

Each case of a possible law violation will have to be settled when it arises—as to what is meant by “on his own premises.” I believe if a grower had some land on a country by-road, where his fruit was grown; but had another farm on a main highway, he would be within the intent of the statute if he sold his fruit out on the main highway. This illustrates what I mean by a reasonable interpretation.

INSURANCE COMMISSIONER: Right of Commission to limit time in which company guaranty fund must be deposited in order for company to complete organization.

Liability of Commissioner if he accepts guaranty fund with knowledge that stock has been sold prior thereto.

May 19, 1941.

Honorable Frank J. Viehmann,
Insurance Commissioner of Indiana,
240 State House,
Indianapolis Indiana.

My dear Mr. Viehmann:

I have before me your request for an official opinion presenting the following inquiry:

“In October, 1940, a group of individuals, the majority of whom were residents of the State of Indiana and citizens of the United States, presented to the Insurance Department proposed Articles of Incorporation of an insurance company pursuant to the provisions of Section 61, et seq. of the Indiana Insurance Code (Chapter 162 of the Acts of 1935). The proposed Articles of Incorporation were approved by the Department of Insurance of Indiana, and were submitted to the Attorney General, who examined such Articles. The Attorney General then certified that the Articles conformed to the provisions of the Insurance Code and were not inconsistent with the Constitutions of the State of Indiana or of the United States. Subsequently the proposed Articles of Incorporation were presented to the Secretary of State for the State of Indiana, who endorsed his approval as required by Section 70 of the

Insurance Code. However, the incorporators did not at that time, nor for many months thereafter, comply with Section 71 of the Insurance Code relating to the filing with the Insurance Department of a certified copy of the Articles of Incorporation endorsed with the approval of the Secretary of State, nor did the incorporators file with the Insurance Department a surety bond or other security in the sum of \$10,000.00 as required by said Section 71. No permit to complete the organization of this company was issued as contemplated by Section 72 of the Insurance Code. Subsequently the incorporators offered for sale and sold stock in the insurance company and in divers ways held out to the public that the proposed insurance company was a corporation.

"1. The incorporators on May 10, 1941, tendered the \$10,000.00 surety to the Insurance Commissioner in an effort to conform to Section 71 of the Insurance Code of 1935 and the question is presented as to whether or not the Insurance Commissioner can now accept this \$10,000.00 tender in view of: (a) the lapse of time between October, 1940, and May, 1941, which seems to be a longer period of time than that contemplated by the Insurance Code; (b) in view of the fact that the Insurance Commissioner knows that the incorporators have violated the Insurance Code by offering for sale and selling stock in the insurance company prior to the tendering of the \$10,000.00 as surety and obtaining of a permit to complete the organization of the company; and (c) in view of the fact that the financial statement filed by the incorporators indicates that the proposed organization is in an impaired financial condition as of the date that the tender was made.

"2. What recourse, if any, would a person have who purchased stock in the insurance company prior to the date of the tendering of the \$10,000.00 as surety and the obtaining of a permit to complete the organization of the company?

"3. What would be the liability, if any, of the Insurance Commissioner or the officers or employees of the Insurance Department to a person who purchased

stock in the insurance company prior to the tendering of the \$10,000.00 by the incorporators and the obtaining of a permit to complete the organization of the company?"

I shall respond to your questions in the order in which they appear in your request.

It should be noted that Section 71 of Article II of the Insurance Code of 1935 provides:

"Whenever the incorporators have filed their certified copy of the Articles of Incorporation and bond, as provided hereinbefore, then the Department may issue a permit for completion of organization. The company shall have authority under such permit to solicit subscriptions and payments for capital stock, if a stock company, and applications and advance premiums for insurance, if a mutual company, and to exercise such powers, subject to the limitations in this law prescribed, as may be necessary and proper in completing its organization and qualifying itself for a certificate of authority from the Department to make the kind or kinds of insurance proposed in its Articles of Incorporation: Provided, that such company shall not issue policies or enter into contracts of insurance until it shall have received the certificate of the Department authorizing it so to do."

Section 72 provides that upon the issuance of the permit for the completion of the organization by the Insurance Department, the corporate existence shall begin and thereupon the incorporators and their associates shall become a body corporate with power to sue and be sued, contract and be contracted with, and to do other acts needful to accomplish the purposes of completing its organization. Section 73 then contains the following language, in part:

"If a company transacts any business or incurs any indebtedness in violation of this Section, the officers who participated therein and the directors, except those who dissented therefrom and caused their dissent to be filed at the time in the principal office of the company, or who, being absent, filed their dissent upon

learning of the action, shall be severally liable for the debts or liabilities of the company so incurred or arising therefrom."

From the foregoing, it appears that no limit has been set by statute upon the period of time which may elapse between the date that the Articles of Incorporation are approved by the Secretary of State and the date on which the \$10,000.00 as surety is posted with the Insurance Department. It is apparent that the Legislature did not expressly vest in the Insurance Commissioner the discretion to deny the issuance of a permit to complete organization upon a finding that the incorporators had violated the Insurance Code. If such discretion exists, it exists by virtue of the use of the word "may" in connection with the Insurance Commissioner's right to issue a permit for completion of organization. However, for the purpose of your inquiry, it seems quite clear that the Insurance Commissioner may accept the \$10,000.00 and issue a permit to complete the organization in spite of his knowledge that stock has been sold in violation of the Insurance Code; provided, of course, that conditions precedent to the issuance of such permit have been complied with.

It should be noted that the General Assembly has not expressly vested in the Insurance Commissioner the discretion to deny the permit for the completion of the organization on the ground that the financial condition of the proposed organization has been impaired by excessive advances to salesmen or in any other manner. I believe that the Insurance Code contemplates that the proposed Articles of Incorporation have been approved by the proper officials and if the \$10,000.00 surety is posted with the Insurance Commissioner, that the Insurance Department will issue the permit for the completion of the organization. The responsibility for passing upon the soundness of the plan from a security standpoint has been vested by the General Assembly in the Securities Commission, and that instrumentality of the State has the affirmative duty to protect the public insofar as this phase of the matter is concerned.

2. A person who purchased stock in the proposed insurance company prior to the date of the issuance of the permit to complete organization would have all of the remedies that would inure to any stockholder, and in addition would be in a position to take advantage of the provisions of Section 73

contained in Article II of the Insurance Code, which provides that the directors are each severally liable for the debts or liabilities of the company arising from any violation of Section 73 of the Insurance Code.

3. In response to the third inquiry, permit me to state that neither the Insurance Commissioner nor any employee of the Insurance Department would be liable to any person who purchased stock in the proposed insurance company prior to the date upon which it received its permit for the completion of organization, nor for that matter, at any time subsequent to the issuance of such permit. Section 8 of Article I of the Insurance Code provides:

“Neither the Insurance Commissioner nor the several officers and employees of the Department shall be liable, in their individual capacities, except to the State of Indiana, for any act done or omitted in connection with the performance of their respective duties under the provisions of this act.”

From all that appears in your inquiry, it would seem that the Insurance Commissioner may accept the \$10,000.00 which has been tendered as surety and upon the incorporators making proper application therefor, issue the permit to complete the organization of the said insurance company.

PUBLIC INSTRUCTION: County Superintendent, method of election of.

May 22, 1941.

Hon. Clement T. Malan,
State Supt. of Public Instruction,
State House,
Indianapolis Indiana.

Dear Mr. Malan:

I have before me your letter requesting an official opinion in answer to the following questions:

“1. Does the law require that the vote for county superintendent of schools be by secret ballot?

“2. How many of thirteen trustees are necessary for a quorum? Can the auditor be counted?