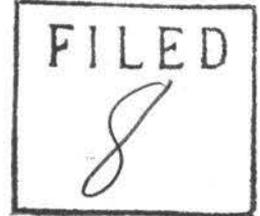


COUNTY JUDGE:

Can Presiding Judge of the County Court act for the county in selecting, for county depository, and lending agent on county warrants, a bank in which he is cashier, director and stockholder?

March 30, 1943

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Honorable J. A. Bishop, Associate Judge  
County Court of Pemiscot County, Box 212  
Steele, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 23rd in which you request an opinion as to whether or not a presiding judge, as such, may enter into a contract with a bank in which he is also cashier, director and stockholder. The text of your letter, set out in full, is as follows:

"I am associate judge of the County Court of Pemiscot County, Missouri. Charles W. Reed of Hayti, Missouri, is the other associate judge. A. B. Rhodes of Caruthersville was recently appointed by the Governor to fill out the unexpired term of J. H. McFarland, deceased.

"A. B. Rhodes, the presiding judge, is cashier, a member of the Board of Directors, and a stockholder in the National Bank of Caruthersville. The First State Bank of Caruthersville is the present county depository, but as you know, the matter of selecting a county depository will be up for decision again in May of this year. Furthermore, we are required to immediately borrow some funds on warrants for state institutions, because you know the state will not accept warrants. The National Bank of Caruthersville will likely make application to furnish money on these county warrants, and will also likely be one of the bidders for the county funds at the May letting of the funds.

"The question has arisen as to whether or not A. B. Rhodes, as presiding judge, and as cashier, director and stockholder of the National

Bank, can act for the county in the selection of the National Bank as a county depository and as lending agent on county warrants. This subject is controversial here and I cannot determine from local advice as to my rights and duties in this matter. The attorneys that we usually call upon for such advice are the attorneys for the First State Bank, and for that reason I would prefer not to have them pass on this question.

"Will you please give me your opinion on these matters at your earliest convenience. There has been called to my attention Section 2491, R. S. Mo. 1939, and the case of Githens vs. Butler County, 165 S.W. (2d) 650."

An examination of the statutes of the State applying to the particular set of facts in your letter would seem to include the following, Section 2491, R. S. Mo. 1939:

"Judges prohibited from doing certain things - No judge of any county court in the state shall, directly or indirectly, become a party to any contract to which the county is a party, or to act as any road or bridge commissioner \* \* \* \* \*". Nodaway County v. Kidder 129 S. W. (2d) 857, 344 Mo. 795; Githens v. Butler County 165 S. W. (2d) 650.

Section 2492, R. S. Mo. 1939 provides:

"Penalty for violating preceding section - Any judge of the county court who shall violate any of the provisions of the next preceding section, or who shall do any of the acts or enter into any of the contracts prohibited or declared unlawful in said section, shall be punished by a fine not exceeding one thousand dollars for each offense, or

by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Section 4484, R. S. Mo. 1939, provides:

"Certain acts of county courts misdemeanors - No judge or justice of any county court in this state shall, either directly or indirectly, become a party to any contract to which such county is a party, or act as any road or bridge commissioner, either general or special, or as keeper of any poor person, or as director in any railroad company in which such county or any township, part of township, city or incorporated town therein is a stockholder, or act as agent for the subscription of any stock voted to any railroad by any county or subdivision thereof; any such judge or justice who shall violate any of the provisions of this section shall be adjudged guilty of a misdemeanor."

Turning to the interpretation of the powers of the county court and the judges thereof, in the decisions of the State we find the following language used in the cases cited below.

County courts are only agents of county with no powers except those which may be granted by law, and, like all other agents, they must pursue their authority to act within the scope of their powers. *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87, *Walker v. Linn County*, 72 Mo. 650.

Where a county court transcends its statutory powers, its acts cannot be supported on the ground that mere irregularities in proceedings of the court will not invalidate its acts. County courts are not the general agents of the state, but their powers are limited and defined by law, and their acts outside of their statutory authority are void. *Sturgeon v. Hampton*, 88 Mo. 203.

At the outset there are two matters to be taken into consideration. First, the position of a judge of a county court and his responsibility and relationship as a municipal officer to the inhabitants of a county which he represents, and second, as in this instance, his position as an officer and his position as a managing director of a corporation to his stockholders, other officers and patrons of his institution. The relationship of an officer of a corporation is quite clearly set out and defined, and it is axiomatic that the directors of a corporation occupy a fiduciary relationship to the corporation which they manage and control and thus interested therein. They are, in a broad sense, trustees. On this subject of fiduciary relations your attention is directed to the decisions in the State on this subject, and I quote:

"Corporation's directors occupy fiduciary relation to corporation and stockholders, and may not profit by virtue thereof at expense of corporation or rights of stockholders." *Bromschwig v. Carthage Marble & White Lime Co.*, 66 S. W. (2d) 889, 334 Mo. 319.

