2420.

APPROVAL, BONDS OF THE VILLAGE OF CHESAPEAKE, LAWRENCE COUNTY, OHIO—$17,517.50.

COLUMBUS, OHIO, August 4, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

2421.

BRIBE—FURNISHING MONEY TO A DETECTIVE TO ENTRAP COUNTY OFFICER NOT CRIMINAL—MEIGS COUNTY CASE.

SYLLABUS:

1. *Where a person furnished money to a detective to be paid to a county official as a bribe, such money actually being paid as a bribe by the detective to such county official, all of such acts being done for the purpose of entrapping the county officer, no crime is committed by the person so furnishing such money.*

2. *Where a member of a board of county commissioners, which is in the market for and is negotiating for the purchase of sand and gravel, accepts money from a detective, representing himself to be the agent of a company engaged in the business of selling sand and gravel, for the purpose of influencing such commissioner to purchase gravel from such company, the fact that such company was a fictitious company would not be a defense on an indictment for accepting a bribe, under Section 12823 of the General Code.*

COLUMBUS, OHIO, August 4, 1928.

HON. D. H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads:

> "The Meigs County Grand Jury now in session, desires the following information:
>
> 1: Can the Grand Jury indict one who has furnished money to a detective with which to trap a county official into accepting a bribe?
>
> 2: Can a county official be indicted under the following circumstances:
>
> The Howell Sand & Gravel Company is a fictitious company; a detective representing himself to be an agent of that company made a contract with the County Commissioners setting forth that 2,800 yards of sand and gravel could be purchased from the said Howell Sand & Gravel Company; and the detective as such agent paid to the county official $240 for approving this contract."

1. In your first question you ask if the grand jury now in session in Meigs County *can* "indict one who has furnished money to a detective with which to trap a county official into accepting a bribe." From your second question and from the statement of the detective submitted with your communication, which for the purpose of this opinion will be assumed to be a true statement of the facts as they actually occurred, it appears that the money furnished to the detective was actually paid by the detective to the county official. I assume, therefore, that by your first question you mean to ask: Is a crime committed by one who furnishes money to a detective for the purpose of having such money paid to a county official as a bribe, such money actually being paid as a bribe by the detective to such county official, all of said acts being done for the purpose of entrapping the county official?

The section of the General Code defining the crime of bribery is Section 12823, which reads as follows:

> "Whoever corruptly gives, promises or offers to a member or officer of the general assembly, or of either house thereof, or to a state, judicial or other officer, public trustee, or an agent or employe of the state of such officer or trustee, either before or after his election, qualification, appointment or employment, any valuable thing, or corruptly offers or promises to do any act beneficial to such person to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him, and whoever, being a member of the general assembly or a state or other officer, public trustee, agent or employe of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, solicits or accepts any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Considering only, and analyzing, the pertinent parts of the first portion of the above section, it will be seen that whoever *corruptly* gives, promises or offers to an officer, either before or after his election, qualification, appointment or employment, any valuable thing, to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him shall be punished as the statute prescribes. To sustain a conviction under the above quoted portion of the section under consideration, therefore, the State must allege and prove beyond a reasonable doubt

(1) That the accused gave, promised or offered,

(2) To an officer, either before or after the officer's election, qualification, appointment or employment,

(3) Any valuable thing,

(4) To influence such officer with respect to his official duty, or to influence such officer's action, vote, opinion or judgment, in a matter pending, or that might legally come before him, and

(5) That such acts were done *corruptly*.

It is a fundamental rule that there can be no crime without an evil, that is, a criminal intent. Mr. Bishop at Section 287 of his scholarly work on Criminal Law, states the rule thus:

> "There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness. Neither in philosophical

speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist."

An Ohio case showing the application of this rule, and one that is particularly pertinent here, is the case of *Backenstoe* vs. *State*, decided by the Circuit Court of Franklin County at the January Term, 1900, and reported in 19 O. C. C. 568. The headnote reads:

"A person who encourages or counsels persons about to commit a crime to do so in order that they may be discovered and punished, is not an accessory before the fact, but merely a feigned accomplice, if in so doing he honestly intended that they should be discovered and punished."

The opinion in this case is, for the most part, a review of many authorities and reads in part as follows:

"In *People* vs. *Collins*, 53 Cal. 185, Collins was convicted of burglary. The evidence showed that he had requested one Parnell to commit the burglary and to divide the money; that Parnell immediately informed the sheriff, who advised him to play the part of feigned accomplice; he did so, and after the money had been delivered to Collins, notified the sheriff and Collins was arrested with the money in his possession, and it was held: 'That, inasmuch as Parnell alone entered the building, and did so without felonious intent, there was no burglary committed and therefore Collins could not have been a privy to a burglary.'

In the per curiam it is said: 'If the act of Parnell amounted to burglary, the sheriff who counseled and advised it was privy to the offense; but no one would seriously contend, on the foregoing facts, that the sheriff was guilty of burglary. The evidence for the prosecution showed that no burglary was committed by Parnell for the want of a felonious intent, and the defendant could not have been privy to a burglary unless one was committed.'

In *Campbell* vs. *Commonwealth*, 84 Pa. St. 187, (a Molly Maguire case) it is held: 'A detective who joins a criminal organization for the purpose of exposing it, and bringing criminals to punishment, and honestly carries out that design, is not an accessory before the fact, although he may have encouraged and counseled parties who were about to commit crime if in so doing he intended that they should be discovered and punished, and his testimony, therefore, is not to be treated as that of an infamous witness.'

In *Commonwealth* vs. *Hollister*, 157 Pa. St. 13, it is held: 'A person who joins others in the commission of a crime for the purpose of exposing it and bringing criminals to punishment, and honestly carries out that design, is not an accessory before the fact, although he may have encouraged and counseled parties who were about to commit crime, if in doing so he intended that they should be discovered and punished; and his testimony, therefore, is not to be treated as that of an infamous witness.' "

In the case of *Licciardi* vs. *The State of Ohio*, 18 Ohio App. 118, decided by the Court of Appeals for Williams County, on February 25, 1924, it was held:

"A detective who joins with others in the commission of a crime for the purpose of securing their arrest and conviction is merely a feigned accomplice, and is not subject to punishment even although he so far cooperated as to be guilty had his intention been the same as theirs."

In the opinion Judge Richards said:

"He also claims to be entitled to immunity from prosecution by reason of the common law. Generally speaking, there can be no crime without an evil intent, and this rule is well stated in 1 Bishop on Criminal Law (9 Ed.), Section 287, as follows:"

Here follows a part of Section 287, which I have quoted above in full.

"The cases in Ohio on the subject of insanity under the common law are not numerous, but one directly in point is *Backenstoe* vs. *State*, 19 C. C. 568, a decision which has stood unquestioned for nearly a quarter of a century. That case holds that one who encourages or counsels persons about to commit a crime to do so in order that they may be discovered and punished is merely a feigned accomplice and is not guilty if he acted in good faith, honestly intending that they should be discovered and punished. To the same effect is *Price* vs. *People*, 109 Ill., 109.

The principle of immunity from prosecution under the common law is well stated in 1 McClain on Criminal Law, Section 117, in the following language:

'Another illustration of the doctrine that the intent determines criminality is found in the rule that a detective who joins with persons in the commission of a crime for the purpose of securing their arrest and conviction is not punishable, although he so far cooperates as to be guilty if his intention had been the same as theirs.'

The doctrine thus stated is followed in *State* vs. *Zorphy*, 78 Mo. App., 206.

These authorities, and others of like import, apply concretely the principles stated in Bishop on Criminal Law already quoted. The magistrate in the trial of Licciardi brushed aside as immaterial and unworthy of consideration testimony which was offered tending to show immunity, and in so doing committed prejudicial error.

A careful reading of the evidence in this case convinces the court that the judgment is clearly and manifestly against the weight of the evidence. Indeed it is so clearly against the weight of the evidence that we quote with approval from *Backenstoe* vs. *State*, supra, the following:

'The case is almost without a precedent, and so strange does it seem upon the facts that Backenstoe could have been indicted and convicted, and sentenced, as to induce us to doubt the evidence of our senses and to read the record a second time.'

That statement, with the name of 'Backenstoe' changed to 'Licciardi' accurately states the condition of the case at bar.' "

The elements necessary to be proved on an indictment for bribery are well stated in the case of *State* vs. *Davis*, 90 O. S. 100, the first branch of the syllabus of which reads:

"Where an indictment charges the solicitation of a bribe, *it is necessary for the state to plead and prove the specific corrupt intent required by the statute, to-wit, 'to influence him with respect to his official duty, action, vote,' etc.*" (Italic the writer's.)

