

repair job under the general statutes providing for the repair of ditches in townships, namely, Sections 6691, et seq., General Code. The said statutes provide that repair work is to be supervised by the county surveyor or the ditch supervisor if one has been appointed (see G. C. 6691), and after the procedure of Sections 6695, et seq., General Code, is followed, the cost of the work is to be paid from the general ditch improvement fund of the county, and the county commissioners are to certify the costs to the county auditor who is required to collect taxes from the property owners benefited, and when collected, these taxes are credited to the general ditch improvement fund. (See G. C. 6702.)

It is believed that the foregoing discussion adequately answers your question.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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2341.

CONTRACT—NOT VIOLATION OF SECTION 12910 G. C. MEMBER OF STATE SENATE OR HOUSE OF REPRESENTATIVES TO BE INTERESTED IN CONTRACT FOR PURCHASE OF REAL ESTATE, SUPPLIES OR FIRE INSURANCE FOR USE OF COUNTY FROM WHICH ELECTED WHEN.

*SYLLABUS:*

1. *It is not a violation of section 12910, General Code, for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of real estate, supplies or fire insurance for the use of the county or any one of the counties from which he is elected.*

2. *It is a violation of section 12911, General Code, for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of real estate and fire insurance for the use of the county or any one of the counties from which he is elected, when the price of the real estate or premium on any one fire insurance policy exceeds \$50.00.*

3. *Whether or not it is a violation of section 12911, General Code, for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of supplies for the county or any one of the counties from which he is elected, when the amount of the supplies exceeds \$50.00, depends upon whether the statutes require the award of the contract for the particular kind of "supply" after advertisement and competitive bidding and such advertisement and competitive bidding is had pursuant thereto.*

COLUMBUS, OHIO, March 3, 1934.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Your recent communication reads as follows:

"You are respectfully requested to furnish us your written opinion upon the following:

Question 1: Is it illegal for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of real estate, supplies or fire insurance for the use of the county from

which he is elected, as provided in Section 12910 of the General Code?

Question 2: Is it illegal for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of real estate, supplies or fire insurance for the use of the county from which he is elected, when the amount exceeds \$50.00, and is not let on competitive bids after advertisement, as provided in Section 12911 of the General Code?"

Sections 12910 and 12911, General Code, mentioned in your communication, reads as follows:

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. 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."

In Opinions of the Attorney General for 1931, volume I, page 359, it was held as disclosed by the syllabus:

"A board of township trustees may not purchase land for a township cemetery from a member of such board."

A reference to the opinion shows that the word "property" in section 12910, General Code, was construed to include "real estate." I concur in the conclusion of such opinion, and further, am of the view that the word "property" appearing in section 12911, General Code, includes "real estate."

Approaching your first specific question, it is to be noted from a close examination of section 12910 that the said section only prohibits an officer from being interested in a contract for the sale of property, supplies and fire insurance for the use of the particular subdivision with which the officer is *connected*. Inasmuch as the section is penal in nature, it is obvious from the general rule of law that it must be strictly construed.

A member of the State House of Representatives or State Senate is a state officer, and not a county or district officer from the county or district from which he is elected, even though such officer is voted for by the voters of the county or district only. This seems clear from language in the Ohio Constitution. Article XVII, Section 2, of the Ohio Constitution provides in part:

"\* \* \* Any vacancy which may occur in any elective *state office* other than that of a *member of the general assembly* or of governor, shall be

filled by appointment by the governor until the disability is removed, or a successor elected and qualified. \* \* \*” (Italics the writer’s.)

In 59 Corpus Juris, 84, under the heading “States,” it is stated at section 51:

“Members of the legislature are *state officers* \* \* \*.”

The foregoing text cites the cases of *In re Anderson*, 164 Wisc., 1, 159 N. W. 559; and *Dillman vs. State*, 20 Wyo., 414, 125 Pac., 313.

An examination of the said cases supports the law as announced by the above text. In the opinion in the case of *Dillman vs. State*, *supra*, it is stated at pages 437 and 438:

“\* \* \* Members of the legislature are, in a strict legal sense, state officers. They are clearly not county or precinct officers. They are members of a body which constitutes a separate and distinct department of the state government. They are paid by the state. \* \* \* They perform duties, and exercise powers relating to the state at large. ‘In general, it may be said that a state officer is one whose duties and powers are co-extensive with the state, while a county officer is one whose duties and powers are co-extensive with the county.’ (*People vs. Evans*, 247 Ill. 547, 93 N. E. 388) ‘State officers are those whose duties concern the state at large, or the general public, although exercised within general limits, and to whom are delegated the exercise of a portion of the sovereign power of the state. They are in a general sense those whose duties and powers are co-extensive with the state, or are not limited to any political subdivision of the state, and are thus distinguished from municipal officers strictly, whose functions relate exclusively to the particular municipality, and from county, city, town, and school district officers.’ (36 Cyc., 852-853.) In *Morrill vs. Haines*, 2 N. H. 246, it was held that within the meaning of a statute providing the method of balloting for state officers a representative in the state legislature was a state officer \* \* \*.”

