



Special

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Albert J. Hutson
County Attorney
Trinity County
Groveton, Texas

Dear Sir:

Opinion No. O-2656
Re: Eligibility of directors
of a bank which has been
designated as the depository
of an independent school
district having more than
150 scholastics to serve as
a member of the board of
trustees of said district.

We have your request for an opinion on the following proposition:

"Three members of the Board of Trustees of the Trinity Independent School District are directors in the school depository. Two of the Directors and Trustees on September 21, 1959 voted to make their bank the depository. From time to time the board with its three director members pass interest bills rendered by the depository. Are such Director Trustees eligible to serve on the School Board? If not, can they be removed by *quo warranto*?"

You have also advised us that:

"The last scholastic census of the Trinity Independent School District totaled one thousand three hundred four (1,304)."

Under the provisions of Article 2832, Revised Civil Statutes, 1925, the depository of an independent school district

Honorable Albert J. Hutson, Page 2

having more than one hundred and fifty (150) scholastics is selected by the board of trustees of such district. Such depository, or treasurer must give bond approved by the board of trustees.

The common law has always recognized the danger to the public welfare arising when a public official, acting in his official capacity, makes a contract in which he is interested individually. 6 Williston on Contracts, Sec. 1735. The Texas courts applied this rule at an early date and declared such contracts to be void. As stated by Justice Lipscomb, in Flanikin v. Fokes (1855), 15 Tex. 180, p. 182:

"A contract which would give him (the public officer) an interest in an official act to be done by him would be repugnant to law and sound morality.
* * *"

This common law rule as it affects certain officers and certain types of contracts has been enacted into a penal statute; Article 373, Penal Code of Texas, which reads:

"If any officer of any county, or of any city or town shall become in any manner pecuniarily interested in any contracts made by such county, city or town, through its agents, or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined not less than fifty nor more than five hundred dollars."

This statute has been conscientiously enforced by the courts. Meyers v. Walker, 276 S. W. 305; City of Edinburg v. Ellis, 59 S. W. (2d) 99. In the latter case, Judge

Honorable Albert J. Hutson, Page 3

Sharp, speaking for the Commission of Appeals, declared:

"The rule prohibiting public officers from being interested in public contracts should be scrupulously enforced."

We believe, however, that the situation outlined in your letter does not come within the purview of Article 373, supra. It is true that trustees of school districts have been held to be county officers within the meaning of civil statutes, Scherz v. Telfer, 74 S. W. (2d) 327; Hendricks v. State, 49 S. W. 705; Fowler v. Thomas 275, S. W. 253; Walker v. Walker, 241 S. W. 524. But the Texas Court of Criminal Appeals has refused to adopt so liberal a construction in construing a penal statute. In Hall v. State, 80 Tex. Crim. Rep. 109, 133 S. W. 1002 that court held that a treasurer of an independent school district was not included within the term "any county treasurer" as found in Article 1580 of the Revised Criminal Statutes of 1911. See our Opinion No. 0-1589, copy of which is enclosed herewith.

It is likewise to be noticed that Article 373 does not refer to all types of contracts in which the public officer may be interested, but is limited to "any contracts * * * for the construction or repair of any bridge, road street, alley or house, or any other work * * * or any bid or proposal for such work or in the purchase or sale of anything * * *." A contract with a bank to act as depository is not such a contract as described in this statute. Applying the rule that penal statutes must be strictly construed, we are of the opinion that Article 373 of the Penal Code is not applicable to the situation here under consideration.

The converse of the question asked by you was considered by this department in conference opinion No. 2785, dated September 16, 1929, appearing at page 127 of the Attorney General's published report for 1928-1930. We quote this opinion in full:

"Honorable S.M.N. Marrs, State Superintendent of Public Instruction, Austin, Texas.

"Dear Sir: This will acknowledge receipt of your letter of September 10th, addressed to the Attorney General. By this favor, you ask the opinion of the department as to whether a

stockholder or director of a corporation serving as depository or treasurer of an independent school district would be eligible for appointment and qualification as trustee of said school district.

"We are of the opinion that the two positions present such a conflict of interests as to prevent the holding of the two relationships at one and the same time. The trustees of an independent school district have as part of their duty the task of seeing that the treasurer or depository properly manages the fund and moneys of the school district. It is also incumbent upon the trustees to see that the school funds are properly protected by bonds and that the solvency of the bonds and also the solvency of the institution should be watched after to the end that the moneys may always be properly protected. Innumerable instances could be recounted where the pecuniary interests of a stockholder in a corporation would sway the trustee to an act of favoritism, at least that an unbiased and non-interested trustee would resolve against such depository or treasurer; without attempting to enumerate these various objections we conclude that upon the grounds of public policy the two positions are incompatible and that, therefore, we must answer your question by saying that a stockholder or officer of a corporation acting as a depository for an independent school district would not be eligible for appointment or election as trustee of said school district. All prior opinions of this department to the contrary are expressly overruled.

Yours very truly
W. Dewey Lawrence,
Assistant Attorney General."

In conclusion, we beg to advise you that in our opinion (1) the contract made by the Board of Trustees of the Trinity Independent School District designating as depository the bank, three of whose directors are trustees, is void; (2) the trustees are not subject to criminal

Honorable J. Hutson, Page 5

prosecution under Article 373 of the Penal Code; (3) upon necessary findings of fact by a court or jury, the trustees may be removed from office by the procedure provided by Article 5, Section 24 of the Constitution of Texas, and Title 100, Revised Civil Statutes, 1925.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Walter R. Koch*
Walter R. Koch
Assistant

WRK:RS

APPROVED SEP 10, 1940

Gerald B. Mann
ATTORNEY GENERAL OF TEXAS

