OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

ALD C. MANN
ORNEY GENERAL

March 1, 1939

Hon. Fred Erisman
District Attorney
Longview, Texas

Dear Sir:

Opinion No. O-344
Re: Whether holding of a note by a county commissioner on a filling station which he formerly owned, the county now making some purchases from the station, involves a violation of Art. 2340, R. C. S., or Art. 373, P. C.

We are in receipt of your letter of January 28th, in which you request our opinion on the above question.

Article 2340, R. C. S., 1925 is as follows:

"Before entering upon the duties of their office, the county judge and each commissioner shall take the official oath, and shall also take a written oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in which he resides, except such warrants as may issue to him as fees of office...."

Article 373, R. C., 1925, follows:

"If any officer of any county.... shall become in any manner pecuniarily interested in any contracts made by such county,....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, ...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,...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."

The foregoing statutes are based upon sound public policy. The object is to insure to the county strict fidelity upon the part of those who manage its fiscal affairs. The rule prohibiting public officers from being interested in public contracts should be scrupulously enforced.

The authorities are practically unanimous to the effect that the officer to be liable, must have an interest (directly or indirectly), in the subject matter of the contract. A remote contingency will not bring said officer within the statutes.

The Texas rule is well stated in Texas Jurisprudence, as follows:

"An officer is prohibited from acting in his official capacity as to matters in which he has an interest. Conspicuous examples of such prohibitions are those which forbid....members of the commissioners' court from consideration of any claim in which they are interested. But to come within the rule the officer's interest must be direct and certain; he is not disqualified by an alleged monetary interest which is at most contingent, and may not in fact exist at all." 34 Tex. Jur. 499, 872.

Corpus Juris states the law to be:

"A pecuniary interest in the contract direct or indirect is held to come within the prohibition....An interest to invalidate the contract must be of a personal or private

> nature....It must be an interest in the subject matter of the contract itself as distinguished from outside interests of the.... officer incidentally affected by the making of the contract." 44 C. J. 93, para. 2175.

In the case of City of Edinburg v. Ellis, 59 SW (2d) 99, the Commission of Appeals in a retailer's action against the city for a balance due on an open account, held the question of whether a city commissioner who sold supplies to retail dealers, and who sold such supplies to the retailer bringing the action, was a fact question, finally determinable only by all the attendant circumstances. If fraud and collusion could be shown, the contract would be an illegal one.

From the authorities quoted, supra, we are of opinion the county would not be precluded from making purchases from the filling station in question, and that there would be no violation of either statute you cite, unless collusion and fraud be provable as to the commissioner affected.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By Benjamin Woodall

Benjamin Woodall
Assistant

BW:AW

APPROVED:

Gerald C. Mann

ATTORNEY GENERAL OF TEXAS