

2189.

BOARD OF EDUCATION—SALE OF COAL BY MEMBER TO VENDOR
WHO HAS CONTRACTED TO SELL COAL TO SAID BOARD—WHEN
VALID OR INVALID.

SYLLABUS:

While the law is not violated, where a member of a board of education sells coal to a vendor who has previously contracted to sell coal to the board, unless there be an understanding between said vendor and board member at the time of the contract with the board creating on behalf of the board member an interest in such contract, such circumstances create an inference of previous agreement, and public officials should avoid transactions of this character.

COLUMBUS, OHIO, August 1, 1930.

HON. EMERSON C. WAGNER, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—Your recent communication reads:

“The Board of Education of a School District advertised for bids for furnishing coal for the various school buildings of said District. Mr. B., who was the lowest and best bidder, received the contract by a unanimous vote of said board. Mr. B. buys most of his coal from Mr. A., a member of the Board of Education. The checks are made payable to Mr. B., who in turn pays Mr. A. for coal purchased from him.

Can Mr. A., a member of the Board of Education, sell coal to Mr. B?
Is Mr. A. criminally liable for selling coal to Mr. B?

Sections 4757, 12910 and 12932, General Code, are applicable to your questions, and provide, so far as pertinent, as follows:

Sec. 4757. “* * No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board * * * ”

Sec. 12910. “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.”

Sec. 12932. “Whoever, being a local director or member of a board of education, * * * 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.”

It may be noted that Section 4757, supra, is not a penal section like Sections 21910 and 12932, Therefore, said Section 4757 should not be as strictly construed as the two latter sections.

In order to determine the existence or non-existence of such an interest as the sections above quoted comprehend, it is necessary to make a careful examination of the facts and surrounding circumstances in a given case.

I have held that purchases of coal made by a board of education from a corporation, a stockholder of which is at the time of such purchase a duly appointed

clerk of said board, are contrary to law. See Opinions of the Attorney General for 1929, Volume 2, page 1460. Moreover, my immediate predecessor held in Opinions of the Attorney General for 1927, page 1326, as follows:

"A board of education is prohibited by virtue of Section 4757, General Code, from entering into a contract for the purchase of coal with a corporation of which one of the members of the board is a stockholder even though such board member has only one share of stock, and the corporation of which he is a stockholder, and which is selling the coal is being operated at a loss. Such board member, if he participated in the making of such a contract would be subject to prosecution under the provisions of Section 12910 of the General Code."

However, the facts as disclosed by your communication indicate that Mr. B. is not connected with Mr. A. as a business partner, nor does there exist any corporation of which Mr. A. is a stockholder which sells coal to the board as in the opinions above noted. On the other hand, there appears to be no business relation between B. and A. other than the contractual relation resulting from the sale of coal by A. to B. after the awarding of the original contract by the board to B.

While I find several opinions of this office which have discussed somewhat similar questions to those presented by you, I may say that the holdings have not always been consistent. I find one Ohio court decision based on facts very similar to those presented in your communication. I refer to the case of *State ex rel Taylor vs. Pimney* (13 O. D., N. P., 210), (1902), wherein the court had under consideration for interpretation R. S., 856, (now Section 2420, General Code). Said statute read in part, that "no commissioner shall, directly or indirectly, be concerned in any contract for work to be done, or material to be furnished, for the county, under the penalty of not exceeding two thousand nor less than two hundred dollars." The court held as disclosed by the third paragraph of the syllabus:

"A county commissioner is not liable to amercement under Sec. 856 Rev. Stat., notwithstanding persons to whom contracts for the construction of public improvements have been awarded by the county commissioners, during his term of office, afterward purchase stone from a stone company of which he is a stockholder and director, and where it does not appear that, at the time of the letting of the contracts, and agreement or understanding existed between him and the contractors that he should take any part in the subsequent carrying out of the contracts or derive any benefit therefrom."

It may be noted that the court placed the test of determining whether there was any liability on the question of whether there existed at the time of the letting of the original contract any agreement or understanding between the board member and the contractor that said board member would derive any benefit from said original contract.

With respect to your questions, Page on Contracts, Second Edition, Section 415, (1920), says:

"Whether a transaction between a public contractor and one who is a public officer is within the scope of statutes which forbid a public officer to have an interest in a public contract, is a question on which there is some difference in result, depending in part on the wording of the different statutes and in part on the construction placed upon the statutes by the courts. A

public contract is held not to be rendered invalid by the fact that the contractor purchases certain supplies from an individual who is also a public officer. Under a statute which provides that no officer shall be interested directly or indirectly in a contract with a town, a contract by a contractor for a public improvement whereby he purchases certain material from a corporation in which municipal officers have stock is said to be valid, if the purchase is made after the public contract is let. If, however, the contractor makes arrangements to make such purchases from a public officer before the public contract is let, such transaction is a violation of the statute."

The facts which you have submitted do not disclose there was any agreement existing between B. and A. at the time the contract was entered into by the board of education and B. and, under the authorities which I have cited, the conclusion is forced that there has been no violation of the laws hereinbefore set forth. There is, however, some question as to the morals of such a situation. In a case of this kind suspicion of the existence of some prearrangement will always exist, even though unfounded, and the wiser course for public officers to pursue would be to avoid all possible inference of wrong doing.

In view of the facts which you submitted, however, I am impelled to conclude that your first question must be answered in the affirmative, and your second in the negative.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

2190.

APPROVAL, ABSTRACT OF TITLE TO LAND IN CITY OF COLUMBUS,
 FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, August 2, 1930.

State Office Building Commission, Columbus, Ohio.

GENTLEMEN:—There has been submitted for my examination and approval an abstract of title, warranty deed and encumbrance estimate No. 635, relating to the proposed purchase by the State of Ohio of a certain lot and tract of land in the city of Columbus, Franklin County, Ohio, which is more particularly described as being the north half of Inlot number one hundred and twenty-one (121) in said city as the same is numbered and delineated upon the recorded plat thereof, of record in Deed Book "F", page 332, Recorder's Office, Franklin County, Ohio.

Upon examination of the abstract of title submitted, which is certified by the abstracter under date of July 10, 1930, I find that one John D. Vail, died intestate on July 23, 1928, seized of a fee simple title and estate in and to the above described property and that Horace D. Vail, his only heir at law, now has a good and indefeasible title to said property, subject to the consummated dower interest of Ella Vail, the widow of said John D. Vail, deceased, and to the inchoate dower interest of Geraldine D. Vail, the wife of said Horace D. Vail.

I further find that said Horace D. Vail owns and holds the title to said property free and clear of all encumbrances except the following taxes and assessments which are here noted as exceptions to said title: