

The only statutory authority for a hearing upon a road improvement by township trustees, such as was held, is contained in Section 3298-7, General Code. This hearing may be had by township trustees only after taking jurisdiction of a road improvement, which jurisdiction may be taken in one of two ways, either upon the filing of a petition as provided in Section 3298-2, General Code, or upon the unanimous vote of the trustees as provided in Section 3298-5, General Code. In the instant case no petition was filed and the trustees proceeded unanimously under Section 3298-5. There is clearly no statutory authority vested in a board of township trustees to grant a rehearing upon objections to a road improvement upon the filing of a motion by interested parties, nor is there, for that matter, any statutory authority whereby a board of township trustees is vested with authority to grant a hearing in such matters upon the filing of a motion by interested parties. As previously indicated, this hearing may be only granted pursuant to the unanimous vote of the township trustees or pursuant to the filing of a petition for the improvement.

There is no question but that a motion filed by the taxpayers interested, asking for such rehearing, while if no legal import and not binding upon the board, might cause the members of the board to desire to reconsider the entire matter. In such event the board should, in the absence of a petition, by unanimous vote pass a resolution redeclaring the necessity of the improvement and publish a notice of such rehearing as was done theretofore in accordance with the provisions of Section 3298-7, General Code.

In view of the foregoing, it is my opinion that when a board of township trustees has, by majority vote, ordered that a road improvement should not be made, after hearing and determining claims for compensation and damages on account of property taken for such improvement, as provided in Section 3298-12, General Code, in the event the taxpayers interested in such improvement desire a rehearing upon the matter of the improvement, such board may, in the absence of a petition, by unanimous vote pass a resolution redeclaring the necessity of the improvement, and publish a notice of such rehearing as was done theretofore in accordance with the provisions of Section 3298-7, General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

965.

LEGAL COUNSEL—EMPLOYED BY VILLAGE—PROHIBITED FROM SELLING FIRE INSURANCE TO SUCH MUNICIPALITY.

SYLLABUS:

Legal counsel provided by a village council for the village, or any department, or official thereof may not lawfully, during the time of his employment, sell fire insurance to the village.

COLUMBUS, OHIO, October 2, 1929.

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

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

“Section 12910, G. C., reads:

'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.'

Section 3808, G. C., prohibits an officer of a corporation from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation.

Question: May an attorney employed by a village under the provisions of Section 4220, G. C., for specified legal services, legally sell insurance to such village?"

Under "Powers" of villages, Section 4220, General Code, reads as follows:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

In answering your inquiry, it becomes important to determine in the first place whether or not, when legal counsel is provided for a village by authority of Section 4220, supra, that counsel is an officer of the corporation or whether the position of legal counsel under those circumstances is an "office of trust or profit by election or appointment."

In cities governed by general laws provision is made by Section 4303, General Code, for the election of a "solicitor" for a term of two years, thus making such "solicitor" an officer of the corporation. His duties and powers are enumerated in Sections 4305 et seq., of the General Code, wherein it is provided that he shall prepare all contracts, bonds and instruments in writing in which the city is concerned, serve as legal counsel and attorney for the several directors and officers of the corporation, act as prosecuting attorney in the police or mayor's court, prosecute or defend actions in court in which the city is interested when requested so to do by council, render opinions to the officers of the corporation upon request, apply for injunctions in the name of the corporation under certain circumstances and apply for forfeitures or specific performance of obligations and contracts made in behalf of the corporation, in proper cases.

The statute authorizing a village to employ legal counsel for the village or any department or official thereof, does not refer to such counsel as the solicitor of the village, nor is it provided by statute what the duties and responsibilities of such legal counsel are. No public functions are enumerated with which such legal counsel is clothed, as is done with respect to the solicitor in a city.

It may be, although it is unnecessary to so decide, that a village council in its legislation providing for legal counsel for the village, especially in view of the home rule powers of a municipality as granted by Article XVIII, Constitution of Ohio, may charge such legal counsel with the same powers and responsibilities and clothe him with the same public functions, to be exercised in the interests of the public, as are provided by statute with respect to a solicitor in a city. The mere hiring of him as legal counsel without charging him with public responsibilities either in specific terms or by necessary implication, would not, in my opinion, invest in him the same relation to the village as is borne by a solicitor to the city wherein he was elected as such.

Merely providing legal counsel would not, in and of itself, place the final responsibility on such legal counsel for the preparation of contracts, bonds, or other

instruments in writing in which the village is concerned. The final responsibility for the preparation of such instruments would be on the officials of the village who are charged with their preparation, and the legal counsel's relationship thereto would be merely advisory. Neither would such legal counsel, without being specifically empowered to do so, be authorized to apply for injunctions in the name of the village or for forfeitures, or specific performance of obligations and contracts made in behalf of the village. In short, the legal counsel of a village provided by authority of Section 4220, General Code, is a mere adviser unless by the terms of his employment he is clothed with public functions to be exercised independently in the interests of the people.

In a recent case decided by the Supreme Court, *Wright vs. Clark, et al.*, 119 O. S., 462, reported in Ohio Bar, issue of January 29, 1929, Section 3808, General Code, was construed with reference to its application to an engineer of a village. In the course of his opinion in this case, Chief Justice Marshall said:

"Section 3808, General Code, should not be construed to apply in strictness only to persons who hold an office. The language of that section refers to boards and commissions as well as members of council and officers. It was the purpose of the Legislature in that enactment to reach all persons holding positions in a city or village government who are charged with official responsibility in conducting an economic administration of corporate affairs, and to prohibit them from having any interest in the expenditure of corporate funds. We must therefore look to the spirit as well as the letter of that statute. It is a part of such construction to determine what character of a member of a board or officer is included in the ban on having any interest in the expenditure of moneys of the municipality. It should be construed with reference to the occasion and necessity for its enactment, the evils existing or threatened, and the remedy which the statute is designated to provide. It should be so construed as to advance its object by suppressing the mischief and securing the benefits intended. The statute will be nullified if, by construction, it should be held not to reach an engineer, who is charged with the preparation of plans, specifications and estimates, with the supervision and letting of contracts, and with the inspection of quantities and qualities of materials used, and the approval and payment of estimates."

The first and second branches of the syllabus of the above case are as follows:

- "1. The engineer of a city or village is an officer within the meaning and intent of Section 3808, General Code, and therefore inhibited from becoming interested in the expenditure of money of the corporation other than payment of his fixed compensation.
2. Sections 4364 and 4366, General Code, create the office of engineer of a municipality and define the powers and duties of such office."

The above action was a taxpayers' suit against Bayard T. Wright to recover the amount paid to said Wright for cinders and other supplies which he had sold to the village of Bedford. It was alleged that he was the village engineer of the village of Bedford and that the office of village engineer was a public office within the meaning of Section 3808, General Code. It appears that the said Wright had been engaged to perform engineering services for the village by resolution adopted by the village council which read as follows:

"Resolution No. 645.

A resolution providing for the employment of B. T. Wright, as village

engineer, for the village of Bedford, State of Ohio, for the years 1924 and 1925.

Be it resolved by the council of the village of Bedford, State of Ohio.

Section 1. That B. T. Wright, be and he is employed as engineer for said village for the years 1924 and 1925, upon the following terms and conditions. * * * "

Then follows an enumeration of the nature of the work to be performed by the said Wright for the village of Bedford, including the preparation of plans, specifications, estimates, profiles, for water improvements, pavements, sewer and other contract work and for inspection and supervision of said work. The court said :

"The only legal question presented by this error proceeding is whether all these facts and circumstances, in connection with the resolution of council, constituted him as an official of the village."

Reference is made to Sections 4364 and 4366 of the General Code of Ohio, in which authority is given to municipalities to employ an engineer. In Section 4366, General Code, the civil engineer of a municipality is spoken of as an "officer."

The court said that in determining whether Wright was an officer, consideration must be given to the resolution of council in which he was designated as engineer of the village; to the character of service which his employment demanded; to the duties and functions which he in fact performed; to the terms of Section 4364 and 4366 of the General Code, wherein an engineer of a municipality is referred to as an officer and the duties and responsibilities of such officer are defined. The court also observed that while there was a distinction between an office and a contract of employment, that distinction could not be decisive of the question in that case. Every public office has the characteristics of a contract, including parties, consideration and subject-matter. Reference is made to the definition of an office as stated by Judge Spear in the case of *State, ex rel., vs. Brennan*, 49 O. S. 33, 38, in which he said :

"It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office."

Reference is also made to the case of *State ex rel. Attorney General, vs. Jennings*, 57 O. S. 415, in which Judge Minshall discussed the essentials of a public office and reached the conclusion that a public officer is one who exercises in an independent capacity a public function in the interest of the people by virtue of law, which is only saying in another form that he exercises a portion of the sovereignty of the people delegated to him by law.

In view of the provisions of the statute, the character of the services rendered by Wright, the terms of the ordinance providing for his employment, the fact that in determining whether a contract for street improvements has been substantially complied with, he acts in the exercise of quasi judicial functions and is peculiarly the person who stands between the village and the threatened impositions of those who have dealings with the village in matters of public work, the court said :

"Tested by the standards of common law definitions, Wright must be held to fully measure up to the essential elements of a public officer."

In view of what has been said, it seems clear that legal counsel provided by a village council, by authority of Section 4220, General Code, is not necessarily such an officer as is referred to in Section 3808, General Code. He may, however, be clothed by the terms of his employment with such independent sovereign duties and powers as to bring him within the terms of the statute as interpreted by the Supreme Court in the Wright case, supra. Unless he is constituted such a person by the terms of his employment, he could lawfully sell insurance to the village wherein he is employed as legal counsel, so far as the prohibition contained in Section 3808, General Code, is concerned.

However, whether he falls within the terms of Section 3808, General Code, or not, he clearly is an employe of the council of the village in any case, and would be prohibited from selling insurance to the village by reason of the terms of Section 12910, General Code.

The terms of said Section 12910, General Code, will be more intelligible if reference is had to its history. Prior to the codification of 1910, Section 6969, Revised Statutes, read as follows:

“It shall be unlawful for any person holding any office of trust or profit in this state, either by election or appointment, or any agent, servant or employe of such officer, or of a board of such officers to become directly or indirectly interested in any contract for the purchase of any property, supplies or fire insurance for the use of the county, township, city, village, hamlet, board of education or public institution with which he is connected. And it shall be unlawful for any such person, agent, clerk, servant or employe to become interested in any contract for the purchase of property, supplies or fire insurance for the use of any county, township, city, village, hamlet, board of education or public institution with which he is (not) connected when the amount of such contract exceeds the sum of fifty dollars, unless the contract is let on competitive bids, duly advertised as provided by law. Any person violating the provisions of this act shall be imprisoned in the penitentiary not more than ten years nor less than one year.”

The above quoted Section 6969, Revised Statutes, was enacted in 1900 (94 O. L. 291). It retained its original form without amendment until February 14, 1910, the time of the passage of the act adopting the codification of the committee appointed by the General Assembly for that purpose. In the General Code, then adopted, Section 6969, Revised Statutes, was somewhat changed in its phraseology and was divided into what is now Sections 12910 and 12911, General Code, which sections have not since been changed.

It will be noted that Section 6969, Revised Statutes, provided that it shall be unlawful for any person holding any office of trust or profit in this State, either by election or appointment, or *any* agent, servant or employe of such officer or a board of such officers to become directly or indirectly interested in any contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, hamlet, board of education or public institution with which he is connected, whereas, upon codification, the language was changed to read:

“Whoever holding an office of trust or profit by election or appointment, or *as* agent, servant or employe * * *

Upon comparison of the language of the former statute and the statute as codified, it will be observed that the word “any” as used in the former statute was changed to “as”. I know of no reason why this was done. In so far as this change in language

might affect the meaning of the statute, I am of the opinion that it should be construed as though the word "any" had not been changed to "as". Substituting the word "any" for the word "as" in Section 12910, General Code, it clearly appears that any employe of the village council may not lawfully, during the time of his employment, sell fire insurance to the village.

Respectfully,
GILBERT BETTMAN,
Attorney General.

966.

SALE OF NOTES—ISSUED IN ANTICIPATION OF SALE OF GENERAL OR SPECIAL ASSESSMENT BONDS—WHERE PREMIUMS AND ACCRUED INTEREST PAID.

SYLLABUS:

Premium and accrued interest, received from the sale of notes issued in anticipation of the sale of either general or special assessment bonds, should be paid into the sinking or bond retirement fund of the subdivision.

COLUMBUS, OHIO, October 2, 1929.

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

GENTLEMEN:—Your letter of recent date is as follows:

"Section 5625-10, G. C., 112 O. L. 395 and Section 2293-29, G. C., 112 O. L. 376, provide that premiums and accrued interest received from the sale of bonds or notes shall be paid into the sinking or bond retirement fund of the subdivision. The last sentence of Section 2293-29, G. C., reads:

'If anticipatory notes have been issued, the moneys remaining from the proceeds of the sale of such notes, and money from the sale of bonds, shall be used for the purpose of paying such anticipatory notes.'

When municipal corporations have bonds outstanding which were issued prior to January 1, 1922, the sinking and bond retirement funds are under the control of a board of sinking fund trustees who are not charged with the duty of paying notes and interest thereon, by Sections 4506 to 4522, G. C.

It is the practice in many municipal corporations to pay over to the sinking fund trustees, premiums and accrued interest received from the sale of notes issued in anticipation of the sale of general bonds and in anticipation of the sale of special assessment bonds. When bonds are eventually sold, a sufficient amount of the proceeds to pay the notes and interest, less the accrued interest previously paid over, is transferred to the sinking fund trustees and the notes paid off by said trustees.

This practice leads to complications in determining the cost of an improvement which is to be assessed in whole or in part, against the abutting or benefited properties, in that the amount of premium received from the sale of the notes and the accrued interest is not deducted from the cost of the improvement, which includes interest on the notes in full and interest on the bonds.

Question 1. Is premium received from the sale of notes issued in anticipation of the sale of general bonds to be paid into the bond retirement fund, which is under the control of a municipal board of sinking fund trustees?

Question 2. Is interest received from the sale of notes issued in antic-