From the above discussion and authorities it is manifest that, with reference to the person about whom you inquire in your letter, to warrant the returning of an indictment, the evidence should show that the persons concerned in giving the bribe

did it *unlawfully and corruptly* in order to influence the public official with respect to his official duty, action, vote, etc.

Though the word "corruptly" scarcely needs defining, the following definitions may be helpful.

Words and Phrases, Vol. 2, page 1630 defines it as follows:

> "The word 'corruptly' imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person."

The same authority also gives the following definition, citing *Worsham* vs. *Murchison*, 66 Ga, 715, 719, as authority therefor:

> "In law, 'corruptly' means more than mere illegal conduct, and implies moral turpitude and intentional fraud. It is synonymous with 'actual and intentional wrongdoing' or 'wilful and corrupt dealing.' "

Judge Shauck in the case of *The State of Ohio* vs. *Johnson*, 77 O. S. 461, 467, said of the meaning of the word:

> "It is quite in accord with the views of all the lexicographers to say 'corruptly imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or to some other person.' "

It would seem clear therefore, and it is my opinion, that if the evidence goes no farther than to show that the money was furnished the detective to entrap the official suspected of taking bribes, no crime was committed by the person furnishing the money, for the reason that the acts of such person were not unlawfully and corruptly done. From what you say, the act of the person to whom you refer, in giving the money to the detective, was for the purpose of aiding the detective to apprehend one suspected of criminal conduct. Such party was therefore only a feigned accomplice, his acts being done with the motive of discovering and punishing the officer, and without an evil or criminal intent.

Specifically answering your question, as re-stated at the beginning of this opinion, it is my opinion that where a person furnishes money to a detective to be paid to a county official as a bribe, such money actually being paid as a bribe by the detective to such county official, all of such acts being done for the purpose of entrapping the county officer, no crime is committed by the person so furnishing such money.

2. This brings me to a consideration of your second question. The second part of Section 12823, General Code, above quoted, so far as here applicable, provides that whoever, being an officer, either before or after his election, qualification, appointment or employment, solicits or accepts any valuable or beneficial thing to influence him with respect to his official duty, *or* to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him, shall be punished as set forth in the section.

The elements of the offense here defined are:

(1) That the accused was an officer;

(2) That either before or after his election, qualification, appointment or employment, such accused solicited or accepted any valuable or beneficial thing.

(3) To influence him with respect to his official duty, *or* to influence his action, vote, opinion or judgment, in a pending matter, or one that might legally come before him.

The gravamen of the offense of bribery is the corruptly receiving of anything of value to influence official action. As stated by Bishop at Section 86 of his work on Criminal Law:

> "The gist of the offense seems to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative or judicial * * *."

Since, therefore, the offense of bribery is the unlawful and corrupt acceptance by an officer of some valuable or beneficial thing, given for the purpose of influencing him in the performance of his public duty, the fact that the Gravel Company, which, it was represented to the officer, would furnish the road material, was a fictitious company would be no defense. The materials agreed to be purchased might or might not be furnished. Likewise the contract might be void and unenforceable, still the official, if otherwise guilty, may be lawfully convicted of accepting a bribe.

In McClain on Criminal Law, Vol. II, page 117, it is said:

> "A police officer who accepts money for his promise not to arrest any one of a certain class of offenders is guilty under a statute prohibiting the receiving of a bribe by any executive officer in a matter which 'may be brought before him in his official capacity.' It need not be shown that an offense was committed and that the officer failed to arrest. Thus, it is not essential that one who attempts to secure an office by bribery should be eligible to the office. The gravamen of the offense is the bribery. So it is an indictable offense at common law to offer a bribe to a justice of the peace, corruptly to decide a suit not then pending and which in fact was never instituted, although the bribe was not accepted. So it is criminal for an officer to receive a consideration to use his position to secure the release of property from seizure. Similarly a police officer is guilty of receiving a bribe if he allows a prisoner to escape for a consideration, although the arrest and custody are illegal."

