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COLLEGES AND UNIVERSITIES: Member of Board of Regents of University of Michigan.
CONSTITUTIONAL LAW: Question of conflict of interest.

Discusses relationship of a member of the Board of Regents in his capacity as a businessman whose company has business relationships with the University.

No. 4492 March 10, 1966.

Hon. Jack Faxon and
Hon. George F. Montgomery
State Representatives
Lansing, Michigan

You have requested my opinion on the following question:

> Whether it is proper for a university, such as the University of Michigan, to do business with a company such as University Microfilms, Inc., of which one of the Regents of the University, Eugene B. Power, has a substantial interest?

At your request the Department of the Auditor General conducted a supplementary examination of the University of Michigan in several areas, including the area of the business relationships between the University of Michigan and University Microfilms, Inc., and issued a special report on November 22, 1965. The special report was supported by two documents entitled Exhibit A and Exhibits B and C. These have been carefully studied in my office. In addition my staff sought and has obtained additional information from Eugene Power. Reliance has also been placed upon the letter of Butzel, Eaman, Long, Gust & Kennedy to Mr. Cummiskey under date of December 15, 1965. Based upon such study and additional information furnished by Mr. Eugene Power, the following facts appear pertinent to your question:

Since approximately the year 1938, Eugene Power conducted business operations under the name of University Microfilms in Ann Arbor, Michigan. As a part of his business, he borrowed library materials, including books and journals, from the University of Michigan Library for microfilming and for sale of photocopies. Such business operation included microfilming books and journals to fill orders taken by the University library with University Microfilms handling the shipment and the billing of orders and collection of payments. Employees of the University library would identify the book or periodical requested, and find it on the shelves, charging the material to University Microfilms, discharging it on its return and shelving it.

In 1944, because the number of interlibrary loans to University Microfilms had greatly increased and there was some delay in the return of material to the shelves, Mr. Power and officials of the University of Michigan library entered into an agreement whereby Mr. Power lent the University library a microfilm camera which was operated by the staff of the Unisity Library Photoduplication Service. University Microfilms paid the University library 1¢ for each exposure made by library staff to film short-

run materials, and ¾¢ for exposure on long-run filming operations. The exposed film was sent to University Microfilms for processing. Shipment and billing of orders and collection of payments were undertaken by University Microfilms.

Film exposures were made by University library personnel on orders taken by the library and on orders made by University Microfilms. Employees of the library would identify the book or periodical requested, find it on the shelves, deliver the book to the employee operating the camera, and return the book to the shelf after microfilming. These relationships between the University of Michigan library and University Microfilms continued through the year 1954.

In the Spring of 1955, Mr. Power was elected Regent of the University of Michigan for a term to commence January 1, 1956. Thereafter library and other University of Michigan officials expressed concern about Eugene B. Power's status and the future legality of prevailing University of Michigan and University Microfilms relationships. After Mr. Power took office, all prevailing contracts between the University of Michigan and University Microfilms were cancelled on advice of counsel for the University of Michigan as of January 1, 1956.

It appears that in the interim, before assuming office, Eugene B. Power sold a camera to the University of Michigan library and the University continued to use films provided by him to photograph materials at his request, delivered the undeveloped film to University Microfilms for printing of positive film at a rate of 1¢ per exposure on short-run orders and ¾¢ on long-run orders for the filming done by the staff of the University of Michigan library.

During the aforesaid time University Microfilms was a Michigan profit corporation controlled by Eugene B. Power and his wife.

After Eugene B. Power took office as Regent of the University of Michigan, he wrote to Horace W. Gilmore, Deputy Attorney General of Michigan on March 28, 1956, requesting an opinion on the following questions:

> "1. For years we have borrowed books and periodicals from the University of Michigan Library which we have microfilmed, put the negative in our vault, and at a later date made copies for other libraries who were interested in purchasing them. We also borrow books and periodicals on interlibrary loan from other institutions, including the Library of Congress, Harvard, and the American Antiquarian Society. Interlibrary loan of library materials is a common procedure for various business organizations requiring the use of periodical and other library resources. The only difference in the situation is that these corporations may obtain from them a process or information where it is of value, whereas we microfilm the materials and benefit in that way. This is a service which is available to the business organizations of the state as taxpayers.
>
> "2. The University Library operates a microfilm service in their Photoduplication Department from which they supply microfilm copies of articles, periodicals, and books at standard rates. All of the great libraries in the country have similar facilities and they all charge about the same rate. I should like to know if it is acceptable for me

to buy such microfilm from the library at the same offered rates which anyone else would pay.

"3. Upon assuming the office of Regent I cancelled all contracts with the University, many of these of long standing, some as long as 17 years. This was done in accordance with the Regents Bylaw enclosed and the statute mentioned above.

