The conclusions reached in this opinion are in accord with those of Judge Rockel, as stated, at page 193 of Rockel's Complete Guide for Ohio Township Officers, as follows:

> "When the township does not own the place where an election is held, the board of elections pays the rent; however, in the odd-numbered years, it is certified back to the township. * * * "

It is therefore my opinion that:

1. The expenses incurred in renting a polling place for the use of the electors of a township at the April and August Primaries 1928, must be paid from the county treasury.

2. There is no provision of law authorizing such expense to be deducted by the county auditor, in making his next settlement with such township.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2490.

TRUSTEE—PUBLIC INSTITUTION—CONTRACT IN WHICH TRUSTEE IS INTERESTED—DISCUSSION AS TO FINDING AND RECOVERY.

SYLLABUS:

Purchases of supplies made by a state institution from a corporation, a stockholder of which is at the time one of the trustees of said institution, are contrary to law. However, no findings should be made for the recovery of moneys paid as the purchase price of such supplies in the absence of facts showing actual fraud in the transactions relating to the purchase of the same, or that the purchase price of the supplies was substantially in excess of the reasonable value thereof.

COLUMBUS, OHIO, August 25, 1928.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication in which you call my attention to certain purchases of coal made by Ohio University, through its business manager, from the Norris-Poston Coal Company and the Poston Consolidated Coal Company, and my opinion is asked with respect to the question of the legality of such purchases arising from the fact that one T. R. B., then and now a trustee of Ohio University, was a stockholder in said companies.

It appears from certain correspondence attached to your communication that the sale made by the Morris-Poston Coal Company was one transaction in the year 1919 and that the sales to said institution made by the Poston Consolidated Coal Company were made at various times during the years 1921, 1922 and 1923, and that no purchases of coal have been made by Ohio University from either of said companies since June, 1923. This correspondence further shows that the sales in question were made at the request of the University officials and for the accommodation of the University. They were emergency purchases, made when a coal shortage prevailed and at times when it was extremely difficult, if not impossible, to obtain coal elsewhere.

Ohio University, as an institution administered by a board of trustees, is exempted from the jurisdiction of the State Purchasing Department with respect to property and supplies purchased for said institution. Section 154-37, General Code. In this connection it appears from the correspondence accompanying your communication that the coal here in question was purchased by the business manager of the institution "on the market," by which I understand is meant that the coal was purchased as needed at best market prices obtainable, and was not purchased on contract or contracts calling for deliveries of coal at a stipulated price over a considerable period of time. There is nothing in the facts presented to show that said T. R. B., as trustee of said institution, was in any way instrumental in procuring said purchases of coal from the companies above named, of which he was a stockholder. There is likewise nothing in the facts presented to me to show that said person was an officer or director in either of said coal companies, or that he was otherwise actively interested in their respective business affairs. The question here presented is whether or not the interest that said T. R. B. had, as a stockholder in said coal companies, made the sales here in question illegal.

The provisions of Section 12910, General Code, are applicable in the consideration of this question. Said 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 connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

In a consideration of the application of provisions of this section to the question at hand, it is not doubted but that a trustee of Ohio University is the holder of an office of trust by appointment under the provisions of this section; neither can there be any doubt but that Ohio University is a public institution within the meaning of the terms as used in this section.

In 13 Corpus Juris, at page 434, in considering generally the illegality of contracts to influence public officers charged with the letting or making of public contracts, the following is said:

> "Another class of agreements which are within the rule are those between a state, a county, or other municipal corporation for the doing of work or the furnishing of supplies with one of its own officers or with a company or body of men of which such officer is one, or in which he is interested.
>
> In many jurisdictions statutes declaratory of the common-law rule have been passed, expressly prohibiting public officers from being interested in any contract for the furnishing of supplies, etc., to the corporation of which they are officers, and contracts entered into by them in violation of such a statutory provision are *a fortiori* illegal.
>
> The rule prohibiting a public officer from being personally interested in a contract under his supervision or control has been extended so as to prevent him from letting such a contract to a corporation of which he was an officer or a stockholder."

In Page on the Law of Contracts (2nd Edition), at page 414, it is said:

> "By some statutes, a corporation the stockholders of which are city officials can not contract with such city. A statute which forbids a public officer

to have any interest in a public contract, or which forbids him to have any interest, directly or indirectly, renders invalid a contract with a corporation of which he is a stockholder, or an officer. The fact that the public officer in question has nothing to do with making the contract and does not know that it is made, does not render it valid."

In the case of *Consolidated Coal Co.* vs. *Board of Trustees,* 164 Mich., 235, the court had under consideration a statute of that state which, among other things, provided that no trustee or member of any board having control or charge of any educational, charitable or reformatory public institution of the state should be "personally, directly or indirectly interested in any contract, purchase or sale made for, or on account or in behalf of any such institution, and all such contracts, purchases or sales shall be held null and void." Under the provisions of this statute the court held that a sale of coal to the Michigan Employment Institution for the Blind, by a corporation in which one of the trustees of the institution was interested as a stockholder, was absolutely void. The court in its opinion in this case says:

"If we regarded the statute which is invoked by the attorney general as merely affirmatory of a rule developed by the courts, we should be obliged to consider the limitations of the rule which the courts have recognized, some of which are stated and discussed in the brief. We do not regard the statute as merely putting in form of positive law a rule developed by courts, but as a legislative rule, founded in public policy, the plain effect of which courts are not at liberty to deny or to amend. In this view, a very simple question is presented, namely: Was the sale of coal which is in question made in violation of the law? If it was, it was a void sale. There can be but one answer to the question."

Following this decision, the Supreme Court of Michigan, in the case of *Ferle* vs. *City of Lansing,* 189 Mich., 501, held that, under a municipal charter providing under penalty that no person holding an elective or appointive office in the city government should be interested in any contract with the city, a contract, by which the superintendent of public works of the city purchased supplies from the corporation in which an officer of the city is a stockholder, was void, although the stockholder had no official connection with the purchase and had no knowledge that it was made. The court in its opinion in this case said:

"It is true that this prohibition in the charter prevents the city from making purchases of a corporation of which any officer of the city, or member of its council, is an officer or stockholder. This was determined, on principle, in *Consolidated Coal Co.* vs. *Michigan Employment Inst.,* 164 Mich. 235, 129 N. W. 193. A sale is a contract, and a form of contract in which the evil sought to be remedied by the charter is most frequently apparent. And, as said in *Hardy* vs. *Gainesville,* 121 Ga. 327, 48 S. E. 921: 'A stockholder in a private corporation clearly has an interest in its contracts; and if the city cannot make a contract with the officer himself, it cannot make it with a corporation in which such officer is a stockholder.'

The charter does not, in so many words, say that a contract made by the city shall be void if any member of the council or city official is interested in it; but it is void, nevertheless, inasmuch as the charter imposes a penalty for the making of such a contract.

'A statute which imposes a penalty upon an act by implication ordinarily prohibits such act. A penalty usually implies a prohibition, although there are

no prohibitory words in the statute.' Elliott, Contr., Section 666; Re Reidy, 164 Mich. 167, 129 N. W. 196; *Case* vs. *Johnson*, 91 Ind. 477; Bishop, Contr. 2d ed. Sec. 471; Dill. Mun. Corp. 4th ed., Sec. 773, and cases cited.

And a contract made void by charter or by statute cannot be ratified,—there is nothing to ratify,—nor can any recovery be had upon it. The courts will leave the parties as it finds them; and if it is a contract of sale, an action cannot be maintained for the value of goods delivered under it. *Consolidated Coal Co.* vs. *Michigan Employment Inst., supra; Milford* vs. *Milford Water Co.* 124 Pa. 610, 3 L. R. A. 122, 17 Atl. 185; *Berka* vs. *Woodward*, 125 Cal. 119, 45 L. R. A. 420, 72 Am. St. Rep. 31, 57 Pac. 777; *Ensley* vs. *Hollingsworth & Co.*, 170 Ala. 396, 54 So. 95; *Nunemacher* vs. *Louisville*, 98 Ky. 334, 32 S. W. 1091. Nor will the courts inquire whether the terms of the contract are fair or unfair. The purpose of the prohibition is not only to prevent fraud, but to cut off the opportunity for practising it.

There can be no doubt that Mr. Rikerd was an officer of the city. The board of police and fire commissioners, in exercising control over the police and fire departments of the city, is performing very important governmental functions. And the fact that Mr. Rikerd cannot be charged personally with having violated the charter, inasmuch as he had no knowledge of the sale or delivery of the lumber, does not determine the case. Every contract with the city is made void when a member of the common council or an officer of the city has an interest in it, whether such member of the council or city official has or has not himself been guilty of procuring the contract."

In the case of *Grand Island Gas Company* vs. *West*, 28 Nebr. 852, it was held that a contract by the city of Grand Island of said state with a corporation, whereby said corporation contracted to light the streets of said city for a definite period at a fixed price per month, was invalid where at the time of the making of said contract a member of the city council of said city was also a stockholder and the secretary and treasurer of the corporation.

In the case of *Doll* vs. *State*, 45 O. S. 449, the court, in considering the provisions of Section 6969, Revised Statutes, now Section 12910, General Code, above quoted, said:

"To permit those holding offices of trust or profit to become interested in contracts for the purchase of 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."

Considering the provisions of this section as they read in Section 6969 Revised Statutes, it was held by the court in the case of *Bellaire Goblet Company* vs. *City of Findlay, et al.*, 5 C. C., 418, that contracts entered into between a board of gas trustees of a municipality and an incorporated company were against public policy and void where it appeared that a member of the board of gas trustees was at the time an officer and personally interested in the corporation with whom said contracts were made. In the opinion of the court in this case it is said:

"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 an 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 interested 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 that 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."

This department, in an opinion under date of September 21, 1914, Annual Reports of the Attorney General for 1914, Vol. 2, p. 1250, held that it was a violation of law for a person who owned stock in a corporation that sells goods to a city, to act as sinking fund trustee of such city. Touching the question there presented, the following language was used in said opinion:

"In answer to your second question, I beg to say that this department has always held to the opinion that a stockholder in a corporation which sells to a city, has such an interest in the sale as amounts to a violation of Section 12910, when said stockholder holds an office of trust in the municipality. I am, therefore, of the opinion that your second question must be answered in the affirmative."

