

851.

APPROVAL, BONDS OF MONTGOMERY COUNTY, \$5,305.00.

COLUMBUS, OHIO, August 10, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

852.

VILLAGE COUNCIL—MEMBER CANNOT LEGALLY SELL LUMBER TO A CONTRACTOR FOR USE IN CONNECTION WITH A CONTRACT AWARDED TO SUCH CONTRACTOR BY THE COUNCIL OF WHICH THE PARTY IN QUESTION IS A MEMBER.

SYLLABUS:

A member of a village council during his term of office cannot legally sell lumber to a contractor for use in connection with a contract awarded to such contractor by the council of which the party in question is a member.

COLUMBUS, OHIO, August 11, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion in answer to the following question:

“May a member of the village council during his term of office legally sell lumber to a contractor for use in connection with a contract awarded to such contractor by the council of which the party in question is a member?”

By virtue of Sections 4221 et seq., General Code, the council of a village is vested with the authority to make and supervise the execution of all contracts made on behalf of the village. In the exercise of such authority it becomes council's duty to inspect and pass on the quality of all material used by contractors for the purpose of determining whether or not proper material is being used and whether or not the specifications for the improvement are being properly complied with. This fact itself is in my opinion sufficient to preclude a member of a village council from selling material to a contractor.

It is a familiar principle of common law that an agent in the execution of his agency shall not be permitted to put himself in a position antagonistic to his principal. An agent by accepting the undertaking committed to his care impliedly agrees that he will use his best endeavors to further the interest of his principal. This principle of law precludes him absolutely from dealing with himself directly or indirectly. From this principle there is evolved the rule that a public officer cannot act in matters involving discretion where the exercise of that discretion effectuates objects in which

the officer has a personal interest. Aside from this personal interest and the conflicting public duty under which a member of a village council would be put were he to sell material to a village contractor, there are other considerations which weigh heavily in favor of the inhibition of public officers sustaining such conflicting relations as are suggested by your inquiry.

Section 3808, General Code, provides :

"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."

Section 12912, General Code, provides :

"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."

Similar provisions with reference to boards of education are contained in Section 4757, General Code, which provides in part that :

"* * * No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board. * * *"

A question similar to the one you have asked was in 1915 submitted to the Attorney General for his opinion, in response to which it was said: (Opinions, Attorney General, 1915, Vol. 1, 267)

"The president of a board of education who is also a director and stockholder of material company, which material company sells its material to the principal contractor dealing with said board of education, has such an interest in said contract as is prohibited by Section 4757, General Code. No criminal liability is attached to the violation of Section 4757, General Code, but this section does effect the validity of contracts."

In that case the President of the Board of Education, although both a director and stockholder in the material company, was not in position to prevent his company from making the sale and in fact it appeared that his company persisted in making the sale in spite of his attempt to prevent it from doing so. In the light of these facts the Attorney General said :

"As to the contract between the brick company and the contractor that is a private matter and I shall not attempt to pass upon it. The contract

between the board of education and the principal contractor is a public matter and if the principal contractor by some action of his own and with his eyes open places himself to have performance or payment questioned he assumes any risk that such action may involve.

Answering your question as to the application of Section 12910, General Code, I am of the opinion that under the statement of facts you have submitted and assuming that the board of education has awarded the principal contract and has no control over the contractor as to where or of whom he shall or may buy the bricks, the president of the board of education would not be subject to prosecution under such section."

In an opinion found in the Annual Report of the Attorney General for 1911 and 1912, at page 409, it is said:

"Section 3808, General Code, comprehends a prohibition against officers of municipal corporations having any pecuniary interest whatsoever in contracts of the municipality. Therefore, a member of the board of public service who is interested in a subcontract connected with a municipal contract is within the prohibition and the principle applies the more forcibly when the interest is attached to material being supplied by the subcontractor to the main contractor, the estimate of which material must be approved by the board of public service."

Here again the element of the officers' supervision of the work and his right and duty to inspect and accept or reject the material enters into the reasons for the conclusion reached by the Attorney General.

You have called my attention to an opinion of Attorney General, U. G. Denman, found in the Annual Reports of the Attorney General for 1910 and 1911 at page 319, the second paragraph of the syllabus of which reads as follows:

"Officer or employe of city may in his private capacity sell supplies and material to persons doing contract work for the city unless he has an actual interest in said contract."

This statement is perhaps somewhat misleading unless read in connection with the body of the opinion. "Actual interest" is, of course, a question of fact and in the course of the opinion the distinction is pointed out between an "interest in law" and an "interest in fact." This distinction is recognized in the case of *State ex rel. Taylor vs. Pinney*, 13 Ohio Decisions 210, in which it was held as stated in the headnote:

"A county commissioner is not liable to amercement under Sec. 856 Rev. Stat., notwithstanding persons to whom contracts for the construction of public improvements have been awarded by the county commissioners, during his term of office, afterward purchase stone from a stone company of which he is a stockholder and director, and where it does not appear that, at the time of the letting of the contracts, any agreement or understanding existed between him and the contractors that he should take any part in the subsequent carrying out of the contracts or derive any benefit therefrom."

Without entering upon the discussion of the many situations in which the interest of public officers in public contracts or the expenditure of public moneys may arise, it is sufficient to say that a determination of whether or not the officer has an interest directly or indirectly in the contract or the object for which funds are ex-

pending, depends largely on the facts peculiar to each particular situation and I would not want to be understood as laying down a general principle that the inhibition placed on public officers by virtue of Section 3808 and cognate sections of the General Code, would in all cases be applicable to sales made by such officers to contractors under the political subdivision to which they sustain the relation of an officer, but confirming myself to your inquiry and answering your question specifically I am of the opinion that a member of a village council during his term of office cannot legally sell lumber to a contractor for use in connection with a contract awarded to such contractor by the council of which the party in question is a member.

Respectfully,
EDWARD C. TURNER,
Attorney General.

853.

RESTAURANT—WHERE PROPRIETOR OF A GROCERY STORE SELLS CHEESE, HAM, BUNS, ETC., TO HIS CUSTOMERS BUT DOES NOT SERVE HIS PATRONS WITH PREPARED LUNCHESES HE IS NOT CONDUCTING A RESTAURANT.

SYLLABUS:

1. *In so far as the "Ohio Hotel and Restaurant Law" (Sections 843 to 843-18 General Code) is concerned, a restaurant is defined by Section 843-2 as a "building or other structure kept, used, maintained, advertised or held out to the public to be a place where meals or lunches are served for consideration, without sleeping accommodations."*

2. *Where the proprietor of a grocery store sells articles of food, such as cheese, ham, veal loaf, buns, etc., to his customers but does not serve his patrons with prepared lunches, he is not engaged in the business of conducting a restaurant within the meaning of Section 843-3 and related sections of the General Code, even though he has knowledge that his customers intend immediately to prepare and actually do prepare a lunch from such articles.*

COLUMBUS, OHIO, August 11, 1927.

HON. LOUIS F. MILLER, *State Fire Marshall, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date reading as follows:

"Within the corporate limits of one of the cities in Ohio we have the following proposition:

A man who operates a grocery directly across the street from a large factory sells, at meal times, to the employees of the factory—and possibly to anyone else who wishes such articles of food—cheese, ham, veal loaf, buns and the like. Our investigation has developed that this groceryman cuts his cheese, ham, meat and so on, as well as the buns, hands them to the purchaser or puts them in a bag, and explains that the customer is to make his own sandwiches,—that the law does not permit him (the groceryman) to make them. So far as we know, these articles of food are not eaten in the store.