"The difficulty, however, is that the services we offer in certain instances are unique and they are not obtainable elsewhere. As an illustration, we are microfilming all of the books printed in England before 1640. No one else is doing this and if the University were to do this themselves they would be put to a very great expense. We split the expense of preparing the negative among a great many institutions and thus can supply copies of these materials at low rates. Another illustration is the microfilming and publication of dissertations, a service which we perform for some seventy other institutions in the United States. An essential part of the service is the publication of an abstract in a nationally recognized volume known as *Dissertation Abstracts*. Obviously the University cannot do this themselves for they cannot obtain the recognition and the benefit which comes from a generally used volume if they publish their own abstracts. There are a number of other similar services in addition to these.

"The end result of all of this is that so far, the only solution I have come up with is that these services should be given to the University as an outright contribution and this means contributions of something around $6,000 to $10,000 a year. I don't mind helping the University, but this amount is a sizable item and I would like to explore other possibilities in respect to it."

Deputy Attorney General Gilmore responded on April 10, 1956 with the following answers to the questions propounded.

In response to the first question about the action of Mr. Power in behalf of University Microfilms in borrowing books and periodicals from the University of Michigan library which he microfilmed, put the negative in his vault and at a later date made copies for other libraries interested in purchasing them, Deputy Attorney General Gilmore concluded that there was no conflict of interest or legal involvement in the situation Regent Power outlined. The borrowing of books and periodicals for microfilming does not constitute a contract, purchase or sale made for, or on account, or in behalf of the University of Michigan. Consequently it does not run contrary to Section 122 of Act 328, P.A. 1931, as amended, being C.L. 1948 § 750.122; M.S.A. 1962 Rev. Vol. § 28.317. Deputy Attorney General Gilmore found the activities described in question 1 to be completely legal and that they could be continued.

Relative to the second question dealing with the purchase of microfilms at standard rates, Deputy Attorney General Gilmore concluded that as long as the purchase was made openly at the same rate at which all citizens can purchase them, it is perfectly proper for Regent Power to do so and there is no violation of law.

Responding to the third question relating to the purchase of services by

the University of Michigan from University Microfilms, Deputy Attorney General Gilmore stated that such transaction would be illegal, contrary to statute, and if any such contracts existed they should be cancelled immediately.

Regent Power, on August 15, 1956, directed a further letter of inquiry to Deputy Attorney General Gilmore informing him that University Microfilms employs negative film supplied by the University of Michigan to University Microfilms for printing and subsequent sale at a profit, and asked whether this fact altered the opinion as to the second question answered in Gilmore's letter of April 10, 1956. Deputy Attorney General Gilmore replied under date of August 22, 1956 by indicating that the subsequent sale at a profit by University Microfilms did not in any way alter the opinion of April 10, 1956.

Following this advice, all contracts between University Microfilm and the University were cancelled, and all charges to the University were stopped. But, by this time, the services available to the University from University Microfilms were unique, and were of such value that in the interest of the University, it was deemed imperative that they be continued. Therefore, the services were continued to be rendered to the University by the Company as a gift, each invoice being marked paid and no charges being made by the Company. The amount of services thus provided by University Microfilms, Inc. at no cost to the University has steadily increased over the years.

A further letter from Eugene Power dated June 17, 1958 was directed to Attorney General Paul Adams, in which representation was made that the business concern of Regent Power was borrowing books from the University of Michigan library for the purpose of microfilming and sale of films, and the question was propounded whether such activity was lawful. On June 19, 1958 Attorney General Adams responded:

> "In a letter dated April 10, 1956 this office answered the same question as follows:
>
> " 'A careful examination of this statute and an examination of the cases covering the general question leads us to the conclusion that there is no conflict of interest or legal involvement in the situation which you have outlined. The borrowing of books and periodicals for microfilming does not constitute a contract, purchase or sale made for, or on account, or in behalf of the University of Michigan. Consequently, in our opinion, it does not run contrary to this section.
>
> "'* * * it is our opinion that your activities are completely legal and may be continued.'
>
> "After discussing this with members of my staff, it is my opinion that the conclusion reached above still applies inasmuch as the statute involved and the factual situation are identical."

Apparently the question to Attorney General Adams was precipitated by the problem of loans of library materials to University Microfilms which did not appear to be finally resolved.

The minutes of the July 1958 meeting of the Board of Regents in this regard read:

> "Regent Power, for the information of the Regents, explained

that his firm, University Microfilms, borrows books from University of Michigan libraries, copies them, distributes them for sale. His firm follows the same procedure with many other libraries. In no way is his firm in a privileged position with reference to the University of Michigan. The procedure as outlined is the same as that followed generally by other users of library books and is not a special privilege extended to Regent Power."

In 1958 Eugene B. Power, in behalf of University Microfilms, donated a camera to the University of Michigan library for the purpose of photographing excerpts from books instead of students copying them by hand. The library would provide the film, develop the negative and send it to University Microfilms who would reproduce the film by copyflo and return it to the library without charge. The library would then make the copyflo available to the student at a low rate to cover the library handling cost.

During the year 1959 University Microfilms had persons in its employ who worked regularly in the University of Michigan library searching the catalogs and securing publications from the shelves to be charged to University Microfilms. At the same time it also appears that the University of Michigan library was continuing to film certain library materials at the request of University Microfilms.

Agreement for Space In Library

In 1962, at the request of the librarian, University Microfilms placed its camera in the University of Michigan library in a large closet on the third floor. The reason given by the librarian was to reduce both the charge-out time of books being borrowed and the wear and tear on the volumes. No rental was charged to University Microfilms by the University of Michigan. The camera was operated by regular employees of University Microfilms.

A second camera was subsequently placed in the library so that the charge-out time would be reduced. The cameras were placed in an unused and unventilated storage room designated by library officials.

It does not appear that any other person or persons were afforded space in the University of Michigan library on similar terms, nor is there any indication that library officials received requests for similar arrangements from other person or persons. It should be pointed out, however, that this arrangement is common in libraries throughout the world, and we have learned of no case where any library has ever requested that rent be paid for the space occupied by cameras placed there for this purpose.

One final observation is made relative to the above described general relationship between University Microfilms and the University of Michigan library. The special report of the Auditor General shows that the University of Michigan Library Photoduplication Service charges a basic rate of .05¢ per exposure for copies of bound materials, and where the order is for 1,000 exposures or more, the rate of .045¢ per exposure. University Microfilms was given the reduced rate of .045¢ per exposure on all orders including those that were under a thousand exposures. For the fiscal year ending June 30, 1965 a total of $1,797.63 of business was transacted be-

tween the University of Michigan library and University Microfilms. The Auditor General states further that most of the orders from University Microfilms were under 1,000 exposures and no other company was given the reduced rate.

Mr. Power states that almost every order placed by University Microfilms, Inc. was for more than 1,000 exposures. The University charged a uniform 4½¢ rate. He states further that if University Microfilms, Inc. had been charged the higher rate the additional charge would have been during the last two years $16.85.

University Shelf List

The University of Michigan library is one of the few libraries in this country that receives without charge one copy of a catalog card for each publication cataloged by the Library of Congress. This catalog card contains a record of the name of the author of the publication cataloged, the title of the publication, publisher, the date of printing, size of the publication, the number of pages, certain indexing by topic and a call number. The University of Michigan library keeps the card in the Library of Congress catalog depository. Whenever a book is acquired by the University of Michigan library, the depository of the Library of Congress catalog cards is searched and if there is a Library of Congress catalog card available, the University duplicates it for its various library catalogs. If the University of Michigan library acquires a book that is not cataloged by the Library of Congress, employees of the University of Michigan library proceed to catalog the book and prepare necessary catalog cards containing comparable information found in Library of Congress catalog cards. These cards are inserted in the various catalogs of the University library. In addition, the University library has catalog cards for books not indexed by the Library of Congress which had been previously prepared by the staff of the library. It is estimated that between the years 1956 and 1958, when the collection of the undergraduate Michigan University library was acquired, 92.2% of all the titles acquired and cataloged by the library had been cataloged by the Library of Congress or previously cataloged by employees of the University of Michigan library. In addition, the remaining 7.8% acquired were cataloged by the University staff at the expense of the University of Michigan.

This information has been obtained from Frederick H. Wagmann, Director of the University Library, who estimates that during the past 30 years perhaps 90% of the catalog cards of the University of Michigan undergraduate library have been obtained by duplicating cards received from the Library of Congress without charge. The remainder of the cards have been prepared by the University library staff at the expense of the University of Michigan.

One copy of the catalog card for each publication in the University of Michigan undergraduate library is kept in a separate catalog as the shelf list of the library, consisting of approximately 57,000 cards, and serves as an inventory of the undergraduate library.

In 1959, at the request of Eugene B. Power, in behalf of University Microfilms, the University of Michigan library produced a microfilm of

the shelf list of the undergraduate University library. In effect the microfilm was of each of the catalog cards in the undergraduate library. University Microfilms paid $375.00 or 5¢ per exposure for microfilming of the undergraduate library shelf list. The order was executed on May 11, 1959 and was billed on May 29, 1959. The statement for this account indicates that the charge was 5¢ per exposure. Thereafter University Microfilms sold copies of the University of Michigan undergraduate library shelf list at rates determined by University Microfilms, Inc. In 1964 University Microfilms reordered the undergraduate library shelf list for copyflo purposes, apparently a different process of film reproduction, and University Microfilms was billed in the amount of $570.96 at 6¢ per exposure.

Exhibit A, which is attached to the Special Report of the Auditor General, indicates that the University library had on other occasions sold certain portions of its shelf list to other subscribers at a price which paid for the library's cost of cataloging. It is also clear that no effort was made to charge University Microfilms any portion of the cost of cataloging.

Publication of Theses by Doctoral Candidates

Prior to the election of Eugene Power as Regent of the University of Michigan, graduate students submitting doctoral theses as a requirement for award of a degree were required to publish the thesis at a fee of $25.00 and the microfilming was done by University Microfilms, which collected the fee, published an abstract of the thesis, indexed the thesis in a publication known as "Dissertation Abstracts," retained the negative of the thesis in its vault and sold copies at a rate fixed by University Microfilms.

After the election of Regent Power and his assumption of office, upon advice of counsel, a new agreement was executed by the doctoral candidate and the University of Michigan, wherein the doctoral candidate paid a fee of $25.00 to the University of Michigan for microfilming of his thesis. The microfilming was to be done by the University, a film copy was to be sent to the Library of Congress and the University library would retain the negative and make copies of the thesis upon request at rates fixed by the library. The aforesaid agreements in effect since 1956 have never been fully kept by the University of Michigan, in that the University of Michigan library, in making a microfilm of the thesis, delivered the negative film to University Microfilms for storage in its vaults and for the sale of copies at rates determined by University Microfilms, Inc. Eugene Power states that he became aware of the agreement for the first time in 1964 and that steps were promptly taken to correct the matter.

At that time, University Microfilms attempted to obtain a modification of the agreement, and at Mr. Power's suggestion, the agreement would have contained the following language: "the manuscript is to be microfilmed and returned to the Graduate School. The negative will be stored where positive microfilm or xerographic enlargement will be made upon request at announced rates." See letter of August 5, 1964 on University Microfilms, Inc. stationary, signed by Stephen Rice. This same letter also

indicates that University Microfilms, Inc. wished permission to distribute microfilm or xerographic copies of the dissertation.

The contract form between the University of Michigan and the doctoral candidate was not changed. John G. Gantt, head of the Photoduplicate Service of the University library, in a memo dated November 27, 1965 to Dr. Frederick H. Wagmann, Director of the University library, indicates that the procedure for microfilming dissertations has been consistent since 1956. It appears further that the University of Michigan library microfilmed the dissertation and stored the negative microfilm at University Microfilms, Inc. with copies made by that concern at rates fixed by it. Nor is there any indication that any other arrangement is presently in effect.

Relative to the dissertations, it must be concluded that when Eugene Power became Regent of the University of Michigan, University Microfilms, Inc. no longer collected $25.00 for microfilming doctoral dissertations of students at the University of Michigan. In addition, abstracts of dissertations were prepared and editorial work done by University Microfilms, Inc. at no cost to the students. However, University Microfilms continued to receive negative microfilm, stored it in their vaults and sold copies of it at rates fixed by University Microfilms, Inc.

Contracts between Agencies of the University and University Microfilms

University Microfilms undertook to microfilm certain rare books and journals and to be sales agency of these microfilms paying royalties of 10%. The Special Report of the Auditor General indicates that such agreements were entered into with the Bureau of Business Research, University of Michigan School of Business Administration and for the microfilming of current and back files of the "Michigan Business Review" authorizing University Microfilms to reproduce the issues on microfilm and pay a commission of 10%. The contract was signed by Eugene Power in behalf of University Microfilms and Philip Wernette, the Professor in the School of Business Administration. Apparently the University received royalties in the amount of $4.46. The Bureau of Business Research entered into 4 contracts with University Microfilms to reproduce 4 of the University of Michigan publication titles in their out-of-print book series. This contract called for University Microfilms to pay the University royalties of 10% on the invoice of the sale price of each copy sold. Apparently one payment was made by University Microfilms to the University in the amount of $4.89 in January of 1965. One of these contracts for the publication of the book "The Problem of Retail Sight Selection" dated February 7, 1964, was executed by Alfred W. Swinyard, Director of the Bureau of Business Research in behalf of the University, and Eugene Power signed in behalf of University Microfilms. The Special Report of the Auditor General indicates that the Board of Regents never authorized the execution of the aforesaid contracts. Further, unauthorized persons executed the contracts in behalf of the University.

Purchases of Services by University of Michigan

During the period of January 1, 1956 through October 31, 1965, the University of Michigan purchased certain services from University Micro-

films, Inc. in the total amount of $49.83 and services from University Microfilms, Limited, in the amount of $614.39. Mr. Power states that he had no personal knowledge of any of the aforesaid purchases by the University of Michigan, from either business concern.

General

University Microfilms, Inc., a Michigan profit corporation, as heretofore indicated, was controlled by Eugene Power and his wife. Mr. Power also owned the controlling interest in University Microfilms, Limited, a foreign corporation. On April 26, 1962, the Powers transferred all of their ownership of University Microfilms, Inc. and University Microfilms, Limited, to Xerox Corporation, a foreign corporation, in exchange for approximately ½ of 1% of Xerox common stock. At that time University Microfilms, Inc. became a wholly owned subsidiary of Xerox Corporation. Since University Microfilms, Inc. became a wholly owned subsidiary of Xerox Corporation, Regent Power continues to serve as President of University Microfilms, Inc. and draws a substantial annual salary in that office. He also serves as a member of the Board of Directors of Xerox Corporation but without salary. He remains a stockholder in Xerox Corporation.

The controlling law prior to the Michigan Constitution of 1963

The public policy of Michigan was established very early in its history relative to the interest of public officers in contracts with the governmental unit that they represented. The controlling principles were laid down with great clarity in *The People, ex rel. Aldert Plugger et al., v. The Township Board of Overyssel,* 11 Mich. 222, 225 (1863). Mr. Justice Manning, speaking for the court, said:

> "* * * So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. Hence, the law will not permit an administrator to purchase at a public sale by himself, property of the estate on which he has administered; or a guardian the property of his ward, when sold by himself. All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And, a greater necessity exists than in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less. A judge cannot hear and decide his own case,

or one in which he is personally interested. He may decide it conscientiously and in accordance with law. But that is not enough. The law will not permit him to reap a personal advantage from an official act performed in favor of himself. For these reasons, we hold the contract we are asked to enforce by mandamus, void as against public policy."

Mr. Justice Christiancy, in his concurring opinion, laid down the following test:

"The public were entitled to their best judgment, unbiased by their private interests, and by accepting the office they became bound to exercise such judgment, and to use their best exertions for the public good, regardless of their own. They had no right, while they continued in office, to place themselves in a position where their own interests would be hostile to those of the public." Ibid, p. 226

Commenting upon the motives of the public officer and fairness of contracts, Justice Christiancy said:

"And, though these contractors may, as members of the board, have acted honestly, and solely with reference to the public interest, yet if they have acted otherwise, they occupy a position which puts it in their power to conceal the evidence of the facts, and to defy detection. If, therefore, such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be, that they must be enforced *in spite of fraud or corruption.* Hence, the only safe rule in such cases, is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party. This rule appears to me so manifestly in accordance with sound public policy as to require no authority for its support." Ibid, p. 227

In *Village of St. Johns v. Board of Supervisors of Clinton County,* 111 Mich. 609 (1897), the court upheld an action to recover a claim of a county health officer for special services where the claimant took no part in the proceedings to fix his compensation, the services had been personal and the amount claimed was reasonable.

Consideration must also be given to the case of *Lewick v. Glazer,* 116 Mich. 493 (1898), in which suit was brought to restrain the carrying out of a municipal contract for waterworks where it was contended that some of the trustees who voted for the contract were interested in the contract in that one of the trustees was a member of the electric company to be benefited under the contract, and another was the father of the person awarded the contract. The court ruled that if the contract were validly approved by persons not interested in the contract it would be upheld. The relationship of one of the trustees to the contractor did not serve to disqualify him for voting on the contract. Thus, the contract had been approved by the requisite number of disinterested trustees.

A suit was brought by a private company to recover the cost of goods sold to the Michigan Employment Institution for the Blind in *Consolidated Coal Co. v. Board of Trustees of the Michigan Employment Institution for the Blind,* 164 Mich. 235 (1910). Defense was made that an officer

of the defendant was also a stockholder in the plaintiff company, contrary to the provisions of Act 107, P.A. 1873. The court declared the contract for the purchase of coal to be absolutely void under the statute, holding that the public policy of the state was expressed in the statute and the court could not amend it to reflect any rule developed by the courts.

To the same effect is *Perle v. City of Lansing*, 189 Mich. 501 (1915), in which suit was brought to restrain the defendant city from paying a lumber bill where one of the officers of the city was an officer and stockholder of the plaintiff supplying the materials. The city charter prohibited every contract made by the city in which any officer thereof or member of its common council had a private interest. The court relying upon *Consolidated Coal Co.*, supra, declared that the city was prevented from making purchases of a corporation of which any officer of the city or member of its council is an officer or a stockholder. The court said:

> "A sale is a contract, and a form of contract in which the evil sought to be remedied by the charter is most frequently apparent."

The court concluded that it will not inquire whether the terms of the contract are fair or unfair. "The purpose of the prohibition is not only to prevent fraud, but to cut off the opportunity for practicing it."

