SCHOOLS:
NEPOTISM:

Article XIV, Section 13, relating to nepotism, is not violated by the appointment by a school director of a relative within the fourth degree who later marries during her term of employment.

December 3, 1940

1209

FILED
86

Honorable Elmer A. Strom
Prosecuting Attorney
Cape Girardeau County
Jackson, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated November 28, 1940, which reads as follows:

> "You are requested to furnish the undersigned an opinion relative to the construction to be placed upon Article 14, Sec. 13, relating to Nepotism, based on the following facts.
>
> "One of three school directors voted affirmatively with one other school director for the reemployment of a school teacher in April, 1940, at a time when the school teacher was reported to be unmarried and not contemplating marriage. Soon after her election and prior to the beginning of the school year in September, and prior to signed acceptance of the contract she married the nephew of the school director who had voted for her employment, and has been employed and compensated each month since that time.
>
> "The question presented is whether the school director mentioned thereby forfeited his office, although no proof is available that he knew

> that the wedding would actually take place although there is sufficient evidence to prove that he had reasonable notice that a marriage would take place.
>
> "The second question presented is whether the contract of employment is valid and the school directors obligated to pay the warrants under her contract."

Article XIV, Section 13, Constitution of Missouri, page 157, reads as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The above section has been construed as self-enforcing.

In the case of State v. Ellis, 28 S. W. (2d) 363, l. c. 365, the court said:

> "The opinion, however, seems to put the conclusion squarely upon the theory that the constitutional provision itself was not self-enforcing. That is contrary to the general rule, as mentioned above and as announced in this state in a later case, State ex inf. v. Duncan, 265 Mo. 26, loc. cit. 42, et seq., 175 S. W. 940, Ann. Cas. 1916D, 1, and in cases cited there. It was there said, loc. cit. 42, of 265

Mo., 175 S. W. 940, 944, in relation to section 9, article 9: 'Indeed, the clause under discussion merely expresses a status which will instantly result from the election required to be held. Statutory language would be impotent to add aught to the Constitution's expression of this resulting status, and so the clause is self-executing. It is a provision complete in itself, and needs no legislation to put it in force.' That language aptly applies to this case.

"Section 13 provides that any official violating its provision, '* * * shall thereby forfeit his * * * office employment.'

"He forfeits by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. loc. cit. 511, 91 S. W. 477.

"The debate in the Constitutional Convention which put forward section 13 as an amendment to the Constitution shows that it was intended to be self-enforcing. It was assumed that no legislative act would be necessary to put it into effect. One reason why it is self-executing is because some of the very state officials affected by it should not be depended upon to put it into force. It was intended, as quoted from Corpus Juris above, to put it 'beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect.' That was clear in the debates.

"No doubt that idea was prominent in the minds of the voters who adopted

it. As a matter of common knowledge it was so agitated in the newspapers."

Section 9209, R. S. Missouri 1929, relates to the procedure of the employment of teachers. This section was amended in the Session Laws of 1933, page 387, and the Session Laws of 1933, page 387, were amended and a new section enacted in lieu thereof by the Session Laws of 1939, page 695, and given the section number of 9209. Section 9209 of the Session Laws of 1939, page 695, reads as follows:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teachers's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the selection of such person; nor shall the teacher serve as a clerk of the district. All

> transactions of the board under this section must be recorded by and filed with the district clerk. Provided, that the board of education of any first class high school may employ a superintendent either before or after the annual school election."

It will be noticed in the above section that the following appears:

> "* * * nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the selection of such person; nor shall the teacher serve as a clerk of the district. * * "

The above phrase relates to the acceptance of the application of the teacher and does not refer to the contract entered into later on at a general or special meeting of the school directors between the teacher and the board of school directors.

In your request you state that two directors voted affirmatively for the reemployment of the school teacher in question in April, 1940, and at that time this teacher was unmarried but later married the nephew of the school director who had voted for her employment. This act of the two school directors was not a violation of Article XIV, Section 13 for the reason that at that time the teacher was not a relative of either of the school directors within the fourth degree, either by consanguinity or affinity.

You also state in your request that after her application as a school teacher she married the nephew of the school director who had voted for her employment and that after the marriage she signed the formal contract tendered her by the board of school directors. I am assuming that at the time the formal contract was authorized that all three members of the board of directors were present and if so, if the contract was

authorized on the vote of two members of the board of directors who were not related to the school teacher, the contract without question would be valid even though one of the directors was related to the school teacher within the fourth degree. Unless the relative of the school teacher, as a director, fraudulently connived with the other two members of the board of school directors, this appointment would be valid. It was so held in State v. Becker, 81 S. W. (2d) 948, l. c. 951, where the court said:

> "Now, in the instant proceeding, it is freely conceded that in the intended appointment there is not in fact or in semblance any connivance, agreement, confederation, or conspiracy between the majority members of the Court of Appeals as between themselves or as between them, on the one hand, and the non-voting member on the other, or any common design between any two of them, that the two should accomplish in behalf of any or all a prohibited purpose. The sum of the matter is that Judges Becker and McCullen are about, honestly and in good faith, to exercise their official power in securing for the Court of Appeals the continued and uninterrupted services of a commissioner whose record of integrity of character, untiring industry, and distinguished judicial service, has met with the unqualified approval alike of his associates on the Court of Appeals and the bench and bar of the state.
>
> "In view of the foregoing considerations, we are of the opinion that the threatened action of the respondents is not beyond or in excess of their jurisdiction as members of the St. Louis Court of Appeals and is not in violation of section 13 of article 14 of our State Constitution."

The state law does not prohibit the employment of married women and have even gone so far as to hold that a prohibition in the contract between the board of directors and the teacher which would declare the contract void in case of marriage during its term was against public policy and absolutely of no effect. It was so held in the case of Taggart v. School District #52, Carroll County, 96 S. W. (2d) 335, 339 Mo. 223, which reversed 88 S. W. (2d) 447. It has been held in this state in regard to contracts entered into by school teachers with the board of school directors take effect after the application of the teacher has been passed upon favorably by the board of directors and does not depend upon the later formal signing of the contract of employment. It has also been held in this state that where a school teacher formally makes application for employment as a school teacher and her application has been passed upon favorably and her employment accepted, if the board of directors should then fail to send her the formal contract of employment and employ another teacher they would be liable for damages for a breach of contract. In the case of Bailey v. Jamestown School Dist. No. 11, 77 S. W. (2d) 1017, l. c. 1020, par. 4, the court said:

> "A contract is the agreement which the parties made and not the writing which evidences the agreement. Edwards v. School District, 221 Mo. App. 47, 297 S. W. 1001, 1002."

In the above case a school teacher filed her application for reemployment and it was accepted and placed upon the minutes of the meeting of the board of directors. Later they employed another teacher and at no time did they send the formal contract of employment to the school teacher. The court held that the contract of employment was consummated at the time of acceptance of the application of the teacher for reemployment which is the same facts as set out in your request except under the facts in your request the contract of employment was signed after her marriage. In the above case it specifically held that the formal contract was only evidence of the original contract of employment. In the case of Edwards v. School Dist. No. 73, 297 S. W. 1001, l. c. 1002, par.

3, the court said:

> "A contract is the agreement which the parties make and not the writing which evidences the agreement. 13 C. J. 239. In Baxter v. School District, 217 Mo. App. 389, 266 S. W. 760, we held a teacher's contract valid, although the president of the board had not signed a formal written paper evidencing the contract.
>
> "Plaintiff in the cause at bar filed her written application, duly signed by her. It specified as to the school, term, salary, etc. This application may be termed an offer, and the board of directors not only made an order accepting this offer, but went further, and each director, including the president, signed a writing which evidenced the contract which they had consummated by their acceptance of record. It also appears that the clerk of the district signed the minutes of the board accepting plaintiff's application to teach the school. This record shows that every requirement as to writing and signing, made by section 11137, was fully met. There is no argument against the validity of the contract except that it was not formally written upon a separate paper and there signed by all the parties required by the statute. Such is not necessary and could not be made so without making the law respecting teachers' contracts different from the general law of contracts. We hold that plaintiff's contract was valid and binding."

Under the above two preceding cases there is no

question but that the contract is consummated at the time the board of school directors accept the application of the teacher for employment. Under the facts in your request the contract was consummated at the time one of three school directors voted affirmatively with one of the other school directors for the reemployment of the school teacher in April, 1940, at which time she was unmarried.

In the case of State v. Whittle, 63 S. W. (2d) 100, l. c. 101, the court said:

> "Original proceeding in this court. Information in the nature of quo warranto. In substance it is alleged that, at a lawful meeting of the board of directors of a common school district in Miller county, Logan Stone was by said board employed and contracted with as teacher of the school in said district; that Stone is a first cousin by affinity of respondent Otto Whittle, a director of said district; that he was so employed by said board as the result of respondent Whittle and another director of the district voting in favor of him for the position; that the other director of said district voted against the employment of Stone to teach the school; that respondent Whittle, by voting to employ Stone as teacher, violated section 13, art. 14, of the Constitution, and thereby forfeited his office as director of the school district. The case was submitted on respondent Whittle's demurrer to the information.
>
> * * * * * * * * * * *
>
> "Even so, respondent contends that said provision of the Constitution

is not directed against school directors who participate as such in naming a teacher. He argues that a director is without authority in the matter, citing section 9209, R. S. 1929 (Mo. St. Ann. section 9209), which provides that the board shall have power, at a lawful meeting, to contract with and employ a teacher by order of record.

"Of course, there must be a substantial compliance with the statute. Otherwise the teacher is not employed. It follows that, as between the district and the teacher, the power to employ is lodged with the board. However, as between the public and a director, 'the right to name or appoint' a teacher is not determined by reference to the statute. To hold that said 'right' is so determined would convict the people of intending to eradicate only a small part of the evil. Furthermore, to so hold would be absurd. Respondent also argues that the amendment is only directed against officials having all the right (power) to appoint. We do not think so. The question must be determined upon a construction of the amendment. It is not so written therein. The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates

> the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

Under the holding in the above case the school director who had violated Section 13 of Article XIV of the Constitution sought to enter the defense that he did not personally contract for the employment of his first cousin, but that the board of directors, by authority of Section 9209, R. S. Missouri 1929, which is now Section 9209, Session Laws of 1939, employed the teacher. It also specifically stated that the violation of Section 13, Article XIV was committed when the appointment was made and not when the formal contract was entered into.

CONCLUSION

In view of the above authorities it is the opinion of this department that a school director who, upon application of a school teacher, appoints the teacher who later marries the nephew of the school director joining in the voting for the appointment has not violated Section 13, Article XIV of the Constitution of Missouri.

It is further the opinion of this department that where the school teacher has made application and has been accepted and appointed before marriage but marries a relative within the fourth degree of the school director voting for his or her appointment before signing the formal contract of employment, the contract of employment is valid and the school directors are obligated to pay warrants under her contract for the full term of her employment.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA