

884.

MAYOR—VILLAGE MAYOR CANNOT ACT AS AGENT FOR SURETY COMPANY AND EXECUTE CONSTRUCTION BONDS, REQUIRED TO BE GIVEN BY CONTRACTORS WHEN MAKING CONTRACTS WITH THE VILLAGE—PENALTY.

SYLLABUS:

For the mayor of the village to act as agent for a surety company, and execute bidding or construction bonds required to be given by contractors when making contracts with the village, for which service he receives a commission from the surety company, is a violation of Section 3808, General Code, and subjects the mayor to the penalties imposed by the statute.

COLUMBUS, OHIO, August 16, 1927.

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

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

“Question: If the mayor of a village acts as agent for a surety company and as such signs the bonds of contractors making contracts with the village, does such action constitute a violation of Section 3808 of the General Code, if he receives a commission on such business?”

In accordance with the provisions of Section 4255, et seq., of the General Code, the mayor of the village is by virtue of his office, the chief executive officer of the village, empowered to exercise general supervision over each department and the officers thereof. He is chief conservator of the peace and charged with the duty of seeing that all ordinances, by-laws and resolutions of the council are faithfully obeyed and enforced. He appoints the street commissioner whose duty it is under the direction of council to supervise the improvement, cleaning and lighting of streets and other public places. In short, he is the head of the village government and his influence extends to all village activities.

In addition to this, he is president of the village council, and presides at all its meetings. Although he has no vote in council except in case of a tie his relation to that body by virtue of his being its presiding officer and the chief executive officer of the village is such as to make his influence an important factor in council's deliberations.

All contracts made on behalf of the village, except those made by the board of public affairs, are made by the village council, executed in the name of the city and signed by the mayor and clerk. Contracts relating to public utilities, if the village owns or conducts such utilities, are not made by the council but by a board of public affairs. While this board is independent of council it is a part of the village government of which the mayor is the head.

These considerations show the relation between a mayor of a village and contractors making contracts with the village to be such that a contractor desiring to curry favor with the village authorities would be only too glad to patronize the mayor by purchasing through him the bonds he is required to give upon being awarded contracts or bidding for same; and a mayor so dealing with the contractor would not be in a position disinterestedly to act on behalf of the village in its relation to the con-

tractor in the execution of a contract in which the mayor had been interested to the extent of receiving a commission for the furnishing of the bond given by the contractor.

Section 3808, General Code, reads :

“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 reads in part 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, * * 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 principle involved in the inhibition upon a public officer to have an interest in a contract made on behalf of the political subdivision to which he sustains the relations of an officer is founded on public policy and is an inheritance from the common law, and Section 3808, General Code is declaratory of the common law.

The principle is evolved from the self-evident truth that no person can at one and the same time, faithfully serve two masters representing diverse and inconsistent interests with respect to the services to be performed. The principle has always been one of the essential attributes of any rational system of positive law even reaching to private contractual relations where there are created between individuals trust or fiduciary relations.

In an opinion of my predecessor, reported in Opinions, Attorney General, 1926, page 524, it was held :

“Contracts entered into by a depository under Section 4295 of the General Code and for construction where the surety bond is solicited and written by a member of a council are illegal under Section 3808 of the General Code.”

In the opinion the then Attorney General said as follows :

“It will be seen by this section (Section 4221, General Code) that it is the village council which authorizes all contracts and that the contracts are executed in the name of the village and signed by the mayor and clerk.

Section 4222 of the General Code, in part provides :

“Each such bid shall contain the full name of every person or company interested in it, and shall be accompanied by a sufficient bond or certified check on a solvent bank that, if the bid is accepted, a contract will be entered

into and the performance of it properly secured, * * * The council may reject any and all bids. The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash.'

By this section it will be seen that a bond is given with the contract to secure the proper performance of the same and is in fact a part of the contract and that it is necessary for the council to pass upon the matter of the sufficiency of the bond as a part of the contract and may reject the contract by reason of an insufficient bond.

* * * * *

As a member of the council is interested in the award of the contract by virtue of obtaining a commission for executing the surety bonds, it is believed that such a member would have an interest in the expenditure of money by the corporation.

You are, therefore, advised that contracts entered into by a depository under Section 4295 and for construction where the surety bond is solicited and written by a member of a council are illegal under Section 3808 of the General Code."

