

4472.

APPROVAL, NOTES OF MADISON RURAL SCHOOL DISTRICT,
SCIOTO COUNTY, OHIO, \$3,769.00.

COLUMBUS, OHIO, July 29, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4473.

COUNTY AUDITOR—WHERE SEC. 12911, G. C., VIOLATED
COUNTY AUDITOR UNAUTHORIZED TO ISSUE WAR-
RANT FOR PAYMENT OF PREMIUM FOR FIRE INSUR-
ANCE ON COUNTY BUILDING.

SYLLABUS:

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.

COLUMBUS, OHIO, July 29, 1935.

HON. FRANK A. ROBERTS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

“A question concerning the responsibilities and duties of a county auditor in the issuing of warrants has been presented to me.

The county auditor has knowledge of the fact that an agent for a fire insurance company who has sold insurance to the county of Clermont is clerk of a board of education in a school district of the county and is also a justice of the peace acting in that capacity.

It is also a fact known to the county auditor that this insurance was sold to the county by this agent during the time he was acting in the above official capacities.

Statements or bills for premiums upon this insurance have been duly presented to the board of county commissioners and have been approved by them. All provisions of the law for proper presentment and approval have been complied with.

The auditor has asked three alternative questions:

1. May he legally refuse to issue a warrant for the payment of such premiums?

2. In the event the first question is answered in the affirmative, could he be held civilly or criminally for issuing a warrant for such premiums in view of the knowledge which he has of the facts?

3. Does any duty rest on the county auditor to determine whether or not a person contracting with the county holds an official position which would disqualify him from doing business with said county?"

Sections 12910 and 12911, General Code, read as follows:

Sec. 12910.

"Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, village, city, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Sec. 12911.

"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."

Under the circumstances presented in your letter the sale of this fire insurance, if any one premium is in excess of fifty (\$50.00) dollars, constitutes a violation of Section 12911, General Code, *supra*. The provision in Section 12911, General Code, relative to competitive bidding is inapplicable in view of the fact that there is no provision in the law for competitive bidding in the purchase of fire insurance. See O. A. G. for 1916, Vol. II, p. 1275; O. A. G. for 1930, Vol. II, p. 1434, 1438; O. A. G. for 1933, Vol. III, p. 1945, 1949. In the 1930 opinion *supra*, it was held that it was a violation of Section 12911, General Code, for a probate judge to be interested in a

contract for the purchase of fire insurance on a school building when any premium on the policy exceeded fifty (\$50.00) dollars. See also Opinions of the Attorney General for 1933, Vol. III, page 1945.

It should be noticed that Section 12911, General Code, does not expressly state that such contracts are illegal and void. It does expressly impose a penalty where a public official, his agent or employe enter into such contracts. The question that you ask depends to a great extent upon whether or not contracts entered into in violation of Section 12911, General Code, are void or whether or not the section merely imposes a penalty upon the person entering into such contracts. It is the general rule that a contract entered into in violation of the provisions of a statute is unlawful and void and will not be enforced. See McQuillin on Municipal Corporations, Second Edition, Vol. II, Section 531.

In Ohio the cases on this subject have not been in perfect harmony. In the early case of *Bloom vs. Richards*, 2 O. S. 395, it was stated by Thurman, J.:

“That the infliction of a penalty for the commission of an act is equivalent to an express prohibition of such act, seems to be settled by a great weight of authority.”

Also in the case of *Doll vs. State*, 45 O. S. 449, it was stated by Williams, J.:

“To permit those holding offices of trust or profit to become interested in contracts for the purchase of the property for the use of the state, county or municipality, of which they are officers, might encourage favoritism and fraudulent combinations and practices not easily detected, and thus make such officers charged with the duty of protecting those whose interests are confided to them, instruments of harm. The surest means of preventing this was to prohibit all such contracts.”

However, there are other cases where the Supreme Court has taken the position that the effect of imposing a penalty for the entering into of a contract depends upon the intent of the legislature. *State vs. Buttles*, 3 O. S. 309; *Vining vs. Bricker*, 14 O. S. 331; *Warren People's Market Co. vs. Corbett*, 114 O. S. 126; *Commercial Credit Company vs. Schreyer*, 120 O. S. 568. The rule as stated in the case of *State vs. Buttles*, supra, is as follows:

“Contracts contra bonos mores, forbidden by positive law, or opposed to public policy, are void, and can neither be ratified nor enforced; but where a statute prohibits an act under penalty, and that is the only illegality claimed, the whole statute must be exam-

ined to ascertain whether the Legislature intended that contracts made in violation of it should be avoided.”

The first branch of the syllabus in the case of *Vining vs. Bricker*, supra, is as follows:

“To determine whether a contract made contrary to the provisions of a penal statute, is illegal and void, the statute must be considered as a whole, to ascertain whether or not it was the intention of the Legislature that the statute should have such effect.”

The first and second branches of the syllabus of the case of *Warren People's Market Co. vs. Corbett*, supra, read as follows:

“1. In construing a statute which imposes specific penalties for its violation, the court must examine the entire act to determine whether or not it was the purpose of the Legislature, in addition to imposing express penalties for the violation of the law, to render void any contract based on the prohibited act.

2. Viewing the Blue Sky Law, Section 6373-1 et seq., General Code, as a whole, it was not the intent of the Legislature to make void sales of stock made in violation of the statute, but to punish persons who did not comply with the provisions of the statute in making such sales of stock.”

The second and third branches of the syllabus in the “Schreyer” case supra read as follows:

“2. Those sections (penal Sections 6310-3 to 6310-14, inclusive, General Code) declare it to be unlawful to sell or give away a motor vehicle unless at or before such sale or gift the seller shall execute and deliver a bill of sale therefor, and prescribe other procedure in perfecting transfer of title. They do not declare the contract itself to be unlawful if executed in a manner other than that prescribed.

3. Any assignment or transfer of a motor vehicle (not violative of the uniform sales laws of this state), which is not executed and delivered in compliance with Sections 6310-3 to 6310-14, General Code, but which is accompanied by delivery of possession, is nevertheless a valid contract between the parties thereto.”

In the case of *Niemeyer vs. Wright*, 75 Va., 239, the Court said:

“A statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition. But it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention to it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.

Conceding the general rule as above stated the mere imposition of a penalty by a statute for doing or omitting to do an act does not of itself, in every case, necessarily imply an intention of the Legislature that every such contract in contravention of the statute shall be void, in the sense that it is not to be enforced in a court of justice.”

The question may now very well be asked as to whether or not the legislature intended that contracts entered into in violation of Sections 12910 and 12911, General Code, shall be void. In the enactment of these two statutes it is clear that the legislature intended to give effect to that well established common law principle, that no man can serve two masters. The legislature no doubt intended to prevent the possibility of perpetrating fraud upon the taxpayers by representatives of the people who held public positions. In the case of *Bellaire Goblet Co. vs. The City of Findlay*, 5 O. C. C., 418, it was held as disclosed by the fifth branch of the syllabus:

“5. Contracts entered into between a Board of Gas Trustees of a municipality and an incorporated company, when a member of the Board of Gas Trustees is at the same time an officer and personally interested in the incorporated company, are against public policy, and void.”

From the opinion at page 429, I quote the following language:

“The next question presented is—What is the effect of the fact that Mr. Gorby, at the time the contract was entered into, was a member of the Board of Gas Trustees, and also an officer of plaintiff?

Section 6969 of the Revised Statutes in effect provides that an officer elected or appointed to any office of trust or profit, shall not be interested in any contract for the purchase of any property under severe penalty.

Section 6976 of the Revised Statutes provides that an officer or member of the council of any municipal corporation, who is inter-

ested directly or indirectly in the profits of any contract, etc., shall be fined or imprisoned, or both.

So that this dual relation existing as to Mr. Gorby, prevented him from acting upon this so-called contract as a member of the Board of Gas Trustees. The record shows he did not act. Yet the board consisted of five members; each one of the members was entitled to be heard, each one of the members was entitled to act, but on account of the personal interest of Mr. Gorby, he could not act, so that in fact five members constituted the board, and in law five members was a legal board, but through the personal interest of Mr. Gorby, the Board, for the purpose of acting upon this contract, was reduced to four, which was not a legal board, and hence had no power to act."

A similar question was presented in the case of *Dalzell vs. The City of Findlay*, 5 O. C. C. 435. The third branch of the syllabus of that case reads as follows:

"3. If one or more of the Gas Trustees of a city owning and operating a natural gas plant, are beneficially interested in a contract to supply natural gas for fuel to a manufactory at a nominal consideration, such contract will not be enforced in equity."

This later case was affirmed by the Supreme Court without opinion. See 27 Weekly Law Bulletin 128. It is particularly pertinent that the violations in the above two cases were of Revised Statute 6976, which is now substantially Section 12912, General Code, and Revised Statute 6969, which was later split up and which now constitutes Sections 12910 and 12911, General Code.

In the case of *Marsh vs. The Village of Hartwell*, 2 O. N. P. 389, an action was brought to enjoin the payment by the village of mortgage installments on a piece of property that was owned by the village solicitor. A purchase money mortgage was given by the village. In granting the injunction, Wilson, J. said:

"Section 6969, Rev. Stat., provides that no officer elected or appointed to any office of trust or profit in this state, while acting as such officer, shall become directly or indirectly interested in any contract for the purchase of any property for the use of the state, county, township, city, town or village. And in the case of *Doll vs. State* (45 Ohio St.) the Supreme Court held that any contract in contravention of this statute is void.

Mr. Marsh was interested in this contract, and being solicitor of the village, would if the contract were entered into, be interested

in the purchase of property for the village. To allow the village to continue the payment of the dues under the mortgage would be to allow the village to enter into an illegal contract."

In the case of *Norris vs. Board of Education*, 12 Ohio Law Abstracts, 639, the Court of Appeals for the fourth district held that where a member of a board of education who voted in favor of awarding a contract for the transportation of pupils was interested in obtaining the position of driver of the bus, his action in voting to award the contract was illegal and void. The case was based upon Section 4757, General Code, which provides in part as follows:

" * * * No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. * * * "

In reference to the question of whether or not contracts entered into in violation of a statute are ipso facto illegal and void, I call your attention to an opinion of my immediate predecessor to be found in Opinions of the Attorney General for 1930, Vol. II, page 853. The syllabus of that opinion reads as follows:

"A contract with a person to teach in the public schools, if made in all other respects in conformity to law, is not rendered invalid or illegal by reason of its having been entered into by a board of education, one of whose members voted for or participated in its making in violation of the provisions of Section 12932, General Code."

Section 12932, General Code, which was involved in the above opinion reads as follows:

"Whoever, being a local director or member of a board of education, votes for or participates in the making of a contract with a person as a teacher or instructor in a public school to whom he or she is related as father or brother, mother or sister, or acts in a matter in which he or she is pecuniarily interested, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months, or both."

This opinion pointed out that under the decisions of the Supreme Court of this state in the cases of *Warren People's Market Co. vs. Corbett*, and *Commercial Credit Co. vs. Schreyer*, supra, the effect of imposing the penalty in

Section 12932, General Code, upon the legality of the contract depended upon the intent of the legislature. The then Attorney General concluded that the legislature did not intend that all contracts entered into in violation of Section 12932, General Code, should be illegal and void. The conclusion is also based upon the following pertinent language which is to be found in the opinion at page 356:

“It should be noted that a contract growing out of a violation of the statute, if a violation actually occurs, is not a contract between the person who acts in violation of the statute but a contract with the board of education of whom such person is a member. A board member who might violate the statute in the making of a contract with the teacher is not himself a party to the contract. The contracting parties are the teacher or instructor and the board of education.”

While the cases in Ohio, as stated in the first part of this opinion, are not in perfect harmony as to whether or not the imposition of a penalty renders a contract illegal, it would appear that the later decisions of our Supreme Court place the whole matter upon the intention of the legislature. It is significant however, that Ohio has been cited in many texts as supporting the rule that the imposition of a penalty renders the contract illegal and void. For example, see *McQuillin on Municipal Corporations*, Second Edition, Vol. II, page 213, citing the cases of *Bellaire Goblet Co. vs. The City of Findlay* and *Dalzell vs. Findlay*, supra. Regardless of this question it would seem that under the holding of these last two mentioned cases, contracts entered into in violation of Section 12911, General Code, are illegal and void. This conclusion based upon the two Findlay cases supra is consistent with the intent of the legislature's theory as expressed in the Warren People's Market Company case and the Schreyer case supra upon the assumption that the legislature intended that a contract entered into in violation of Section 12911, General Code, cannot be enforced against the political subdivision. Having reached that conclusion it is apparent that in answer to your first question, the county auditor may refuse to issue a warrant for the premiums in question.

It follows in answer to your second question that if the county auditor issues the warrant with full knowledge of all the facts, it is quite possible that he may be held liable on his official bond for failure to faithfully discharge the duties of his office. See Section 2559, General Code.

In answer to your third question it follows that the county auditor, if he has any knowledge of the illegality of a contract, should refuse to issue a warrant for the expenditure of public funds. Likewise if there are any circumstances which arouse suspicion it would follow that it would be the duty of the county auditor to investigate the matter relative to the correct determination of whether or not he should issue his warrant for the expenditure of public funds.

Summarizing, it is my opinion that 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.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4474.

EDUCATION—WAR VETERAN ENTITLED TO ATTEND
EXTENSION SCHOOL OF OHIO UNIVERSITY WITHOUT
PAYING TUITION.

SYLLABUS:

Any citizen of the State of Ohio, who was in active service of the United States between April 6, 1917 and November 11, 1918 as a soldier, sailor, nurse or marine and who has been honorably discharged therefrom, may attend the extension schools of Ohio University without paying tuition.

COLUMBUS, OHIO, July 30, 1935.

HON. RICHARD W. HORTON, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

“Under Section 7930-1 G. C. there are honorably discharged soldiers of the World War attending the Ohio University at Athens free of tuition.

That college has what they call extension schools here and the soldiers wish to attend such school during vacation. Is their attendance at such schools free of tuition under the above named section?”

Section 7930-1 General Code to which you refer, reads as follows:

“Any citizen of this state who has resided within the state for one year and who was in the active service of the United States as soldier, sailor, nurse or marine between April 6, 1917 and November 11, 1918 and who has been honorably discharged from such service, shall be admitted to any school, college or university which receives state funds in support thereof, without being required to pay