

"All conveyances of real estate, or any interest therein, sold on behalf of the state, in pursuance of law, shall be drafted by the Auditor of State, executed in the name of the state, signed by the Governor, countersigned by the Secretary of State, and sealed with the great seal of the state. The Auditor thereupon must record such conveyances, in books to be kept by him for that purpose, deliver them to the persons entitled thereto, and keep a record of such delivery, showing to whom delivered, and the date thereof."

As above indicated, the only question that I am deciding in this opinion is that with respect to your authority to sell to said applicants the right, title and interest of the State of Ohio in said lots, and I am not passing on the question as to whether such sale should be made for the purchase price tendered in said application or otherwise.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

1942.

MEMBER—BOARD OF EDUCATION—VOTING FOR SON AS TEACHER—
 SUBJECT TO PROSECUTION UNDER SECTION 12932, GENERAL
 CODE—CONTRACT VALID.

SYLLABUS:

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.

COLUMBUS, OHIO, June 4, 1930.

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

GENTLEMEN:—I am in receipt from you of the following inquiry:

"A member of a board of education participates in the employment of his son as a teacher in the schools over which the board had control, by voting for his son at a meeting held May 5, 1928; and again on May 4, 1929, such member of the board made a motion to employ his son as a teacher and voted for such employment, all in violation of the provisions of Section 12932 of the General Code.

Question: May the amount of money paid such teacher be recovered upon a finding for recovery made by an examiner from this department?"

Section 12932, General Code, 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."

It may be generally stated that a contract in violation of the prohibition of a statute is unlawful and void and will not be enforced. It has been said that the Legislature can and does define the public policy of the State. Any contract in contravention of a declaration of the Legislature in the form of a statute would be against public policy. *Hard vs. Harris*, 1 O. C. C. (N. S.) 113.

The law is supreme, and no contract between individuals can make it lawful to do that which the statute positively commands shall not be done. *Robbins vs. Hennessey, et al.*, 86 O. S. 181. There are exceptions to the rule, however, and where the law, which prohibits the contract, at the same time also limits the effect or declares the consequences which shall attach to the making of it, the general rule that the contract is invalid, does not apply. *Rossmann vs. McFarland*, 9 O. S., 369.

There is a wide difference of opinion among the courts of this country upon the question of whether the mere infliction of a penalty for the commission of an act is equivalent to an express prohibition of such act as to make a contract relating thereto illegal and unenforceable.

The courts of Ohio adhere to the doctrines that the effect of the imposing of a penalty for the doing of an act or the entering into of a contract depends on the intent of the Legislature. The mere infliction of a penalty for doing an act does not in every instance make a contract relating to the act illegal. *Strong vs. Darling, et al.*, 9 Ohio, 201; *Bloom vs. Richards*, 2 O. S., 387; *State vs. Buttes*, 3 O. S., 309; *Vining et al., vs. Bricker*, 14 O. S., 331; *The Warren People's Market Company vs. Corbett & Sons*, 114 O. S., 126; *The Commercial Credit Company vs. Schreyer*, 120 O. S., 568.

The rule is stated in the headnote of the case of *State vs. Executor of Buttes*, supra:

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

And again, in *Vining et al. vs. Bricker*, it is said in the first branch of the syllabus:

"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."

Some conception may be had of the difficulties to be met in determining in any case whether a statute declaring it to be unlawful to do certain acts renders contracts made in violation thereof illegal, by a consideration of the case of the *Commercial Credit Company vs. Schreyer*, 120 O. S., 568. The Supreme Court in this case overruled two former decisions recently rendered by it, to-wit; *Ohio Farmers' Insurance Company vs. Todine*, 111 O. S., 274, and *Helwig vs. Warren State Bank*, 115 O. S., 182, and held as stated in the second and third branches of the syllabus:

"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 accom-

panied by delivery of possession, is nevertheless a valid contract between the parties thereto."

In the case of *The Warren People's Market Company vs. Corbett & Sons*, 114 O. L., 126, it is held:

"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."

The provisions of Section 12932, General Code, were written into the law in 1889. At that time there was in force Section 6875, Revised Statutes, which provided in substance, that a member of a board of education who accepted or received any compensation for his services as such member, except as clerk or treasurer of such board, should be deemed guilty of embezzlement of the amount so received, and punished accordingly. The Legislature then enacted an act entitled:

"An Act supplementary to Section 6975 of the Revised Statutes of Ohio."

Section I of the act read as follows:

"Be it enacted by the General Assembly of the State of Ohio, That the following section be enacted as supplementary to Section 6975 of the Revised Statutes of Ohio, with sectional numbering as follows:

Sec. 6975a. It shall be unlawful for any person to offer or give, directly or indirectly, any reward or consideration, or make any present or reduction in price, to any person employed in any of the public schools of this state, or to any officer having any authority or control over the same for favoring, recommending or advocating the introduction, adoption or use, in the school in which such person is employed, or over which such officer has any authority or control, of any text-book, map, chart, globe or other school supplies, or to induce him so to do; and it shall be unlawful for any such employe, or officer, to accept, or to offer or agree to receive or accept any reward, consideration, present, gift or reduction in price for so doing; and it shall also be unlawful for any local director or member of a board of education to vote for, or participate in the making of any contract with any person as a teacher or instructor in any of the public schools of this state to whom he is related as father or brother, or to act in any matter in which he is pecuniarily interested, or to receive, or offer to accept or receive any reward or gain for any official act. Any person violating any of the foregoing provisions, shall, upon conviction, be fined not less than twenty-five dollars, and not more than five hundred dollars, or be imprisoned not more than six months, or both." (86 O. L., 207).

In 1910, the Codifying Commission, without making any material change in the phraseology of Section 6975a of the Revised Statutes, subdivided said section, and made therefrom, Sections 12931 and 12932, General Code.

In Page on Contracts, Section 688, it is said:

"If the statute which forbids the act and imposes the penalty discloses a legislative intent to provide completely for its violation, the courts do not

add an additional penalty which will affect other persons often innocent, by making contracts void."

In support of the text quoted above, the author cites the cases of *Rossman vs. McFarland*, 9 O. S., 369; *Vining et al. vs. Bricker*, 14 O. S., 331; *Todd vs. Wick*, 36 O. S., 370.

The statute in question, Section 12932, General Code, was enacted as a penal statute. The General Assembly, in enacting it, specifically stated that it was enacted as a supplementary statute to a penal statute then in force. Its provisions are directed against the person who brings himself within its provisions and not against the acts which he may perform in violation of the statute. Its specifications, as to what is unlawful, are acts of a local director or member of a board of education in voting for or participating in the making of certain contracts, or acting in a matter in which he or she is pecuniarily interested and not the contracts so made or the matters acted upon. In fact the language of the statute is susceptible of being construed as an acknowledgment on the part of the Legislature that certain contracts named therein could be made, but if made, certain persons who participate in the making shall be subject to the penal provisions there enacted. At any rate, the language of the statute does not, in terms, render a contract with a teacher or instructor in the public schools, the making of which was participated in or voted for by a father or mother, brother or sister, son or daughter of the person with whom the contract was made, invalid or illegal, but simply makes it unlawful for such a member of the board of education to vote for or participate in the making of such a contract and imposes a penalty therefor. If the Legislature intended such a contract was to be invalid or illegal, that intent is not expressed and must be gathered from the language of the statute by reading something into it that is not there.

Although this statute has been considered in former opinions of this office, the question here involved has not been discussed in any previous reported opinions of the office. It has never been held, so far as any reported opinions of this office are concerned or any reported decision of any court in Ohio, that the Legislature intended by the imposition of the penalty imposed by the statute, to thereby render contracts made as a result of a violation of the statute invalid and illegal.

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.

In view of the authorities herein discussed, the history of the legislation and the terms of the statute itself (there being no direct provision in the statute making the transactions growing out of a violation thereof void), I am of the opinion that the intent of the Legislature in enacting the statute was that the penalty provided by the statute for failure to observe it is all that is to be exacted, and that a contract made by a board of education with a teacher or instructor in the public schools, although the making thereof was participated in by a member of the board of education in violation of Section 12932, General Code, is, if made in all other respects according to law, a good and valid contract. That being the case there of course could be no recovery for payments made under such contract.

It should be observed that even if a contract with a teacher or instructor in the public schools voted for or participated in by a member of a board of education in violation of Section 12932, General Code, should be held to be invalid, it is more than probable that payments made under said contract would not be recoverable, under

the doctrine of the case of *State ex rel. Hunt, Prosecuting Attorney vs. Fronizer*, 77 O. S., page 7. See also opinions of the Attorney General, 1920, page 1122.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1943.

APPROVAL, BONDS OF BROWN TOWNSHIP RURAL SCHOOL DISTRICT,
CARROLL COUNTY—\$4,100.00.

COLUMBUS, OHIO, June 5, 1930.

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

1944.

APPROVAL, BONDS OF FRANKLIN TOWNSHIP RURAL SCHOOL DISTRICT,
HARRISON COUNTY—\$5,000.00.

COLUMBUS, OHIO, June 5, 1930.

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

1945.

DISTRICT ADVISORY COUNCIL—GENERAL HEALTH DISTRICT—MA-
JORITY OF SUCH COUNCIL MUST BE PRESENT TO TRANSACT BUSI-
NESS.

SYLLABUS:

A majority of a district advisory council of a general health district, such as is provided for in Section 1261-18, General Code, is necessary to constitute a quorum to transact business.

COLUMBUS, OHIO, June 5, 1930.

HON. H. M. MILLER, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“At a recent meeting of the district advisory council of the general health district of this county, eight members of an entitled representation of seventeen members were present. Those present at said meeting elected a member of the district health board. This meeting was held pursuant to Sec. 1261-18, G. C.