

grounds under its control for the holding of meetings of grange organizations when the building and grounds are not in actual use for school purposes, providing the janitor fees and other proper expenses incident to such use is paid by the grange, subject, of course, to proper and reasonable regulations imposed by the Board.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3026.

MUNICIPAL UNIVERSITY—BOARD OF DIRECTORS MAY NOT PURCHASE SECURITIES FROM INVESTMENT COMPANY IN WHICH MEMBERS ARE FINANCIALLY INTERESTED.

SYLLABUS:

1. *Where a board of directors of a municipal university purchases securities, with endowment funds of such university, from an investment company in which one of the directors of the municipal university is president and stockholder, Sections 3808 and 12912, General Code, are violated.*

2. *Such transactions as described in syllabus one are contracts void as against public policy.*

COLUMBUS, OHIO, August 11, 1934.

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

GENTLEMEN:—I am in receipt of your communication reading as follows:

“Section 7902 of the General Code provides that the board of directors of a municipal university have full control over all funds of the university and section 7919 G. C., gives authority to such board to invest funds under their control and you, of course, are familiar with the provisions of sections 3808 and 12912, General Code.

We have an instance in Ohio wherein a member of the board of directors of a municipal university is a stockholder in, and the president of, an investment company. An examination of the records show that upon approval of the directors of this university, endowment funds are expended in the purchase of securities from this investment company.

Will you kindly advise this Department whether such action constitutes a violation of sections 3808 and 12912 of the General Code?”

Section 3808, General Code, reads as follows:

“No member of the council, board, officer, or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom.”

With respect to the above quoted statute, the first question arises as to whether or not a director of a municipal university is an "officer" of the municipality. The statute is in the nature of a penal statute and therefore should be strictly construed. Appearing in the General Code under Title XII, "Municipal Corporation", Division IV, "Institutions and Utilities", Chapter 3, "Universities and Libraries", sub-title "Universities", Sections 4001 to 4003, General Code, provide for a board of directors consisting of nine members to govern municipal universities, in municipalities having universities *supported in whole or in part by taxation*. Section 4001, General Code, states that the board of directors shall have the government, conduct and control of the university. Section 4002, General Code, states that such directors "shall be appointed by the mayor" for definite terms. Section 4003, General Code, while providing that directors shall serve without compensation, states that they "shall have all the powers and perform all the duties conferred or required by law in the government of such university, and the execution of any trust with respect thereto imposed upon the municipal corporation."

Sections 7902 to 7922, General Code, inclusive, also in some portions provide for independent powers to be exercised by a board of directors of a municipal university.

From the foregoing provisions, it seems probable that a court would hold that a director of a municipal university is an "officer of the municipality" within the meaning of Section 3808, General Code. While the courts have never laid down a definite test as to what constitutes an "officer", nevertheless the ordinary criteria is—Independency of functions exercised by appointee and character of duties imposed on him, durability of tenure of office, oath, bond and emoluments. See *State, ex rel. Landis vs. Board of Commissioners of Butler County, et al.*, 95 O. S. 157, 159. However, in the foregoing case it is further stated:

"But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office *they are not always necessary*. * * * The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involve the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment."

As indicated above, Sections 4001 and 4003, General Code, and Sections 7902 to 7922, General Code, impose independent functions upon the board of directors and Section 4002, General Code, provides for durability of tenure of the office. While Section 4003, General Code, states that the directors shall receive no compensation, yet the foregoing Supreme Court case stated that the element of compensation was not always necessary.

The next question arises as to whether the investing of funds in securities is an "expenditure" of money, within the meaning of that word as used in the statute. Webster's New International Dictionary defines the word "expenditure" as—"Act of expending; *a laying out, as of money*; disbursement." In the case of *State vs. Gibbs*, 7 N. P. (N. S.) 371, it was stated at pages 372 and 373:

"An *investment* is the laying out of money with the view of obtaining an income or profit from the thing bought, whether it be an interest in a business, a farm, *stocks or bonds*; to place money so that it will be

safe and yield a profit (*Neel vs. Beach*, 92 Pa. St., 221, 226); to put money out at interest, either by way of loan or of income producing property. *Una vs. Dodd*, 39 N. J. Eq., 173, 186."

Obviously, from the foregoing definitions, investing of funds in securities would constitute an "expenditure" of funds within the meaning of Section 3808, General Code.

The remaining question arises as to whether or not the investment of "endowment" funds would constitute "an expenditure of money on the part of the corporation". In other words, is the expenditure of endowment funds of a municipal university "the expenditure of money" on the part of the municipality?

There is no doubt but that a municipal university is an arm of the municipality. Certainly then if endowment funds are donated to a municipality by donors to be expended by the board of directors of the municipal university for support of the university, such funds would constitute public funds of the municipality and when expended by the board of directors would constitute "expenditures of money on the part of the municipality".

I am not advised as to just how the funds termed "endowment funds" in your letter, were donated to the university.

Sections 7902 and 7915, General Code, authorize boards of directors of municipal universities to accept and control funds donated to a municipal corporation for university purposes. I presume that the endowment funds involved in your question were donated to the municipality in trust for the university by will, trust or other instrument, and thus the endowment funds are public funds of the municipality.

Hence, it would appear that the transactions described in your letter would violate Section 3808, General Code.

Coming now to the question of whether or not Section 12912, General Code, is violated, I may say that such section provides as follows:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

The foregoing section is a penal section and should therefore be strictly construed.

In the first portion of this opinion, it was determined that a member of the board of directors of a municipal university was a municipal officer. It is not to be doubted that the sale of securities constitutes a "contract". See the case of *City of Leesburg vs. Ware*, hereinafter noted. Nor can there be any question but what the contract is "for such corporation", as the board of directors represent the municipality in investing the endowment funds, public funds of the municipality.

There is no doubt but that the type of contract involved herein is included

in the word "contract" as used in Section 12912, General Code, *supra*. In the case of *Stone, et al. ex rel. Village of Manchester, vs. Osborn, Mayor, et al.*, 24 Ohio Appellate 251 (motion to certify record overruled by the Supreme Court on April 12, 1927), it was stated at page 259, with reference to Section 12912, General Code, *supra*, after reviewing the history of the section:

"The prohibition is, first, against *any* municipal officer being interested in the profits of *any* contract * * * other than for his official services, and, second, against any municipal officer acting as commissioner * * * in any work undertaken or prosecuted by the corporation during his term or for the year following." (Italics mine.)

It has been held by this office in at least two opinions that an officer and stockholder of a corporation has "an interest in the profits" of any contract made by such corporation, by virtue of such relationship with the private corporation, within the meaning of such language of Section 12912, General Code. See Annual Report of the Attorney General for 1912, Vol. II, page 1599; Annual Report of the Attorney General for 1914, Vol. I, page 849. Moreover, it is stated in Page on Contracts, 2nd Edition (1920), Vol. I, section 414, as follows:

"A statute which forbids a public officer to have any interest in a public contract, or which forbids him to have any interest directly or indirectly, renders invalid a contract with a corporation of which he is a *stockholder, or an officer.*" (Italics mine.)

See also 44 Corpus Juris 93, "Municipal Corporations", section 2176.

In this connection, attention should also be called to the case of *The State of Ohio vs. Moon*, 124 O. S. 465. It was stated in the third paragraph of the syllabus:

"3. It is not essential to a conviction of a township trustee charged with a violation of section 12912, General Code, that it be proven that a *profit* was realized out of the contract or transaction to which he became an interested party while serving as such officer, where the record discloses that bills for services for the township ostensibly rendered by another, but in fact by the employes of the said trustee, in the use of a truck owned by him, were presented by and the entire contract price paid to him."

Thus, it would appear that the transactions set forth in your letter would violate Section 12912, General Code.

However, even if the transactions were held not to be a violation of the two statutes, Sections 3808 and 12912, General Code, such transactions would be void as constituting "contracts against public policy." In the case of *Bellaire Goblet Company vs. City of Findlay, et al.*, 5 Ohio Circuit Court 418, it was held as disclosed by the fifth paragraph of the syllabus:

"5. Contracts entered into between a Board of Gas Trustees of a municipality and an incorporated company, when a member of the Board of Gas Trustees is at the same time an officer and personally interested in the incorporated company, are against public policy, and void."

A recent Supreme Court case of the state of Florida, heretofore mentioned, the case of *City of Leesburg vs. Ware, et al.*, 153 Southern Reporter 87, decided January 18, 1934, rehearing denied March 1, 1934, is directly in point. The facts of this case disclose that one of the bond trustees of the city of Leesburg, Florida, who was also secretary of such board, was president of the First National Bank of Leesburg. A city ordinance provided that the bond trustees should invest certain funds in "approved securities", as a sinking fund for certain city improvement extension bonds. Instead of investing in "approved securities", the funds were invested by purchasing from the First National Bank of Leesburg bonds of the city of Palmetto. The court held that the purchase of these bonds constituted a "contract" void as against public policy. It was stated in the fourth and fifth paragraphs of the syllabus:

"4. Transactions whereby bonds were purchased by city bond trustees through secretary from bank of which secretary was officer held void as against public policy.

5. When contract contravenes established interest of society, it is void as against public policy."

The court in the foregoing case based its argument largely on the language of Justice Wanamaker in the Ohio Supreme Court case of *Pittsburg, Cincinnati, Chicago and St. Louis Railway Company vs. Kinney*, 95 O. S. 64, with respect to the meaning of "public policy".

In view of these authorities, I am of the opinion that the transactions, whereby the board of directors of a municipal university invest endowment funds of the university in securities purchased from a corporation in which one of the directors is an officer and stockholder, are void as against public policy.

Respectfully,

JOHN W. BRICKER,

Attorney General.

3027.

APPROVAL, NOTES OF VAN BUREN RURAL SCHOOL DISTRICT,
SHELBY COUNTY, OHIO—\$985.00.

COLUMBUS, OHIO, August 13, 1934.

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

3028.

APPROVAL, NOTES OF PENN RURAL SCHOOL DISTRICT, HIGHLAND
COUNTY, OHIO—\$181.00.

COLUMBUS, OHIO, August 13, 1934.

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