The decisions and other authorities above cited seem to be conclusive with respect to the first question made in your communication; and by way of specific answer to said question, I am of the opinion that the contracts for the purchase of the coal here in question were illegal.

As before noted, the purchases of such coal were made by the business manager of Ohio University. As to this, however, it is quite clear that in making such purchases the business manager was but the agent of the board of trustees of said institution, which board was the responsible authority in approving contracts for the purchase of such coal and in allowing and directing payments for the same; and, as has been noted, the transactions with respect to the purchase of such coal were illegal by reason of the interest which one of the members of the board had in said transactions arising out of his connection with the companies from which the purchases were made.

Your second question is whether findings should be made against the Morris-Poston Coal Company and the Poston Consolidated Coal Company for the recovery of the moneys paid to said respective companies for the coal furnished by them under said illegal contracts. The answer to this question, in my opinion, is ruled by the case of *State ex rel.* vs. *Fronizer*, 77 O. S. 7. In this case it was held that:

"Section 1277 Revised Statutes (Section 2921 G. C.), 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."

It is not thought that any different rule would apply in actions brought under the provisions of Sections 286 and 286-1, General Code, upon findings made by the Bureau of Inspection and Supervision of Public Offices. The case of *State ex rel* vs. *Fronizer, supra,* was before the court in the case of the *City of Cleveland* vs. *Legal News Publishing Company,* 110 Ohio State 360, which was an action under the provisions of Section 286, et seq., General Code, to recover certain moneys paid by the City of West Park for advertising in excess of the legal rates therefor. With respect to the application of the Fronizer case, the court in its opinion, in the later above cited case, said:

"In affirming the trial court, the Court of Appeals sustained the sufficiency of this defense, relying upon the case of *State ex rel. Hunt* vs. *Fronizer,* 77 Ohio St. 7, 82 N. E. 518. The present case can be distinguished from that case. The parties to this contract were presumed to know the law, which prevented them from agreeing upon a rate for legal advertising in excess of the maximum rate provided by statute. Here the publisher is not denied compensation for the srvice performed, but is permitted to retain the maximum legal rate that the statute allows. The city's petition seeks to recover only the amount charged and paid for advertising in excess of the legal rate provided by statute. In this aspect the case is distinguishable from the Fronizer case."

In other words, with respect to the question at hand, it is significant that the Supreme Court, in the case of *Cleveland* vs. *Legal News Publishing Company, supra,* with an opportunity to do so, did not hold that the principle of law applied in the Fronizer case was not applicable to actions brought to recover money under Sections 286, et seq., General Code.

In the case of *Keenon* vs. *Adams,* 176 Ky., 618, it was held that although it was unlawful for a board of education of the school district to contract with a subdistrict trustee to erect or repair a school house, or to improve its grounds, or to purchase land for school purposes from him or to furnish equipment or supplies for the school, or to pay such trustees for any of the things above mentioned; yet if the payments were made in good faith, and for a purpose, which in itself was legal, and for a thing for which the school funds were raised and held, and the public got that which it was entitled to, the money so paid could not be recovered back from the members of the board of education or the subdistrict trustee, and the public continue to enjoy the benefits of the expenditure. The court in its opinion in this case, quoting from the opinion of the court in the earlier case of *Flowers* vs. *Logan County,* 138 Ky. 59, said:

"If the thing done had been illegal or not warranted by law, however beneficial it might have been, the public ought not to be estopped to deny the validity of the expenditure; or where the thing is authorized, but it is proposed to do it in an unauthorized manner, upon seasonable complaint, these

charged with doing the thing will be compelled to execute it as the law directs, and prohibited from doing it otherwise. But, where the thing is authorized to be done and is done by the party charged with doing it, but done in a manner contrary to that directed by the statute, the court will not compel the official to pay back the money and let the public continue to enjoy the benefits of its expenditure. If it is made to appear that the expenditure was in good faith, and the public has got that which it was entitled to, good conscience forbids the recovery. The law therefore denies it."

So with respect to the case here presented, although the contracts for the purchase of the coal here in question were illegal, and could not have been enforced by either party, yet said contracts having been fully executed and payment for the coal made, no actions can be maintained for the recovery of the money so paid in the absence of a showing of actual fraud or that the price paid for such coal was substantially in excess of the reasonable value of the same.

I am of the opinion, therefore, that your second question should be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2491.

APPROVAL, BONDS OF THE VILLAGE OF LYNDHURST, CUYAHOGA COUNTY—$30,000.00—PURCHASED FOR THE ACCOUNT OF THE SCHOOL MINISTERIAL TRUST FUND.

COLUMBUS, OHIO, August 25, 1928.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

2492.

APPROVAL, BONDS OF THE VILLAGE OF LYNDHURST, CUYAHOGA COUNTY, OHIO—$200,000.00.

COLUMBUS, OHIO, August 25, 1928.

Industrial Commission of Ohio, Columbus, Ohio.