

Opinion No. [29-54]

April 10, 1929

BY: M. A. OTERO, JR., Attorney General

TO: Mr. Hill Jamison, Mayor of Estancia, Estancia, New Mexico.

MUNICIPAL CORPORATIONS -- Officers of may not contract with.

OPINION

Sometime ago you requested the opinion of this office with reference to the legality of an assumed settlement of a judgment against certain sureties on a bond securing the city funds deposited in a bank and which bank had become insolvent. It appears that this assumed settlement was accomplished by the action of councilmen who are the judgment debtors in the said judgment.

A majority of the states have statutes prohibiting the entering into of contracts of this character and it therefore follows that a great majority of the cases decided upon this subject are based upon the particular statute making the contract unlawful. I have not, however, found any such express statute in this State and I have, therefore, not considered such cases, but only those cases where instances in which this character of case is considered irrespective of statutory provisions.

In Dillon on Mun. Corp., Section 773, is the following language:

"At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board or council. Neither the fact that a majority of the votes of a council or board in favor of the contract are cast by disinterested officers, nor the fact that the officers interested did not participate in the proceedings, necessarily relieves the contract from its vice. The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial."

The same doctrine is stated in McQuillin on Mun. Corp., Section 513.

In the case of Beebe v. Board of Supervisors of Sullivan County, et al, 19 N. Y. S. 629, the question was as to the legality of a contract between the Board of Supervisors of the County and one of its members, an attorney at law, for legal services. The Supreme Court in that case held that such contract was void at common law, and that the same could not be enforced. The court in that case said:

"At the time of his employment, the defendant Anderson was a member of the board of supervisors. They were the agents of the county of Sullivan, and as such had no right enter into contracts for their own benefit with their principal, the county of Sullivan. They are trustees, and have no right to enter into contracts with each other at the expense of those for whom they are acting, and whose interests they are bound to guard and protect. * * * The legality of such contracts does not depend upon statutory enactments. They are illegal at common law. It is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers; and this principle applies with particular force to members of a board like a board of supervisors, which not only makes the contract, but subsequently audits the bill.

"But it is said that in the case before us the supervisor who was employed did not vote on the question of his own employment, or upon the audit of his bill. That does not cure the evil. The influence upon fellow members is the same. His constituents are entitled to his judgment in making contracts, to his scrutiny in passing upon accounts, and to his unbiased and disinterested efforts in both; and he cannot make the violation or neglect of the duties he owes to his constituents the means of validating an otherwise illegal act. He cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust, at will, and as best subserve his private interests. He is a part of the board of supervisors. Its act is his act; and he cannot, as a supervisor, make a contract with himself as a private citizen."

In the case of *Noble v. Davidson*, 96 N. E. 325, the Supreme Court of Indiana, in passing upon the validity of a contract entered into between the school district and one of its trustees, held that in the absence of statute, the contract would be void, because it was contrary to public policy. Numerous authorities are cited in this case in support of such doctrine. This is also supported by 7 R. C. L. 944; *People v. Board of Supervisors of Schenectady County*, 151 N. Y. S. 1012; *Seaman v. City of New York*, 159 N. Y. S. 563. See also case and notes 9 L. R. A. (N. S.) 1014.

We are, therefore, clearly of the opinion that any assumed contract of settlement made by your City Council where any of them were interested is void.