

Opinion No. 133**Schools—Contracts—School Trustees—
Husband and Wife—Public Policy—
Nepotism.**

HELD: A contract to build a schoolhouse, which involves more than \$250,000, where one of the trustees voting to let the contract is the husband of the contractor being awarded the contract, is void as against public policy. The Nepotism Act does not apply to contracts.

March 28, 1933.

You request an opinion on the following question: "Is a contract to build a schoolhouse, which involves more than \$250.00, legal where one of the trustees voting to let the contract is the husband of the contractor being awarded said contract?"

The pertinent statutory provisions are Sections 267, 444, 5069, and 1016, R. C. M. 1921. These provisions of the statute clearly express the intention to divorce public officials from any financial interest, of a personal or selfish nature, in any contract made by any board of which such officials are members.

The general rule governing public officials towards contracts in which they may be personally interested may be gathered from the following decision and many others: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private * * *. The disability * * * is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that dictates of self-interest will exercise a predominant influence, and supercede that of duty." *Michaud v. Girod*, 4 Howard U. S. 502, 554.

The statutes and most of the decisions appear to have had in mind the sole interest of public officials, but Section 5069, R. C. M. 1921, relating to cities and towns, specifically includes "relatives and employees" of officials. This raises the question in the case you submit as to whether or not it can be said that a husband is interested in the contract of his wife. A wife has the legal right to the exclusive control of her own property, (Sections 5810-5811) but it would be a long stretch of the imagination to say that the husband has no pecuniary interest in his wife's contract. While it cannot be said that the husband has a direct pecuniary interest in the contract in question, many of the authorities we have been able to find lend support to the view that he has an indirect pecuniary interest therein. (*Sturr v. Borough of Elmer*, 67 Atl. 1059; *Ames v. Board of Education*, 127—Atl. 95; *Tuscan v. Smith*, 153 Atl. 289; *Moody v. Shuffleton*, 262 Pac. 1095; *Woodward v. City of Wakefield*, 210 N. W. 322; *Hobbs, Wall & Co. v. Moran*, 293 Pac. 145; *Douglas v. Pittman*, 39 S. W. (2d) 979; 2 *McQuillin on Municipal Corporations*, Sections 531 and 629, 3 *Id.* Sections 1354 and 1932 *Supp.*; 56 C. J. 485, 486; 15 C. J. 553.)

It would appear to us that the husband's interest in the wife's contract would at least be as great and direct as that of a stockholder or director of a corporation in the corporation's contract. In the latter instance your attention is called to the following cases. *Duncan v. Charleston*, 39 S. E. 265 (S. C.); *Ann. Cases 1921D*, p. 660 and cases cited; *Noxubee County Hardware Co. v. Macon*, 43 So. 304 (Miss.); *President etc., of City of San Diego v. Railroad Company*, 44 Cal. 106.

In *Duncan v. Charleston*, *supra*, three stockholders of a corporation were members of the city council and a contract was entered into between the city and the private corporation by which the latter agreed to furnish the city a water supply. The court said: "The high character of the three gentlemen in question show that their presence in this contract on both sides, so to speak, was due to their great anxiety to promote the best interests of the public in the matter of a water

supply and not for any profit to themselves; still it is our duty to say that their conduct is illegal."

In *Noxubee County Hardware Co., v. Macon*, supra, two members of the city council were interested in a corporation which entered into a contract with the city. The court declared the contract void and said: "The town of Macon will come by its proper rights when both these gentlemen resign as aldermen and resume their business as merchants which * * * we have no doubt they will promptly do." The section of the Mississippi law quoted in the case contains practically the same provisions as Section 1016 R. C. M. 1921 relating to school trustees.

In *President, etc. of City of San Diego v. Railway Company*, supra, a trustee of the city was a stockholder and director of a railway corporation. The city was authorized to donate not to exceed 5,000 acres of city land to the railway company. The court held the conveyance void and further said: "The trustee's relation to the city was that of an agent to his principal, the city, and he could do nothing inconsistent with such relation. This is clear upon principle and rests upon abundant authority. No man can faithfully serve two masters."

In view of the foregoing authorities, it is the opinion of this office that a contract entered into between a woman and a school board of which her husband is a member is clearly against public policy. "Public policy of this state is determined by the acts of the legislature, and, in their absence, by the decisions of the courts." *Cruise v. Fischl*, 55 Mont. 258.

Such contracts have been held void in Iowa (111 N. W. 25) in Illinois (*Sherlock v. Winnett*, 59 Ill. 389), and in other states, but in others are voidable only. (*Tucker v. Howard*, 122 Mass. 529).

Section 446 R. C. M. 1921 is as follows: "Every contract made in violation of any of the provisions of the two preceding sections (444 and 445) may be avoided at the instance of any party except the officer interested therein."

Section 444 refers to all public officers but does not specifically mention

school officials, but it might be construed to include school officials as school districts are subdivisions of the state. *State v. Meyers*, 65 Mont. 124. Although the language of Section 446 might lead to the belief that the contract is merely voidable, yet, the contract being contrary to public policy, we think it should be held to be absolutely void. (*McManus v. Fulton*, 85 Mont. 170; *Berka v. Woodward*, 57 Pac. 777; 13 C. J. 420-435; 2 Page's Law of Contracts, Section 1020.)

The recent act on nepotism, Chapter 12, Laws of 1933, does not apply in this matter as that act was intended to relate only to appointments to office and employees in various governmental capacities.