It is said in that opinion that the bond is a part of the contract. This being true, it follows that anyone interested in the bond is interested in the contract. True the mayor does not perform the same duties in the making of village contracts as do the members of council. The mayor does not make the contract as does council. He has no direct interest in the actual making of the contract unless his vote becomes necessary in case of a tie, but he does have a direct interest as mayor in the carrying out of the contract and that interest is sufficient in my opinion to taint the entire contract with illegality if he becomes pecuniarily interested in it to the extent of receiving a commission for the furnishing of the surety bond which the contractor is required to give.

In Opinion No. 852 addressed to your department under date of August 11, 1927, there was considered the question of the right of members of the village council during their term of office to sell material to contractors in connection with contracts awarded to such contractors by the council of which the party in question was a member, and it was there said:

"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."

Likewise it could not be said that in all cases merely because the agent of the surety company furnishing bonds to contractors was an officer of the corporation such fact would taint the contract with illegality and thereby make it void, but because of a village mayor's relation to the council which makes the contract and because of his position in the village government and his relation to the public whose interest it is to have due and proper execution of all contracts made with the village, it would open the door to collusion and fraud to permit such mayor to have the interest which he would have necessarily in contracts for which he had furnished the bond.

Public offices are public trusts and a mayor with that high sense of duty which a public officer should have would not place himself in such a position that his conduct might be questioned and subject himself to cause for suspicion even though he might act with honest intent.

Section 12912, General Code, relates to an interest in the profits of a contract, job or services. It does not necessarily follow that an agent for a surety company furnishing a bond to a contractor is interested in the profits of the contract. It is possible

and probable that premiums on surety bonds would be paid by contractors in the regular course of business without any relation to the receipts from the particular contract for which the bond had been furnished and regardless of whether or not the contractor received any profit from that particular contract, and unless it could be shown at the time of the letting of the contract that there existed an agreement or an understanding between the mayor and the contractor that the contractor's bond should be furnished by the mayor who was to receive his pay from the profits of this contract, I am of the opinion that under the proper construction which must be placed upon penal statutes, the mayor could not be prosecuted under Section 12912, General Code, simply because he had furnished bonds and received a commission therefor to contractors on contracts made with the village of which he was the mayor. See *Richardson vs. Trustee 6 O. N. P.* (N. S.) 505, *State vs. Pinney*, 13 Ohio Decisions 210.

Specifically answering your question, I am of the opinion that for the mayor of the village to act as agent for a surety company, and execute bidding or construction bonds required to be given by contractors when making contracts with the village, for which service he receives a commission from the surety company, is a violation of Section 3808, General Code, and subjects the mayor to the penalties imposed by the statute.

Respectfully,
EDWARD C. TURNER,
Attorney General.

885

DISAPPROVAL, ABSTRACT OF TITLE TO LAND FRANKLIN
TOWNSHIP, ADAMS COUNTY, OHIO.

COLUMBUS, OHIO, August 17, 1927.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—You have submitted an abstract of title last continued by Horace G. Pettit to September 29, 1926, supplemented by certain data in the form of certified copies of probate court proceedings and recorded deeds, which are accompanied by an encumbrance estimate No. 946 to Clara R. Herman and A. Z. Tillotson, executor of Edward A. Day's estate for \$3,405.00, and the deed of Clara R. Herman and Phillip Herman, her husband, for real estate situate in the Township of Franklin, County of Adams and State of Ohio, the first tract containing two hundred and thirty-six (236) acres more or less and being a part of O. S. U. lot No. 83; the second tract containing one hundred and ninety-four (194) acres more or less and being a part of O. S. U. lot No. 84 lying north of the Brown tract; and the third tract containing two hundred and fifty-one (251) acres more or less in O. S. U. lot No. 84, lying south of the Brown tract, the same being bounded and described as follows:

First Tract: Situated in the Township of Franklin, County of Adams, and State of Ohio, and known as being a part of O. S. U. lot 83, in said township and county, beginning at a double Chestnut oak, corner to survey No. 15001, and corner of Lot No. 82; thence with one line of said lot west 20 poles to a stone in the line of Survey No. 16068; thence S. 11° W. 126 poles to a black oak, corner to Survey No. 13338; thence S. 45° E. 22 poles