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COUNTY COMMISSIONERS, BOARD OF — CONTRACT — FIRE INSURANCE — AGENT OF INSURANCE COMPANY, WHO AT SAME TIME HELD MUNICIPAL OFFICE — COUNTY MAY NOT RECOVER PREMIUMS PAID FROM INSURANCE COMPANY OR AGENTS AFTER PERFORMANCE OF CONTRACTS — SECTION 12911 G. C. AS TO CRIMINAL PENALTY NOTWITHSTANDING.

SYLLABUS

Where the board of county commissioners of a county has entered into contracts for fire insurance with an agent of an insurance company who, at the same time, held a municipal office, the premiums paid for such insurance may not be recovered by the county from either the company issuing the policies or its agents after the contracts contained in such policies have been fully performed, notwithstanding the criminal penalty imposed by Section 12911 of the General Code.

Columbus, Ohio, January 17, 1944

Hon. William A. Ambrose, Prosecuting Attorney
Youngstown, Ohio

Dear Sir:

I am in receipt of your letter requesting my opinion, your request reading as follows:

"Mr. X holds an official position with the City of Youngstown. Prior to his appointment to said position, he was a duly licensed insurance and real estate agent or broker and was engaged in the insurance business in said city. During such tenure of office, he has so far as his time would permit, continued to write insurance.

While holding this official position, he wrote two policies of insurance for Mahoning County when insurance coverage was allocated by the County Commissioners to the various insurance agencies doing business in this county. Holding such official position with the city, the writing of this insurance by him for the county was apparently in violation of Section 12911, General Code. He received, as premium for such policies, the sum of \$568.50. While these policies were still in full force and effect, the insurance company represented by said policies, paid to the county the sum of \$358.54 for a loss sustained by the county.

It is conceded by all concerned that the county commissioners, who awarded him this business, and Mr. X, who accepted it, were ignorant of the provisions of Section 12911, General Code, and that all parties concerned acted honestly and in good faith. The county has received protection during the time these policies were in force and effect and, in fact, was paid the loss above stated. Policies will expire in several months. * * *

It might be added that the cost of the insurance furnished the county is determined by a bureau that establishes rates, which all companies must apply, and therefore the county could not have saved any money by asking for bids on this insurance.

In view of the foregoing facts, it may be conceded that a finding should be made to the effect that such a procedure is in contravention of the provisions of Section 12911, General Code, in order that notice may be served on all concerned as to the existence and provisions of this statute. However, my inquiry is directed to you to secure your opinion as to whether or not, upon the facts stated above, Mr. X or his company should be called upon to pay back to Mahoning County the premium which he, or it, received for such insurance."

I note further your reference to the case of State v. Fronizer.

Your inquiry involves a consideration of Section 12911 of the General Code, which section reads as follows:

“Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years.”

There have been many holdings by the various Attorneys General applying this section to different officials and employes, but I take it that there is no question as to its applicability to the case mentioned in your letter, and it is, therefore, not necessary to discuss that question.

The real question that you raise is as to the legality of a contract between the county commissioners and the insurance company, which was procured by Mr. X, who held an official position in the City of Youngstown. The further question arises as to whether the moneys paid by the county for insurance premiums on account of the policy issued by such company could be collected either from the insurance company or from Mr. X.

In an opinion rendered by one of my predecessors, found in Opinions of the Attorney General for 1935, page 898, it was held:

“A county auditor should refuse to issue his warrant for the payment of premiums for fire insurance on county owned buildings where the contract for such fire insurance was entered into in violation of the provisions of Section 12911, General Code.”

As observed in the opinion just above cited, the adjudicated cases considering contracts entered into in violation of the provisions of Section 12911 of the General Code do not hold that all contracts entered into in violation of the provisions of such section are void. Such opinions of the courts are reviewed in the opinion of my predecessor so cited.

However, in view of the facts set forth in your inquiry, it is unnecessary, for the purposes hereof, to express any opinion as to whether the contract in question could have been avoided prior to its perform-

ance. The contract in question, even if illegal at the time of its inception, has been fully performed by each of the parties thereto. The premiums for the insurance have been paid by the county and such was the only duty of the county under the terms of the contract and such premiums have been received by the insurance company. The company by which the agent was employed has furnished the insurance agreed to be furnished under the terms of the contract and the county has received all benefits which it was to receive under the terms of the policies, including full payment of the loss insured against in the amount of \$358.54.

A somewhat similar question to that presented in your inquiry was before the court in *State, ex rel. Hunt v. Fronizer*, 77 O. S. 7. The contract in that case was entered into by the county commissioners without their having obtained from the county auditor a certificate that the money required for the performance of the contract was in the treasury to the credit of the fund from which payable or was in the process of collection, as required by former Section 2834b of the then Revised Statutes of Ohio. Such statutory requirement is substantially the same as that now contained in Section 5625-33 of the General Code and specifically provided that a contract entered into in violation thereof would be void.

I am not unmindful of the fact that the courts on many occasions have construed the word "void" as though it read "voidable". However, in construing each of the sections just above referred to the courts have consistently held that a contract entered into without having obtained the certificate therein mentioned was unenforceable. *State, ex rel. v. Kuhner*, 107 O. S. 406; *Trustees v. Machinery Co.*, 5 O. App. 298; *Knowlton v. Board of Education*, 13 O. App. 30; *State, ex rel. v. Commissioners*, 19 O. C. C. 627; *North v. Commissioners*, 10 O. C. C. (N. S.) 462; *Thomas v. Commissioners*, 28 O. App. 8; *Surety Company v. Moores-Coney Co.*, 29 O. App. 310; *Allen v. Shepline*, 49 O. App. 249; *State, ex rel. McGraw v. Smith*, 129 O. S. 246; *Hawley v. Toledo*, 47 O. App. 246.

The court, in the *Fronizer* case, recognized such consistent holdings of the court but held as stated in the syllabus that:

"Section 1277, Revised Statutes, which authorizes a prosecuting attorney to bring action to recover back money of the

county which has been misapplied, or illegally drawn from the county treasury, does not authorize the recovery back of money paid on a county commissioners' bridge contract fully executed but rendered void by force of section 2834b, because of the lack, through inadvertence, of a certificate by the county auditor that the money is in the treasury to the credit of the fund, or has been levied and is in process of collection, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of such contract for such work, nor any claim of effort to put the contractor in *statu quo* by a return of the bridge or otherwise, the same having been accepted by the board of commissioners and incorporated as part of the public highway."

Such court, at page 16 of the opinion, sets forth its reasons for the holding made in such opinion, as follows:

"This court is of the opinion that such recovery is not authorized. The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in *statu quo*, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases."

It is the general rule, with certain exceptions not here material, that where an illegal contract has been fully performed on both sides the court will not disturb it even though before performance the court, in proper proceedings, would have held the contract to be void or unenforceable. See Vol. 5, Williston on Contracts, Section 1630; 6 *id.*, Section 1762, and cases there cited.

In the case outlined in your request, the performance on both sides had been fully completed and no circumstances are suggested therein which would indicate that a court might order a recovery of a consideration after performance even if the contract were illegal and void. It would, therefore, seem to me that whether or not the contract in question was void, the answer to your inquiry must be in the negative.

Specifically answering your inquiry, it is my opinion that where the board of county commissioners of a county has entered into contracts for fire insurance with an agent of an insurance company who, at the same time, held a municipal office, the premiums paid for such

insurance may not be recovered by the county from either the company issuing the policies or its agents after the contracts contained in such policies have been fully performed, notwithstanding the criminal penalty imposed by Section 12911 of the General Code.

Respectfully,

THOMAS J. HERBERT

Attorney General