In the case of *Glover* vs. *State*, 109 Ind. 391, 10 N. E. 282, involving an indictment for bribery under a statute similar to the one here involved, the court held:

> "It is not material to such a prosecution whether the contract was in writing, and such a one as could have been enforced or not; the question being, not whether the accused made a contract binding upon the township, but whether he accepted a bribe to influence his official conduct."

In the opinion the court said as follows:

> "As we understand the brief of appellant's counsel, three objections, and only three, are urged to the indictment.
>
> The first is that there is no statement of the kind of furniture purchased; that the terms of the contract are not specifically stated; that hence it is not shown how or wherein appellant was bribed or influenced; and that it does appear that he was not improperly influenced, because the furniture, etc., contracted for was worth all he gave or agreed to give for it. It is not particular as to the kind of property purchased. The purchase of the property is not the *gravamen* of the offense as defined by the statute. * * * That which the statute prohibits and declares to be a crime, is the soliciting or accepting of money or other valuable things by the trustee to influence him with respect to his official duty, or to influence his action in any matter pend-

ing or that may legally come before him. It is not a crime for a trustee of a school township to purchase school furniture for or on behalf of the corporation, but it is a crime to accept money to influence him to enter into such a contract, or make such a purchase. The vital change presented by the indictment to be met by appellant was that he had accepted money to influence his official conduct. If he could meet that charge he would overthrow the case against him. * * * Did appellant accept the money to influence his official action, in contracting for, and purchasing the furniture, etc.? That is the question to be settled. If he did, he is guilty under the statute, without regard to the particular articles of the purchase, or the terms of the contract.

* * * The question is not whether the appellant entered into a contract binding upon the township, but whether he accepted the bribe. If he did, he cannot be heard to say that the contract was not enforceable against the township. If he did, he is guilty of the crime defined by the statute. *Shircliff* vs. *State*, 96 Ind. 370; *State* vs. *McDonald*, 106 Ind. 233, 6 N. E. Rep. 607; *Woodward* vs. *State*, 103 Ind. 127, 2 N. E. Rep. 321."

In the case of *The State* vs. *Ellis*, 4 Vroom (33 N. J. Law Reports) 102, it was held:

"1. Any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department of the government, by the offer of a reward or pecuniary compensation, is indictable.

2. The offense is complete when an offer is made, although in a matter not within the jurisdiction of the officer."

In the opinion the court said:

"It is contended, in the next place, that the facts set forth in the indictment constituted no offense, inasmuch as the common council had not jurisdiction to grant the application for which the vote was sought to be bought. In my opinion, it is entirely immaterial whether council had or had not jurisdiction over the subject matter of the application. If the application was, in point of fact, made, an attempt to procure votes for it by bribery was criminal. The offense is complete when an offer of reward is made to influence the vote or action of the official. It need not be averred, that the vote, if procured, would have produced the desired result, nor that the official, or the body of which he was a member, had authority by law to do the thing sought to be accomplished. Suppose an application made to a justice of the peace, in the court for the trial of small causes, for a summons in case of replevin, for slander, assault and battery, or trespass, wherein title to lands is involved; over these actions a justice of the peace has no jurisdiction, and any judgment he might render therein, would be *coram non judice* and void; yet, I think, it can hardly be contended, that a justice thus applied to may be offered, and with impunity accept a reward, to issue a summons in any case without his jurisdiction. If the common council of Jersey City had not authority to grant the application referred to, the act of the defendant in endeavoring to procure the grant asked for was only the more criminal, because he sought, by the corrupt use of money, to purchase from council an easement which they had no authority to grant. He thereby endeavored to induce them to step beyond the line of their duty, and usurp authority not committed to them. The gist of the offense is said to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial. 2 Bishop's Criminal Law, Section 96. * * *"

A question somewhat similar to the one here involved was presented in the case of *Scott* vs. *United States*, 172 U. S. 343, 43 L. Ed. 471. In this case one indicted for stealing a letter from the United States mails attempted to defend on the ground that the letter stolen was a decoy letter mailed by postal inspectors. The second branch of the headnotes reads:

> "The fact that a letter stolen from the mails was a decoy addressed to a fictitious person is not a defense to an indictment under U. S. Rev. Stat. Sec. 5467, when the letter had been delivered into the jurisdiction of the postoffice department by dropping it into a letter box."

In the opinion the court said:

> "In *Montgomery* vs. *United States*, 162 U. S. 410, we not only decided that, upon an indictment against a letter carrier, charged with secreting, etc., a letter containing money in United States currency, the fact that the letter was a decoy was no defense, but it was also held that the further fact that the decoy letters (mentioned in the case) and the moneys enclosed therein, although belonging to the inspectors who mailed them and by whom they were to be intercepted and to be withdrawn from the mails before they reached the persons to whom they were addressed, was no defense, and that such letters were in reality intended to be conveyed by mail within the meaning of the statute on that subject. In that case the court, speaking through Mr. Justice Shiras, said:
>
> * * *
>
> 'In the indictment it was averred that the letters in question had come into the defendant's possession as a railway postal clerk, to be conveyed by mail, and to be delivered to the persons addressed. It was disclosed by the evidence that the letters and money thus mailed belonged to the inspectors who mailed them, and were to be intercepted and withdrawn from the mails by them before they reached the persons to whom they were addressed.
>
> There is no merit in this assignment. The letters put in evidence corresponded, in address and contents, to the letters described in the indictment, and it made no difference, with respect to the duty of the carrier, whether the letters were genuine or decoys with a fictitious address. Substantially this question was ruled in the case of Goode vs. United States, above cited.'
>
> In the last cited case, which is reported in 159 U. S. 663, the court said at page 671, speaking through Mr. Justice Brown:
>
> 'It makes no difference, with respect to the duty of the carrier, whether the letter be genuine or a decoy, with a fictitious address. Coming into his possession, as such carrier it is his duty to treat it for what it appears to be on its face—a genuine communication; to make an effort to deliver it, or, if the address be not upon his route, to hand it to the proper carrier or put it into the list box. * * *"

You inform me that in the case presented by you the county commissioners were actually in the market for sand and gravel, and were then engaged in certain negotiations looking toward the purchase of such road materials. Obviously, the purchasing of such material, or voting to purchase, or other like action is an official duty of a county commissioner. If, therefore, a county commissioner accepted money to influence him with respect to making such a purchase, it seems clear that such money was accepted to influence him *with respect to his official duty.*

In view of the foregoing and in specific answer to your second question, it is my opinion that where a member of a board of commissioners, which is in the market for and is negotiating for the purchase of sand and gravel, accepts money from a detective, representing himself to be the agent of a company engaged in the business of selling sand and gravel, for the purpose of influencing such commissioner to purchase gravel from such company, the fact that such company was a fictitious company would not be a defense on an indictment for accepting a bribe, under Section 12823 of the General Code.

In concluding, I deem it proper to point out that I am in no wise passing, or attempting to pass, on the evidence in this case, or upon the guilt or innocence of any persons involved in the investigation now being conducted by the Grand Jury. Under the law, the determination as to whether or not an indictment or indictments should be returned is vested exclusively in the Grand Jury, which must act, in accordance with the oaths taken by the members thereof, under the charge of the court and upon the advice of the prosecuting attorney as to the law. No inference whatever, as to whether or not indictments should be returned, is to be drawn from this opinion, which is confined solely to the questions of law presented in your communication.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2422.

BOARD OF EDUCATION—AUTHORIZED TO HIRE CLERK OF BOARD TO DRIVE SCHOOL VAN—MUST NOT BE MEMBER OF BOARD.

SYLLABUS:

A board of education may lawfully employ the duly elected and acting clerk of the board, to drive one of the school vans in the district, unless such clerk be a member of the board.

COLUMBUS, OHIO, August 6, 1928.

HON. JOHN E. PRIDDY, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—This will acknowledge receipt of your inquiry requesting my opinion as follows:

> "Is it legal for a Board of Education of a Centralized School District to elect a person as Clerk of the Board of Education and then enter into a contract of employment with the same person to drive one of the school busses in the district?
>
> This question of dual employment comes up but this is a new one and I would be glad if you would let me have your reaction on the proposition."

By the terms of Section 4747, General Code, boards of education are directed to organize on the first Monday of January after the election of members of such board. In effecting such organization they are required to elect a clerk, the chief duties of whom are prescribed in Section 4754, General Code, which reads as follows:

> "The clerk of the board of education shall record the proceedings of each meeting in a book to be provided by the board for that purpose, which shall