MUNICIPALITIES: A lease consummated by city officials who have a pecuniary interest in it comes within the purview of Section 106.300, RSMo 1949.
LEASES:

FILED
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May 15, 1958

Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Some of the members of the newly elected city officials of Clarence, Missouri, have requested me to write you asking for an opinion on the following:

"On April 14, 1958, the outgoing administration of the city of Clarence has passed an ordinance No. 95, a copy of which is herewith enclosed.

"Immediately thereafter and on the same date, the outgoing Mayor and City Clerk entered into a lease with the Clarence Lake Development Association, Inc.

"The Board of Directors of the Clarence Lake Development Association, Inc. are: B. L. Edrington, Morris Eisenberg, Faye Tils, Robert L. McCollun, Ralph E. Tucker, Yovette Wood, Charles White, and Charles Jennings.

"Of the Board of Directors of this Corporation, B. L. Edrington was outgoing Mayor of

> Clarence, and Morris Eisenberg, Faye Tils, and Charles White were members of the Board of Aldermen of the outgoing administration, however Charles White, as Alderman, voted against passing the Ordinance, and also made the statement that he was not a member of the Board of Directors of the Corporation, although the record filed in the Recorder's office of the Articles of Incorporation lists him as one of the first Board of Directors of said Corporation. The other two members of the Board of Aldermen voted for the Ordinance and the Mayor approved the Ordinance, and Morris Eisenberg, one of the outgoing Alderman, signed the lease, as the President of the Corporation.
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> "The members of the newly elected officers of the city of Clarence, who have not yet gone into office, want an opinion as to whether the lease is a valid lease under the laws of the State of Missouri.
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> "The members of the Board of Aldermen that talked to me said that their attention had been called to Section 106.300 of the Revised Statutes of Missouri, and they, after reading the same, were of the opinion that the lease would not be a valid lease, and they wanted an opinion from your office on this question."

The fact situation which you present is one which involves two separate bodies, to wit, the City of Clarence and the Clarence Lake Development Association, Inc. Officers of these two bodies are, to a degree, identical, or were so at the time the contract here in issue was consummated. The Mayor of Clarence, B. L. Edrington, and two members of the board of aldermen, Morris Eisenberg, and Faye Tils, were also members of the Board of Directors of the Clarence Lake Development Association, Inc. Eisenberg was, in fact, president of the Lake Development Association. The lease was by the City of Clarence to the Lake Development Association. Edrington signed as Mayor of Clarence and Eisenberg as president of the Lake Development Association.

Charles White was a member of the board of aldermen and was listed as being on the board of directors of the Lake Development Association. However, he denied that this was true and voted against the ordinance here in question.

The Clarence Lake Development Association is a nonprofit corporation. The consideration paid by the Association to the City of Clarence was purely nominal, to wit,the sum of $10 for a five year lease.

The question which is presented by this situation is whether the action that was taken is in violation of the law because of the fact that three of the city officials of Clarence were at the same time officials of the Clarence Lake Development Association.

In regard to this matter we direct attention to Section 106.300 RSMo 1949 which reads:

> "If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointed officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately suspend such officer and report the facts to the council, whereupon the council, as soon as practicable, shall be convened to hear and determine the same; and if, by two-thirds vote of the council, he be found so interested, he shall be immediately dismissed from such office."

It will be noted that this section states that if any city officer "shall be directly or indirectly interested in any contract under the city ...." he shall be deemed guilty of a misdemeanor.

Our problem here is to determine the meaning of the words "interested in." This issue resolves itself into a question of whether such interest, within the meaning of the statute, is solely pecuniary. If, as we believe, the term means a pecuniary interest only, our field of investigation will be greatly narrowed. This issue resolves itself into a question of whether such interest, within the meaning of the statute, is solely pecuniary.

Let us now attempt to determine whether the "interest" contemplated by Section 106.300 supra, is solely pecuniary.

In the case of State v. White, 282 S.W. 147, a 1926 case, a donor had bequeathed to the City of Mexico the sum of $1,000 for the erection of a drinking fountain on the public square. Subsequently, the city passed an ordinance accepting the gift and providing for the erection of the fountain at a particular spot on the courthouse lawn. At l.c. 148 the St. Louis Court of Appeals stated:

> "At the time the ordinance was passed and the contract was entered into for the erection of the fountain, Mayor Gallaher was a partner of the relator in the marble business. The name of the partnership was James W. Gallaher & Co. That this partnership existed as stated was conceded, and the learned chancellor found that Gallaher, as a member of said partnership, was directly interested in the contract for the erection of the fountain. There was abundant evidence to support this finding.
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> "The charter of the City of Mexico (section 8237, Revised Statutes 1919), provides that, 'if any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor,' and section 3665, Revised Statutes 1919 contains the same provision. There ought to be no question that the contract involved here is within the purview of these sections of the statute. Though the contract relates to a gift to the city in trust for the specific purpose of erecting a drinking fountain, nevertheless the contract was a contract under the city, and the work of erecting the fountain was a work done by the city, within the meaning of these sections. This being so, the contract was illegal and void. As mayor of the city, Gallaher had the superintending control of all the officers and affairs of the city, and it was his duty to see that the ordinances of the city and

> the state laws relating to the city were complied with. It was his duty to preside over the council and cast the deciding vote in case of a tie. He also had the power to veto any ordinance, resolution, or order of the council. As mayor he approved the ordinance providing for the erection of the fountain, had the plans drawn therefor, appointed a committee to get bids on the work, approved the award of the work to the relator, and signed the written contract therefor on behalf of the city. His direct interest in the contract as a partner of relator was found by the chancellor, to whose finding we ought and do defer. The contract was malum prohibitum if not malum in se. Equity will not assist a party to reap the rewards of a contract prohibited by the statute. It will not compel an officer to become a party to an illegal transaction against his will. Berka v. Woodward, 57 P. 777, 125 Cal. 119, 45 L.R.A. 420, loc. cit. 423, 73 Am. St. Rep. 31; Downing v. Ringer, 7 Mo. 585; Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Kitchen v. Greenabaum, 61 Mo. 110; Haggerty v. St. Louis Ice Manufacturing & Storage Co., 44 S.W. 1114, 143 Mo. 238, 40 L.R.A. 151, 65 Am. St. Rep. 647; O'Bannon v. Wydick, 220 S.W. 853, 281 Mo. 478; Sprague v. Rooney, 16 S.W. 505, 104 Mo. 349, loc. cit. 358; State ex rel. Connecticut Fire Ins. Co. v. Cox, 268 S.W. 87, 306 Mo. 537, 37 A.L.R. 1456."

In the case of Githens v. Butler County, 165 S.W. 2d 650, the wife of a judge of the county court purchased land which was ordered sold by the county court, in which order the husband participated. At l.c. 652 the Missouri Supreme Court stated:

> "' * * * 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, § 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, § 773; 46 C. J. § 308; 22 R. C. L. § 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."

We call especial attention to the statement of the court that "in general, the disqualifying interest must be of a pecuniary or proprietary nature."

In the case of Polk Tp. Sullivan County v. Spencer, 259 S.W. 2d 804, the action was by a township board against a former member to recover such amount paid such member under a contract to work on township roads while he was a member of the board. At l.c. 806 the Missouri Supreme Court stated:

> "* * * Spencer was employed by the board, not a road overseer, and the board is expressly authorized to contract and to employ operators 'and * * * necessary help and do such work by day labor.' Section 229.040, RSMo 1949, V.A.M.S. In Nodaway County v. Kidder, supra, in addition to the county judge's contract being against public policy, the statutes under which he held office expressly provided 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, or to act as any road or bridge commissioner, * * *.' Section 49.140, RSMo 1949, V.A.M.S.; Githens v. Butler County, 350 Mo. 295, 165 S.W. 2d 650. Likewise, in 1899, the statutes relating to drainage districts provided that 'said commissioners shall not, during their term of office, be interested, directly or indirectly, in any contract for the construction of any ditch, * * * nor in the wages of or supplies to men or teams employed on any such work in said district.' St. 1899, § 8336. Consequently, it was held that a contract by which one of the commissioners was employed as the engineer to supervise the construction of a levee and drainage ditch was void, and that he could not recover upon the warrants issued in payment of his contracted services. Seaman v. Cap-Au-Gris Levee Dist., supra; annotation 140 A.L.R. 583. The force and significance of the absence of the statutory prohibition and the presence of the authority to contract in general is that the employment contract is not void, but voidable. * * *"

The above appear to be the leading cases in Missouri. We have examined numerous other cases in other jurisdictions, in all of which the statutory prohibition was substantially similar to that in Missouri, to wit, Section 106.300. Some of these cases are: Commonwealth ex rel. Gardner v. Elliott, 291 Pa. 98;

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Gillen v. City of Milwaukee, 183 N.W. 679; City of Northport v. Northport Town Site Company 68 P. 204 and numerous others. In all of these cases, both within and without Missouri, we have found none in which the "interest" in issue was not a pecuniary interest.

Whether the city officials of Clarence, who also were members of the Clarence Lake Development Association, Inc., had a pecuniary interest in the lease in question, can only be determined from a careful weighing of numerous facts with which you are much more familiar than are we. We do say that if the city officials had a pecuniary interest in the lease they were in violation of Section 106.300 supra, and that if they did not have a pecuniary interest, that they were not.

CONCLUSION

It is the opinion of this department that a lease consummated by city officials who have a pecuniary interest in it comes within the purview of Section 106.300 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

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