CIRCUIT CLERKS: May give cause for ouster by failing to personally
COUNTY CLERKS: devote time to duties of office.

CONTRACTS: For purchase of supplies for office are void where clerk represents seller.

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April 18, 1942

4-23

Hon. D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

FILE
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Dear Sir:

Under date of April 11, 1942, you wrote this office requesting an opinion, as follows:

> "I respectfully request an opinion upon the following:
>
> "1. Does an elective official, such as a County Clerk, Circuit Clerk, etc., subject himself to ouster if he takes private employment, which necessitates absence from his office several days each week?
>
> "2. Can such official sell to himself stationery, books and other supplies of his office and render the County liable therefor, assuming that such purchases are necessary and are within the official's budget?
>
> "The facts upon which the above questions are propounded are as follows: a county official is employed by a stationery company. He is away from his office about three days a week, leaving deputies in charge. When stationery, books and other supplies

> are needed for his office, he orders such supplies from the firm with which he is connected and the County is billed. The supplies purchased are within his budget."

Section 18 of Article II of the Constitution requires an officer to personally devote his time to the performance of his duties, as follows:

> "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

Further, Section 12828, R. S. Mo. 1939, provides for the forfeiture of office and removal of an officer for certain things, including failure to personally devote his time to the performance of his duties, as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with

> respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

In the early case of State ex rel. Tilley v. Slover, 113 Mo. 302, the Supreme Court upheld the ouster of a court stenographer of Jackson County who appointed a deputy, left the duties of the office to be performed by the deputy, went to Buchanan County and there acted as court stenographer. The ouster was upheld because the officer was not personally devoting his time to the performance of his duties. And, in the case of State v. Yager, 250 Mo. 388, an ouster action against a sheriff, where one of the alleged causes of ouster was a wilful failure to attend circuit court when it was in session, the court said absence, except upon pressing official duty or because of other lawful excuse, was neglect of office.

In the Constitutional Convention, which prepared the Constitution of 1875, when Section 18, Article II was under discussion, it was stated the purpose of the section was to prevent the farming out of offices by persons chosen to fill them, that is, the acceptance, and appointment of a deputy, drawing the salary and permitting the work to be performed by the deputy.

Attention is called to the fact that neither the section of the Constitution above cited, nor Section 12828, R. S. Mo. 1939, requires that the officer devote <u>all</u> of his time to the performance of his duties or that he perform <u>all</u> of the duties in person. It would seem an officer is not precluded from accepting private employment or having other interests if he personally devotes as much time to the performance of his official duties as is required by the nature of the office and the amount of business to be transacted. However, if, while in the performance of private employment he wilfully neglects to devote so much of his time to the performance of his duties as is required by circumstances there would unquestionably be grounds for bringing an action to oust the officer.

The brief statement of facts contained in your letter fails to state whether the duties of the office are being fully performed or whether the business of the public is suffering by reason of the private employment of the officer. If, after a further investigation, you find the officer is not personally devoting as much of his time to the performance of his duties as is required by the nature of the office, the amount of business in the office, and the nature of the duties, for the office to be efficiently administered under the personal supervision of the officer, or that the business of the office is being permitted to suffer by reason of the private employment of the officer, beyond any question the officer would be subject to have an ouster suit filed against him.

In regard to your second question, no statutory provision prohibiting such practices has been found. The situation as explained by your letter is a strange one. Stated briefly the question is, may a county officer in his official capacity as an officer purchase from himself, as agent of a private business concern, supplies to be used in his official capacity.

Inasmuch as your letter states the purchases are within the budget estimate and seems to assume the right of the individual officer to purchase the supplies for his office these matters will not be discussed herein. But the opinion will be limited to a discussion of the question as set out in the preceding paragraph.

In this state there seems to be a well defined public policy as regards financial transactions had by officers with the municipal corporation in which they hold office. The members of the county court, the business managers of the county, are forbidden to become a party, either directly or indirectly, to any contract to which the county is a party. Section 2491, R. S. Mo. 1939. And, by statute, officers of cities are not permitted to have an interest in city contracts. Sections 6276, 6676, and 6896, R. S. Mo. 1939, relating to cities of the first, second and third class respectively. These are but a few of the many statutes which forbid officers to be interested in contracts with the municipal corporation of which they are officers.

It would seem a contract in which a county clerk or a circuit clerk in his official capacity would purchase from himself as agent for a private concern supplies for the county would be a contract in which the clerk had an interest, for his compensation would, in all probability, depend at least in part upon his sales. This being true the transaction would appear to be contrary to the public policy of the state.