In *Woodward v. City of Wakefield*, 236 Mich. 417 (1926), a suit was brought to set aside a land contract entered into by the city with the wife of the mayor of the city. The mayor had acted as an agent for his wife and participated in the meeting in which the council approved the contract. Without his vote the contract would not have been made. The Wakefield City Charter contained a provision that no officer of the city shall be interested directly or indirectly in the profits of any contract and any contract made in violation of this provision shall be void. The court declared the contract void, ruling that it is the policy of the law to keep public officers far enough removed from temptation as to insure the exercise of their unselfish interest in behalf of the governmental unit they represent. The fact that the city was in no way defrauded and that the purchase was beneficial to the city would not serve to change the rule. The court declared the contract void and cited with approval *People, ex rel. Plugger v. Township Board of Overyssel*, supra.

It must be concluded that until the year 1964 when the Michigan Constitution of 1963 became effective the common law in Michigan was that public officers may not be interested in contracts with a governmental unit which they represent.

In the Michigan Constitution of 1963 the people have provided in Article IV, Sec. 10:

> "No member of the legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a *substantial conflict of interest*. The legislature shall further implement this provision by appropriate legislation." (Emphasis supplied)

We have then restated in the Michigan Constitution of 1963 the prohibition against state officers being interested directly or indirectly in any

contract with the state, and the people have then provided "which shall cause a substantial conflict of interest."

It is incumbent, then, to determine when a contract shall cause "a substantial conflict of interest." Resort may be had to the debates of the framers of the Constitution to determine the meaning and intent of the people in ratifying Article IV, Sec. 10. *Burdick v. Secretary of State,* 373 Mich. 578 (1964).

Article IV, Sec. 10 first came before the Constitutional Convention as Committee Proposal 115, which stated:

> "NO MEMBER OF THE LEGISLATURE OR STATE OFFICER SHALL BE INTERESTED DIRECTLY OR INDIRECTLY IN ANY CONTRACT WITH THE STATE OR ANY SUBDIVISION THEREOF WHICH SHALL CAUSE A SUBSTANTIAL CONFLICT OF INTEREST. THE LEGISLATURE MAY IMPLEMENT THIS PROVISION BY APPROPRIATE LEGISLATION."

Mr. Hoxie, chairman of the committee on legislative powers, submitted the following reasons in support of Committee Proposal 115:

> "The proposed section amends article V, section 25. The committee is of the opinion that it should be clearly expressed that persons who serve the state in elected or appointed positions should not have conflicting interests.
>
> "The detailed restrictions of section 25 were inserted in the 1850 constitution and are legislative matter which do not deserve inclusion. There is no question of the legislature's power to act in these fields and it should be free to do so.
>
> "The prohibition against conflict of interest is self executing in form, but flexibility is given so that the legislature may pass suitable legislation.
>
> "The committee does not feel that a detailed prohibition had to be written concerning conflicts of interest and that a self executing statement of principle is sufficient."
>
> Official Record, Constitutional Convention, Vol. II. page 2361.

Delegates Marshall and Mahinske offered an amendment to the Committee Proposal which would in part strike out the word "substantial." Delegate Powell responded to the amendment in part as follows:

> "And then, by striking out this word 'substantial' you open up a whole field of technicalities in this age when there is widespread distribution of stock in big corporations. A person who held a share of stock in General Motors would be in trouble if he were in the legislature and the state purchased a General Motors car for the state police, or for the state motor vehicle pool. And so on with utilities. It seems to me that this is totally impractical and unrealistic and unreasonable. I think the report of our committee goes far enough and that this is just making the matter ridiculous."
>
> Official Record, Constitutional Convention, Vol. II, page 2361.

Subsequently the sponsors of the amendment withdrew their amendment to delete the word "substantial." Constitutional Convention, Official Record, Vol. II, page 2362.

Delegate Wanger made the following observation in the debate that ensued:

> "It is those words 'or indirectly' which make it impossible, if you read the language in its ordinary sense, as we should, for anybody that owns even one share of stock in a company which is dealing with the state to be in the legislature. And there are other examples which came up in the committee when we discussed this. I just want to point out that the reinsertion of the word 'substantial' does not solve the problem at all as far as the first conflict of interest provision which Mr. Marshall and Mr. Mahinske seek to insert is concerned."

Delegate Marshall, one of the proponents of the amendment responded:

> "But this amendment does not deal with a person who might have a share, or 2 or 5 or 10 shares of stock in a corporation, because the stockholder himself would not be involved in the transaction. This is where you contract with the state government to supply material, or any form of a legal transaction between an individual legislator and the state government. And I don't agree with the interpretation that Delegate Wanger placed on this amendment."
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> Official Record, Constitutional Convention 1961, Vol. II, page 2362.

As thus amended, Committee Proposal 115 was approved with only a small change on first reading on April 12, 1962. Official Record, Constitutional Convention 1961, Vol. II, page 2403.

On second reading Committee Proposal 115 was considered with only minor changes in the language. The debate on second reading reveals that there was still some concern about the meaning of the term "substantial conflict of interest." Delegate Ford made inquiry:

> "by saying that there shall be no substantial conflict of interest, is this limited to a pecuniary interest in a contract or some transaction with the state, or could it be a philosophical or ethical interest in something?"

Delegate Hoxie responded:

> "The intent of the committee was that it be something of a substantial nature where there would be a conflict and we left it to the legislature to determine ground rules, so to speak, of what would be a substantial conflict of interest."

Delegate Ford then said:

> "But for the record, and to clearly establish our intent here, is it fair to say that what you intend is a conflict that involves a pecuniary interest rather than any kind of a conflict that might be devised by the legislature from time to time?"

Delegate Hoxie responded:

> "Pecuniary or money interest, I think, is what we are concerned

about; in other words, that the individual involved wouldn't have any direct interest in something of a substantial nature."

Official Record, Constitutional Convention 1961, Vol. II, page 2959.

Finally, Delegate Ford commented:

"If you read section 25, you find almost identical language that has been adopted here constitutes the last sentence of that section, but when you finally get around to reading that sentence in the section, you realize that you have been talking about contracts between suppliers and vendors and the state of Michigan, and it is very clear—and the court has held—that this involves a pecuniary conflict of interest.

"Now, I just want it made clear on the record, before I vote for this, that we do not intend to enlarge upon this concept, but merely to prevent a restriction from being placed on the prevention of any kind of dealing by a state officer or legislator with the state for profit. But I shouldn't like to be a party to a section which was intended, when they say it is going to be broader, to open the door for witch hunts because someone owns shares of stock in a company which directly or indirectly is interested in bidding with the state of Michigan. This has not been the law in the past and I don't think it should be the law in the future."

Official Record, Constitutional Convention 1961, Vol. II, page 2960.

Thereafter Committee Proposal 115 was approved on second reading without change. Constitutional Convention 1961, Vol. II, page 2960.

The aforesaid represents the pertinent recitation of the debate at the Constitutional Convention relating to "substantial conflict of interest" as found in Article IV, Section 10 of the Michigan Constitution of 1963.

The key to the problem is the meaning of the word "substantial" in Article IV, Sec. 10 and the debates support the conclusion that the framers of the revised Constitution wish to recognize certain realities of our modern society in that many persons including public officers own shares of stock in large corporations and the state should not be penalized for purchasing products from such corporations because the state officer may hold a small stock interest in the corporation. The debates are clear that the conflict relates to a pecuniary interest, but the delegates to the convention do not assist us fully in explicitly adopting a definition of the term "substantial."

Some guidance may be obtained by examining decisions of courts of last resort in determining what constitutes a substantial conflict of interest. In *Opinion of Justices,* 183 A 2d 909 (N.H. 1962), the court held that being a stockholder, officer or attorney of a public utility furnishing electricity to a state educational institution of which such person was an officer was too attenuated and unsubstantial a factor to raise a conflict of interest. The exact stockholder's interest was not stated in the case.

Under a federal statute requiring a federal judge to disqualify himself from any case in which he had a substantial interest, the court held the term normally referred to a pecuniary or beneficial interest of some kind.

Adams v. U.S., 302 F 2d 307 (C.C.A., 5th Ct, 1962). A judge holding 20 shares of 13,881,016 shares of a large corporation did not have a substantial interest in the litigation involving the corporation. *Lampert v. Hollis Music, Inc.*, et al., 105 F Supp. 3 (1952).

The term "substantial" appearing in a state statute dealing with injunctive relief was defined by the court to mean serious as opposed to trivial. *Phelps Dodge Copper Products Corporation v. United Electrical Radio & Machine Workers of America*, et al., 46 A 2d 453 (N.J. 1946).

In *Bank of Chatham v. Arendall*, 16 S.E. 2d 352 (Va. 1941), the statutory term "substantial" was defined as "important, essential, material."

If the interest of a public officer in a particular matter is the same as any other citizen, his vote cannot be questioned on the ground of conflict of interest. *Preston v. Gillam*, 184 A 2d 462 (N.H. 1962). The decision whether a conflict of interest exists is ordinarily factual and depends upon the circumstances of a particular case.

There can be no question but that members of the Board of Regents of the University of Michigan are state officers. *Attorney General, ex rel. Cook v. Burhans*, 304 Mich. 108 (1942).

Giving due weight to the debates of the framers of the Michigan Constitution of 1963, and applying the principles enunciated by the various courts of last resort, it is my opinion that the word "substantial" as it is used by the people in Article IV, Section 10, means material as opposed to trivial, and the conflict of interest must involve a pecuniary or beneficial interest.

Applying these legal principles to the facts at hand, it is clear that we need concern ourselves only with some but not all of the transactions between University Microfilms and the University of Michigan.

Such consideration must give recognition to previous opinions of this office rendered in answer to inquiry of Eugene Power.

Deputy Attorney General Gilmore rendered an opinion holding that the borrowing of books and periodicals and microfilming and subsequent sale of films was completely legal and may be continued. This opinion was confirmed by Attorney General Adams in 1958. Mr. Power, as Regent of the University of Michigan, had a right as a state officer to rely upon the opinions of Deputy Attorney General Gilmore and Attorney General Adams. These opinions are also supported by the holding in *Preston v. Gillam*, supra, that there is no conflict of interest when the interest of a public officer in a particular matter is the same as any other citizen.

Deputy Attorney General Gilmore also upheld the legality of the purchase of microfilm at standard rates made openly at the same rate at which all citizens can purchase them. The Auditor General's report indicates that University Microfilms was given preferential treatment. There appears to be a dispute as to how many orders placed by University Microfilms were for less than 1,000 exposures, but there is no dispute that not every order was for 1,000 or more exposures. To some extent at least it must be concluded that University Microfilms received preferential treatment. This aspect of the matter may be resolved by the University library reviewing its accounts and billing University Microfilms for any charges that may

be due so that University Microfilms would have purchased microfilms at standard rates charged all citizens without any preference.

Relative to the purchase of services by the University of Michigan from University Microfilms and University Microfilms, Limited, it is clear that isolated transactions took place between the aforesaid business concerns and the University of Michigan over the period of 1956 through October 31, 1965. These apparently were done without the personal knowledge of Regent Power. The holding of Deputy Attorney General Gilmore is clear that it is contrary to law for the University of Michigan to purchase services from business concerns in which a Regent has an interest in such purchase of services. Since these transactions were entered into without the personal knowledge of Regent Power, any sums collected from the University of Michigan should be refunded by University Microfilms. We note again that these are in the amount of $49.83, a relatively small sum when spread over ten years. The purchases of services by the University of Michigan from University Microfilms, Limited, are somewhat larger in amount. This business concern is located in a foreign country, far removed from the University of Michigan, and clearly supports the contention of Eugene Power that he had no personal knowledge of such purchase of services and the sums should be refunded to the University of Michigan.

It is possible also to dispose of the problem of the contracts between University Microfilms and certain departments of the University of Michigan for reproduction rights of journals and books. These contracts were neither authorized by the Board of Regents nor any other persons with authority to execute such contracts in behalf of the University. These contracts were also entered into without the personal knowledge of Regent Power. They should be terminated at once. University Microfilms has instituted controls to prevent these occasions from recurring. It is also incumbent upon the University of Michigan to take proper steps to make certain that this problem does not recur.

Conclusion

Nevertheless, there remain three basic problems: (1) microfilm cameras owned by the company have been placed in the University library without rental; (2) the undergraduate shelf list was sold without royalty payments to the University; and (3) copies of doctoral dissertations were sold by University Microfilms and microfilms of doctoral dissertations were stored in the company's vaults rather than in the vaults of the University library.

Certainly, Mr. Power was entitled to rely upon the advice he received from the Attorney General in 1956 and 1958. But two major developments have occurred since 1956:

In the first place, the amount of use measured by the number of photographic exposures taken annually by University Microfilms of materials in the various libraries of the University of Michigan has increased sevenfold over the past decade.

Secondly, the nature and complexity of the relationship has been sharply altered. For instance, where before the books were microfilmed at the company's office, now because of the volume the company has placed

two cameras on University property; where before the microfilming was limited to books and periodicals, now it has been extended to the filming of the University shelf list; and the method of handling dissertations has been changed.

It is true that these altered circumstances were undertaken primarily at the request and for the convenience of the University, but it is also apparent that by these actions the relationship between the University and the company has changed radically both in the amount and character since Mr. Power's initial days as a Regent. Therefore, while there is no question of Mr. Power's motives, his integrity, or his devotion to the interest of the University; and while it is clear that, serving without compensation, Mr. Power has made invaluable contributions to the welfare of the University and to the cause of education and scholarship in this state and, indeed, the nation, it must be concluded that because of the change in the amount and character of the relationship between the University and the company, for Mr. Power to maintain his position as a Regent while his company has its present relationship with the University is inconsistent with the requirements of the Michigan Constitution relating to "substantial conflict of interest."

Need for Legislation

A review of this case also indicates the immediate necessity of legislative action to carry out the constitutional mandate concerning conflict of interest set forth in Article IV, Section 10 of the Michigan Constitution, which provides: "The legislature shall further implement this provision by appropriate legislation." It is apparent that such legislation is needed so that all concerned may know their rights and responsibilities with greater particularity.

It is to be hoped, therefore, that the legislature will act promptly to fill this void, and that in doing so they will find a formula for permitting public agencies to avail themselves of the services of successful men and women.

Business success should not in and of itself be a bar to public service. Therefore, reasonable guidelines recognizing the interrelated and complex nature of our economy should be provided.

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Attorney General.