"Directors and other officers, while not 'trustees' in a technical sense of the term, occupy a fiduciary relation to corporation and to stockholders as a body." *Punch v. Hipolite Co.*, 100 S. W. (2d) 878, 340 Mo. 53.

"President of corporation occupied fiduciary relationship to company and to its stockholders." *Southwest Pump & Machinery Co. v. Forslund*, 29 S. W. (2d) 165, 225 Mo. App. 262.

"Relationship existing between corporation and its officers is one of trust and confidence and officers cannot use official positions for benefit of any one other than corporation." *Frankford Exchange Bank v. McCune*, 72 S. W. (2d) 155.

*Hill v. Gould*, 30 S. W. 181, 129 Mo. 106;  
*Grand Co. v. Palladun*, 287 S. W. 438, 315

Mo. 907.

Bent v. Priest, 10 Mo. App. 543,

Ford v. Ford Roofing Co., 285 S. W. 538.

46 C. J. 1037 at paragraph 308: "A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit, and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Thus public officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members in respect of the trust reposed in it. Where two boards are created by statute, one having power to make appointments to another and to supervise its actions, it is illegal for the first board to appoint members of the first board to the second board.

"In the discharge of his duties the officer must be disinterested and impartial, and he cannot at the same time act in his official capacity and as the agent of one of the public whose interests are adverse to those of another.

"Statutes prohibiting public officers from having an interest in contracts executed in their official capacity are declaratory of the common law. Such a statute applies to municipal as well as other public officials. A statute making it unlawful for any officer, either elective or appointive under the constitution, to become interested in any contract in the making of which he may be called upon to vote includes not merely constitutional officers but all officers who fall under the provisions of the constitution. An office is a lucrative one, to

which any salary, compensation, or fees are attached, regardless of the amount, within a statute prohibiting a person holding a lucrative office from being interested in certain stated contracts."

Turning now to the current decisions in our courts bearing on this particular subject, your attention is invited to Nodaway County v. Kidder, 129 S. W. (2d) 857, l. c. 860-861:

"Section 2089, R. S. Mo. 1929, Mo. St. Ann. Section 2089, p. 2663, provides, 'no judge of any county court in the state shall, directly or indirectly, become a party to any contract to which such county is a party, or to act as any road or bridge commissioner, either general or special \* \* \*.' The succeeding section provides a penalty by a fine or jail imprisonment for the violation of said section.

"The alleged agreement between appellant and the county court, of which appellant was a member, was void under the express terms of the statute.

\* \* \* \* \*

"In the case of Boyd County v. Arthur, 118 Ky. 932, 82 S. W. 613, 614, 26 Ky. Law Rep. 906, the fiscal court of said county had appointed each of its members to supervise the construction and maintenance of roads in his district and fixed an allowance of \$3 per day. A statute prohibited a member of the court from being interested in a contract with the county. The court said: 'The members of the fiscal court are the representatives of the county charged with the duty of protecting its interests. \* \* There is no principle better settled than that a trustee will not be allowed to occupy a dual position, and that, where he is charged with the protection of his

cestui que trust, he cannot place himself in a position where his personal interests may be antagonistic to the interests of the cestui que trust. If he does this, it is a breach of his trust. The statutes we have referred to have the same end in view when they forbid the members of the fiscal court being interested in any contract or work, and in providing that they may appoint one supervisor for the whole county and exercise supervision over him.' The court held: 'The fiscal court has no authority to allow its members any other compensation than that fixed by law.'

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. Town of Carolina Beach v. Mintz, 212 N. C. 578, 194 S. E. 309; 46 C. J. 1037 Sec. 308."

The most recent decision in which this same subject has been treated may be found in Githens v. Butler County, Mo. 165 S. W. (2d) 650, 1. c. 652:

"\* \* \* The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 Williston, Contracts, Sec. 1735, p. 4895. The basis of this common law rule is that it is against public policy (State ex rel. Smith v. Bowman, 184 Mo. App. 549, 170 S. W. 700) for a public official to contract with himself. '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 of (or) council. \* \* The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial \* \* \* It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, sec. 773; 46 C. J., sec. 308; 22 R. C. L., sec. 121; State ex rel. Streif v. White, Mo. App., 282 S. W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S. W. (2d) 63; Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857.

"This basic and fundamental common law concept has been enacted into our statute law relating to county courts. Mo. R. S. A., sec. 2491 provides that:

"No judge of any county court in the state shall, directly or indirectly, become a party to any contract to which such county is a party, \* \* \* ."

"The next section of the statute makes the violation of the statute a misdemeanor. Mo. R. S. A., sec. 2492.