"Public policy" is hard to define. In regard to this it is desired to call to your attention the following discussion of public policy from the case of Montgomery v. Montgomery et al., 142 Mo. App. 481, l. c. 486:

> "The court must have sustained this demurrer for the reason that he thought the contract sued upon was against public policy, and it is to this ground of the demurrer that we shall direct our attention. Just what contracts shall be considered void as against public policy cannot, in every case, be readily determined because the circumstances under which they may be made and the conditions of the parties which may induce the execution of a contract vary so much that a general rule that will apply to all cases cannot be laid down. It has been said that, 'Precisely what public policy is in any given case may frequently be a matter of contention, and its application made a subject of dispute. The strict meaning of the expression has never been defined by the courts, but has been left loose and free of definition in the same manner as "fraud." This rule, however, may be safely laid down that whenever any contract conflicts with the morals of the times and contravenes any established interest of society, it is void as being against public policy.' (Pueblo & A. V. R. Co. v. Taylor, 45 Am. Rep. 512 (citing

Story on Cont., par. 546); McNamara v. Gargett, 36 N. W. 218.)

"Our own Supreme Court in Kitchens v. Greenabaum, 61 Mo. 110, said, 'Courts have yet never ventured to define in specific terms the meaning of the phrase "public policy," but the general rule has been laid down that whenever any contract conflicts with the morals of the times and contravenes any established interest of society, it is void as being against public policy.' (Citing Story on Cont., par. 675.)

"The Supreme Court of Georgia makes the following very appropriate observation:

"'Judicial tribunals hold themselves bound to the observance of rules of extreme caution when invoked to declare a transaction void on grounds of public policy, and prejudice to the public interest must clearly appear before the court would be warranted in pronouncing a transaction void on this account. It is said that the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' (Smith v. Du Bose, 78 Ga. 413, 3 S. E. 309-314.)

"While no general rule applicable to all cases can be laid down, yet it is universally agreed that the promotion of public and private morals is one of the chief purposes of the law, and no agreement which tends to defeat that purpose will be tolerated. * * * * * *"

In the early case of Peltz v. Long, 40 Mo. 532, l. c. 537-538, is found the following discussion of contracts contrary to public policy:

> "That all contracts which are immoral in their nature, or contrary to public policy, or contravene any established interest of society, are void and incapable of enforcement, must be considered as settled propositions of law. It is not necessary that the contract should be expressly illegal; but whenever it is opposed to public policy, or founded on an immoral consideration, no action can spring out of it, the maxim being ex turpi causa non oritur actio. In such cases the law will not intervene in behalf of parties who present themselves in the attitude of wrongdoers; it will not listen to their prayers for relief, but will leave them just where their conduct has placed them. Therefore Ld. Mansfield, in Smith v. Bromley, Doug. 695, says: 'If the act is immoral in itself, a violation of the general laws of public policy, then the party paying shall not have his action (to recover back the money); for where both parties are equally criminal against such general laws, the rule is potior est conditis defendentis.' Chancellor Kent, in Griswold v. Waddington, 16 Johns. 486, in one of the ablest opinions that ever emanated from his luminous mind, remarks: 'The plaintiff must recover upon his own merits, and if he has none, or if he discloses a case founded upon illegal dealing and founded on an intercourse prohibited by law, he ought not to be heard whatever the demerits of the defendant

> may be. There is to my mind something monstrous in the proposition that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books.' Ld. Alvanley, in Monk v. Abel, 3 Bos. & P. 35, declares that 'the principle to be extracted from the cases on this subject is, that no man can come into a British court of justice to seek the assistance of the law, who founds his claims upon a contravention of the British laws.' Such contracts have a tendency to familiarize the mind with fraud, to weaken and destroy the force of just and lawful restraint, and induce a defiance of legal obligations, and ought therefore to be rejected. They are, in the expressive and characteristic language of Ld. Ch. Justice Wilmot, contracts 'to do that which is injurious to the community; and the reason why the common law says that such contracts are void, is the public good. You shall not stipulate for iniquity.'"

In the matter here under consideration there is not even a hint of irregularity in connection with the contract, but to permit an officer to contract with the body of which he is an officer would be furnishing an excellent opportunity for a dishonest person to perpetrate innumerable frauds.

At this point it is desired to quote briefly from the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, l. c. 861:

"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."

CONCLUSION

From the foregoing the conclusion is reached that a contract made by a county officer, in his official capacity, with himself, as agent for a private concern, for supplies to be furnished the county is void.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP