act of the General Assembly of Ohio in 1850. Subsequent acts passed by the General Assembly subjected the Eagle Insurance Company as a charter company to supervision of the department of insurance and required them to make a detailed annual report concerning the business and affairs transacted in the preceding year. Under these acts proper blanks were furnished to the company by the state superintendent of insurance, and on its refusal to make the returns as required by the above referred to laws, proceedings by mandamus were begun against it. The defense was that the subsequent enactments by the General Assembly impaired the obligation of the contract which grew out of the charter. The court citing the Needles case, *supra,* and the statute therein construed, refused to recognize any distinction between the two cases, saying that "the views there are decisive of the issue here."

The contract clause of the Federal Constitution is not a specific, particularized contract, or absolute or unqualified prohibition, to be read with literal assurance like a mathematical formulae, although essential with the same section with more specific prohibition, but is general, affording a broad outline and requiring construction to fill in the detail. Home Building and Loan Association v. Blaisdell (1934), 290 U. S. 398, 54 Supreme Court 231, 78 Law. Ed. 413.

It is now generally recognized that the business of insurance is one that is affected with a public interest, 11 Am. Jur. 1064; and that it is a proper subject of regulation by virtue of the exercise of the state's police power. Hartford Accident and Indemnity Company v. N. O. Nelson Manufacturing Company (1934), 291 U. S. 352, 54 Supreme Court 392, 78 Law. Ed. 840; in the interest of public convenience and general good of the people, German Alliance Insurance Company v. Hale (1911), 219 U. S. 307, 31 Supreme Court 236, 55 Law. Ed. 229.

The power of the state to require insurance companies to make periodical statements and reports concerning their busi-

ness, reserves and financial condition is well recognized, and a statute such as ours requiring insurance companies to make annual statements of their business and financial condition, enacted under the police power, does not impair the obligation of the contract evidenced by the charter of a company previously incorporated. Eagle Insurance Company v. Ohio, *supra.*

Generally, when the Legislature confers a franchise, it retains a right to control the recipient in its exercise so far as it does not surrender its authority to do so. Furthermore, statutes which operate only to regulate the manner in which the franchises are to be exercised and which do not interfere substantially with the enjoyment of the grant made by a corporate charter do not impair the contract therein.

Pearsall v. Great Northern Ry. Co. (1896), 161 U. S. 646, 16 Supreme Court 705, 40 Law. Ed. 838.

The whole business of insurance in Indiana is regulated by statute, which makes it unlawful for any company, corporation, or association to do business except on specific conditions, the carrying on of such a business is the exercise of a franchise. 29 Am. Jur. 60. It is a business affected with a public interest or use, and is regarded as quasi-public in character and as such is subject to the police power of the state. 44 C. J. S. 518.

The constitutional protection of the obligations of a contract is necessarily subject to the police power of a state, and therefore a statute passed in the legitimate exercise of the police power will be upheld by the Constitution, although its incidental effect is to destroy existing contract rights. Storen v. Sexton (1935), 209 Ind. 589, 200 N. E. 251; Schmitt v. F. W. Cook Brewing Company (1918), 187 Ind. 623, 120 N. E. 19.

The state cannot surrender or bargain away its police power. State v. Barnett (1908), 172 Ind. 169, 87 N. E. 7; Bruech v. State *ex rel.* Money (1949), 228 Ind. 189, 91 N. E. (2d) 349.

The case of State v. Fidelity Health and Accident Company (1922), 79 Ind. App. 377, 135 N. E. 387, involved an insurance company incorporated under the 1897 act which the Auditor

of the State was attempting to force to comply with an earlier statute requiring the filing of a report. The requirements in section 9 of the 1897 act were in part, "which report shall be in lieu of all other reports required by the insurance laws of this state." The court said that the 1897 act was exclusive in its application. Admittedly, this is applicable to all prior and then existing laws at the time of the passage of the 1897 act and can in no way be construed to limit the power of the state in the exercise of its police power to enact reasonable legislation for the regulation and supervision of insurance companies in the future. State v. Barnett, *supra;* Bruech v. State *ex rel.* Money, *supra;* Eagle Insurance Company v. Ohio, *supra.*

In the case of State v. Continental Insurance Company (1917), 67 Ind. App. 536, 116 N. E. 929, a statute requiring insurance companies to report semi-annually was held to be a valid exercise of the police power of the state. It is well recognized that the business of insurance in Indiana is quasi-public in character and accordingly it is both competent and necessary for the state, under its police power, or as the creator of corporations to determine who might engage in its business within its boundaries and to prescribe terms and conditions on which the business may be conducted. National Colored Aid Society v. State (1935), 208 Ind. 380, 196 N. E. 240; Department of Insurance v. Schoonover (1950), 229 Ind. 187, 72 N. E. (2d) 747.

The Supreme Court of Indiana, in the case of State *ex rel.* Midwest Insurance Company v. Superior Court of Marion County, Room 1, *et al.* (1952), —— Ind. ——, 106 N. E. (2d) 934, by *dicta* recognized that a charter company is subject to police legislation enacted subsequent to the issuance of their charter.

Statutes enacted by the General Assembly of Indiana and regulations issued by the Department of Insurance emanate from the police power of the state, and are designed to prevent the victimizing of policyholders by insolvent companies, and to secure to policyholders valuable remedial rights which otherwise they could not possess. We have seen that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of which the ordinary business of the commercial world

may pursue with a greater amount of liberty. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be inter-dependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the moneys of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is to the public is self evident. On the other hand, to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activities and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world of the earliest times—certainly the sense of the modern world—is of the greatest public concern. Therefore, by virtue of their inherent characteristics it is a necessity that they be subject to reasonable supervision and regulation.

States generally like Indiana have recognized the necessity of supervision of insurance companies. State *ex rel.* v. Vandiver Union Insurance Company (1909), 222 Missouri 206, 129 S. W. 45; Citizens Life Insurance v. Commissioner of Insurance (1901), 128 Michigan 85, 87 N. W. 126; Bankhead v. Howe (1940), 56 Arizona 257, 107 Pacific (2d) 198.

Another section of the Indiana Constitution might be thought applicable to the situation at hand. This is Section 13 of Article 11 of the State's Constitution, which provides:

> "Corporations other than banking shall not be created by special act."

This prohibition relative to the creation of corporations does not admit exact definition. It is evident, however, that the provisions should be so interpreted as to render it impossible for the General Assembly, by special law, to alter an existing charter in such manner as in effect to make a new corporation. *In re* Bank of Commerce (1899), 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489.

To give a close or literal interpretation to the word "create" would make it possible, after a corporation had been brought into existence under a valid law, so to fashion the organization

as practically to bring upon the people of the state the evil of special privileges which it was designed to avoid.

A change in the amount of the capital stock, like a change in the subject thereof is fundamental, and cannot be made without clear legal authority. Railway Company v. Alerton, 18 Wall. (U. S.) 233, 21 Law. Ed. 92; Marion Trust Company v. Bennett *et al.* (1907), 169 Ind. 346, 82 N. E. 782.

It is however evident on its face that the act of 1935 does not bring about a fundamental change in the insurance corporations with which it deals, but is rather a regulatory measure, and that Section 13 of Article XI of the Constitution is not applicable.

By comparing the 1935 Acts, *supra,* with the 1897 Act, *supra,* we find that the major difference is that the insurance commissioner upon a finding that the insurance company in question is not operating its business and affairs in a safe and prudent manner, that he has the authority to either suspend or revoke their certificate of authority. This is evident on its face that this is an exercise of the police powers of the state and as shown beforehand, all insurance companies are subject thereto.

Therefore, in answer to your inquiry, my opinion is as follows:

1. Section 27 of the Indiana Insurance Law as passed in 1935 is applicable to assessment companies organized under Chapter 195 of the Acts of 1897 to do insurance business on assessment plan.

2. Assessment companies organized under Chapter 195 of the Acts of 1897 have to apply each year for a certificate of authority, authorizing and empowering the companies to make the kind or kinds of insurance specified in the certificate.

3. Chapter 195 of the Acts of 1897 did not have the effect of exempting such companies organized under that law from complying with the provisions of the Indiana Insurance Law, being Chapter 162, Acts of 1935.

This opinion is written with due consideration to the opinions contained in Opinions of the Attorney General 1951, page 38, Official Opinion No. 14 and Opinions of the Attorney General 1952, page 301, Opinion No. 78.

OFFICIAL OPINION NO. 14

March 3, 1953.

Hon. Joseph Klein,
State Representative,
Lake County
House of Representatives,
Indianapolis, Indiana.

Dear Sir:

I have your letter in which you request an opinion upon the "hypothetical facts" as follows:

> " 'A' is elected to the legislature. Soon thereafter he is approached by an official of the county that he represents with a request for legislation which calls for increased salaries or augmented appropriations for that county office. Obliging 'A' devotes much of his 61 legislative days to the salary-boosting, appropriation-raising drive and he succeeds in attaining his objectives.
>
> "A day or two after the session of the legislature the efforts of 'A' are gratefully rewarded with a job in the county office.
>
> "Two years later 'A' takes a leave of absence or a '61-day resignation' and returns to the legislature determined inevitably to make a further show of appreciation for the job that he received in return for his legislative activities in behalf of his employer or superior in the prior session.
>
> "The question I raise is whether 'A', and the case is not hypothetical, could continue to participate in the voting on bills which effect his employer or employers or the office in which he is employed when the legislature is not in session."