From the above authorities, it would appear that, since a senator or representative is a state officer, rather than a county or district officer, and thus “connected” with the “state” as a political division within the provisions of section 12910, General Code, it is not illegal for such person to be interested in a contract for the purchase of real estate, supplies or fire insurance for the use of the county from which he is elected.

Coming now to your second question, it was held in an opinion of this office addressed to your bureau and reported in Opinions of the Attorney General for 1919, volume I, page 629, as disclosed by the syllabus:

“Under section 12911 an officer of trust is prohibited from being interested in any contract for purchase of property by a county or other political subdivision or a public institution with which he is not connected, if the amount of such contract exceeds the sum of \$50.00, unless the contract is let on bids *advertised according to laws requiring such contracts to be advertised.*” (Italics the writer’s.)

The question presented in this opinion was—May a common pleas judge legally sell the county commissioners an automobile for the sum of \$300.00, such sale being made without advertisement or competitive bidding?

In the last two paragraphs of the opinion it is stated:

"It must be noted that the particular thing which it is sought to prevent in this section is the interest in such contracts on the part of officers of trusts and the first part of the section is an outright prohibition of such interest, the only exception to which prohibition is found in the latter part of the section. Under this exception if such contract be advertised *as provided by law*, the officer may legally be interested in such contract. In all others, as for example where there is no provision for so advertising, he is prohibited from having any interest.

Consistent with the above conclusion, the question involved in your concrete case may be answered in the negative with the further observation that no provision in law for competitive bidding, after advertisement in such case, being made, the further fact that it was advertised or not would not affect the question, as under the laws applicable to such sales and on the facts stated by you, section 12911 prohibits such official from being interested in such purchase, even if an unauthorized or unprovided for advertisement is made."

There is no general statute which provides for advertisement and competitive bidding when fire insurance is to be procured covering county property. In the course of an opinion reported in Opinions of the Attorney General for 1916, volume II, page 1276, it was stated:

"I might add that I know of no provision in law for advertising and receiving bids for fire insurance."

This language of the foregoing opinion was quoted with approval in a later opinion of this office appearing in Opinions of the Attorney General for 1930, volume II, page 1438.

Furthermore, there is no general statute providing for advertisement and competitive bids for the purchase of all real estate and supplies for the use of a county or any public institution or department therein. There are some statutes, however, which expressly or by implication show that advertisement and competitive bidding is required in the purchase of supplies for a county or public institution therein under certain conditions. For instance, section 2354, General Code, provides:

"When the estimated cost of a public building, bridge or bridge substructure or of making an addition thereto or repair thereof does not exceed two hundred dollars, it may be let at private contract without publication or notice."

In other words, advertisement and competitive bidding is not made compulsory when supplies for a county public building, bridge or bridge substructure or for making an addition thereto do not exceed \$200.00.

Also sections 2526 and 2557-3, General Code, provide in part:

Sec. 2526. " \* \* \* The superintendent and matron (of the county home) shall make such purchases as may be authorized by the rules prescribed by the county commissioners. As far as practicable, all supplies shall be purchased *on competitive bids*, except those ordered from the state as required by law \* \* \*."

Sec. 2557-3. “\* \* \* They (the county commissioners of two or more counties establishing a district home) shall appoint a superintendent and conduct the home *in the manner prescribed in the General Code for the management of the county homes*, so far as such laws are applicable.” (Italics the writer’s.)

Attention should also be directed to sections 2435-1, 3135 and 6948-1, General Code. Section 2435-1, General Code, provides:

“The commissioners of any county may, at any time, either before or after the completion of any county building, invite bids and award contracts for supplying such building with light, heat and power, or any of the same, for any period of time not exceeding ten years; but none of the provisions of section fifty-six hundred and sixty of the General Code shall apply to any such contracts.”

In the case of *Light Co. vs. State ex rel. Potter*, 26 C. C. (N. S.) 525, 26 C. D. 501, this section was construed to require the county commissioners to advertise and award a contract for lighting county buildings only after competitive bidding. Of course, the principle of said court decision would apply equally as well for heat and power contracts for county buildings.

Section 3135, General Code, states:

“Before making a contract for the expenditure of money on any structure or improvement *in excess of one thousand dollars, the hospital trustees* (of a county hospital) *shall advertise according to law for bids*, and cause plans, specifications and detailed drawings to be distributed among the bidders.” (Italics and words in parenthesis the writer’s.)

Section 6948-1, General Code, provides:

“Before undertaking the construction, reconstruction, widening, resurfacing, repair or improvement of a road, the county commissioners shall cause to be made by the county surveyor an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment and all other items of cost and expense. If the county commissioners deem it for the best interest of the public they may, in lieu of constructing such work by contract, proceed to construct the same by force account. Where the total estimated cost of the work exceeds three thousand dollars per mile, the commissioners shall be required to invite and receive competitive bids for furnishing all labor, materials and equipment and doing the work, as provided in section 6945 of the General Code, and to consider and to reject the same, before ordering the work done by force account. When such bids are received, considered and rejected, and the work done by force account such work shall be performed in compliance with the plans and specifications upon which the bids were based. The provisions of this section shall apply both to new construction and to repair work.”

With respect to this latter section, a recent act of the legislature (H. B. 14, 90th General Assembly), second special session, passed December 22, 1933), provides for an exemption from the requirement of competitive bidding therein in

so far as civil works projects carried forward under authority of the National Industrial Recovery Act is concerned. Section 1 of such act provides:

"The provisions of section 1197 of the General Code requiring the director of highways to proceed by contract in certain cases in constructing, improving, maintaining and repairing highways and bridges; the provisions of sections 6948-1 and 6948-2 of the General Code requiring county commissioners in certain cases to invite, receive, consider and reject competitive bids for the construction, reconstruction, widening, resurfacing, repairing or improvement of roads before ordering the work done by force account; and the provisions of sections 4678-1 and 4678-2 of the General Code requiring city and village authorities in certain cases to invite, receive, consider and reject competitive bids before proceeding to construct, reconstruct, widen, resurface or repair a street or other public way by force account or direct labor, shall not apply to that class of projects or improvements carried on under the provisions of the national industrial recovery act passed by the congress of the United States on June 13, 1933, which projects or improvements are officially known and designated by the federal emergency administrator of public works as civil works projects."

In my opinion No. 219, rendered March 17, 1933, it was stated in the first paragraph of the syllabus:

"The county commissioners are authorized by section 7214, General Code, to purchase materials for road repairs and construction, and in making such purchases, they are not required to let the contract therefor by competitive bidding."

See also page 3 of the opinion.

In my opinion No. 1998, rendered December 13, 1933, I held, as disclosed by the syllabus:

"County commissioners may, but are not required to advertise for bids before contracting for the furnishing of medical relief and medicines as provided by section 2546 of the General Code."

From the foregoing discussion, it may be concluded that it is illegal for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of real estate, and fire insurance for the use of the county or any one of the counties from which he is elected, when the price of the real estate or premium of any policy of fire insurance exceeds \$50.00. The question of whether or not it is legal for such senator or representative to be interested in a contract for the purchase of supplies for the use of the county or any one of the counties from which he is elected may not be categorically answered. If there is no provision of law requiring advertisement and competitive bidding for particular "supplies," then it would not be illegal for the senator or representative to be interested in a contract for the purchase of the "supplies," exceeding \$50.00, for the use of the county or any one of the counties from which he was elected, providing the contract was awarded after such advertisement and competitive bidding was had. On the other hand, if there is no provi-

sion in the law requiring advertisement and competitive bidding for the particular "supplies," then it would be illegal for a senator or representative to be interested in a contract for the purchase of "supplies" over \$50.00 for the use of the county from which he was elected, even if advertisement and competitive bidding was had before the contract was let.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

2342.

SEWER—MUNICIPALITY AUTHORIZED TO REPAIR PRIVATELY OWNED SEWER LOCATED IN PUBLIC STREETS—TITLE NOT THEREBY VESTED IN MUNICIPALITY.

*SYLLABUS:*

*Where a sewer, owned by private persons and located in the public streets of a municipality, becomes out of repair to the extent that it becomes dangerous to the public health or constitutes a nuisance, such municipality has the authority to purchase materials and make the necessary repairs to abate such nuisance, and such action will not operate to vest title to such sewer in such municipality.*

COLUMBUS, OHIO, March 5, 1934.

HON. GEORGE N. GRAHAM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication, which reads as follows:

"The Council of the Village of Highland Park which is in Stark County, and which was incorporated only a few years ago, never accepted the sewer system which was installed by a real estate concern which laid out the allotment, which later on became Highland Park Village.

The Village Council would now like to appropriate a sufficient amount of money to purchase materials to repair this sewer, the work to be done as a CWA project.

The question is: Would the Village of Highland Park have the legal right to appropriate a sufficient amount of money to purchase materials for repair on a sewer that does not belong to the Village, but used by the residents of the Village?

Another question is: Would the act on the part of the Village Council in making repairs on a sewer which they do not own constitute an acceptance by the Village which would place the Village in a position of keeping the sewer system in repair at any future time?"

I assume that the sewer in question is located in duly dedicated streets in the village and is not on private property. If this sewer was constructed prior to the time that the streets, in which it is located, were dedicated to the public, there is some question as to whether, by such dedication and acceptance thereof, the title to such sewers did not pass to the public. *Kinney, et al., vs. Cincinnati, et al.*, 6 N. P. (N. S.) 137. However, it is not necessary to consider this question