"The cases cited in the preceding paragraphs deal with instances of an official being

'directly' interested in the contracts, actions or dealings with the public body of which he was a member. Here the question is whether the public official is so 'indirectly' interested as a party to a transaction with a county court of which he was a member as to invalidate it. In fact the question is whether the relationship of husband and wife is a disqualifying interest within the meaning of the statute and common law prohibition against an official's becoming indirectly interested in a public contract. The two opposing lines of cases are collected in the following: Thompson v. School Dist. No. 1, 252 Mich. 629, 233 N. W. 439, 74 A. L. R. 792; O'Neill v. Auburn, 76 Wash. 207, 135 P. 1000, 50 L. R. A., N. S., 1140; 6 Willis-ton, Contracts, p. 4898."

Turning now to current thought and other jurisdictions touching upon the same subject we find Hayes v. Thornsbrough, 180 Okla. 357. In this decision Hurst, J., speaking states:

"In Lewis v. Schafer (1933) 163 Okla. 94, 20 P. (2d) 1048, this court, in finding a fiduciary relationship to exist between an employer and his employee, stated the rule thus:

"The question as to whether a fiduciary relationship existed is to be determined wholly upon the record facts therein. The courts have generally refrained from defining the particular instances of fiduciary relationship in such manner that other and new cases might be excluded. The expression 'fiduciary relationship' is one of broad meaning, including both technical relations and those informal relations which exist whenever one man trusts and relies upon another. Reeves v. Crum, 97 Okla. 293, 225 P. 177.'

"We do not hold that the office of county judge of itself places the judge in a position of trust and confidence in all of his personal transactions during his term of office. But it is an element strongly to be considered in reaching that conclusion, and this is particularly true where he deals with persons living in his county and who are interested in matters pending in the court over which he customarily presides. The office of county judge itself signifies trust and confidence, as he deals generally with estates of minors, incompetents, and deceased persons inquiring his protection and guidance."

Dawson v. National Life Insurance Company of America, 176 Iowa 362:

Ladd J. - "A fiduciary relation exists between a managing officer of a corporation and a stockholder with relation to the stockholder's shares of stock, and any contract between them by which such officer acquires profit out of such shares to the detriment of such stockholder is presumptively fraudulent and voidable, and the burden is on such officer to rebut such presumption by an affirmative showing that said contract was fairly procured for value, or, if obtained for less than value, that it was procured upon full disclosure of all facts bearing on value known to such officer and unknown to the stockholder.

\* \* \* \* \*

"The authorities are agreed that the officers and directors of a company are trustees of the stockholders in many respects, as in the transaction of the business and care of property of the corporation, but there is a conflict as to whether any fiduciary relation exists between them concerning the shares of capital stock. One line of cases, while recognizing that the

directors and managing officers are trustees for the shareholders in some respects, limit these strictly to matters appertaining to the management of corporate affairs, and say that dealing with the individual shareholder concerning his shares of capital stock is not within the scope of the trust relation, and that, as director or officer, he is charged with no duty to the stockholder with reference to his shares; in other words, the matter of buying from or selling to the stockholder capital stock in the corporation is wholly without the scope of his agency as director or managing officer thereof. Board of Commissioners of Tippecanoe County v. Reynolds, 44 Ind. 509 (15 Am. R. 245); Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108; O'Neile v. Ternes, 32 Wash. 528 (73 Pac. 692); Haarstick v. Fox, 9 Utah 110 (33 Pac. 251); Crowell v. Jackson, 53 N. J. L. 656 (23 Atl. 426); Walsh v. Goulden, 130 Mich. 531 (90 N. W. 406); Hooker v. Midland Steel Co., 215 Ill. 444 (106 Am. St. 170); Bawden v. Taylor, 254 Ill. 464 (98 N. E. 941); Grant v. Attrill, 11 Fed. 469; Gillett v. Bowen, 23 Fed. 625; Harverland v. Lane (Wash.), 154 Pac. 1118; 1 Cook on Corp. (7th Ed.), Sec. 320; 2 Machen on Corp., Sec. 1637; Bower on Actionable Non-Disclosure, Secs. 138, 308; Cooley on Torts (3d Ed.) p. 991."

2 Bouvier's Dictionary, 1217:

"What constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Appeal of Watts, 78 Pa. 392."

CONCLUSION

From the above and foregoing, the conclusion arrived at is this. The presiding judge of a county court is prohib-

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ited by statute from entering into a contract as an officer of a political subdivision with himself as cashier and director of a private corporation in which he is personally interested.

Regardless of the statutory provision such a contract entered into is void as being against public policy. When the relations between the contracting parties are such as to render it certain that they do not deal on terms of equality, but that either, from superior knowledge, derived from his peculiar relationship in the private corporation, and as an officer of a political subdivision of the State, this places him in an unfair advantage concerning the proposed transaction.

Respectfully submitted

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APPROVED BY:

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