

NEPOTISM:

Official is not related to wife's sister's husband within the prohibited degree; duty of Prosecuting Attorney to remove officials of his county who violate said constitutional provision.

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Mr. John B. Owen,
Prosecuting Attorney,
Clinton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"If an official should appoint the husband of his wife's sister, would this be a violation of the anti-nepotism law. Shall appreciate your opinion.

I wrote you some ten days ago for an opinion as to whether Section 13139x8, 1933 Session Acts, was punishable as a misdemeanor. Have not heard from you. Please let me have your opinion on this point also.

Will you also advise what the duties are of the Prosecuting Attorney in enforcing anti-nepotism violation in schools?"

Section 13 of Article XIV of the Constitution of Missouri provides 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."

Under the foregoing provision of the Constitution persons related within the fourth degree, either by consanguinity or affinity, cannot be appointed to office. We are of the opinion, however, that if an official should appoint the husband of his wife's sister, that such act would not be in violation of the Constitution, because he is not related to such husband within the fourth degree by affinity, as prohibited by the Constitution. In 2 C. J. 378, it is said:

"Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor

does the term 'affinity' ordinarily include persons related to the spouse simply by affinity."

In Encyclopedia Britannica, 11th Ed. Vol. 1, page 301, the author has the following to say about affinity:

"The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

In answer to your first inquiry it is our opinion that the official is not related to the husband of the wife's sister within the prohibited degree.

Your next inquiry whether or not the violation of Section 13139x8, Laws of 1933, is punishable as a misdemeanor. There is no such Section and we assume, therefore, that you are referring to Section 13139z8, which is a part of the Beer Act, found on page 266, Laws of Missouri 1933. Said Section provides as follows:

"It shall be unlawful for any holder of a permit authorizing the sale of non-intoxicating beer for consumption in or upon the premises described in such permit, to have or maintain in any room on said premises, wherein such non-intoxicating beer is sold and/or served to customers, any bar, mirror, or other fixtures having the appearance of a saloon such as existed, and was conducted in this state prior to, the effective date of the Eighteenth Amendment to the Constitution of the United States of America, or to have and maintain any blinds or screens, or any other thing, in any such room, that will obscure the interior of such room from public view. It shall also be unlawful for any holder of such permit to keep or secrete, or to allow any other person to keep or secrete, in or upon the premises described in such permit, any intoxicating liquor including beer having an alcoholic content in excess of 3.2 per cent by weight."

The above Section does not provide that the violation of said Section shall be a crime, either a misdemeanor or a felony. There is no general Section in this Law, as is found in many Laws, making the violation of all of its provisions a misdemeanor. The violation of some sections are made crimes. Section 13139y provides:

"Any person convicted of the violation of any provision of this article, the violation of which is by this

article defined as a misdemeanor, and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law * * * *."

That Section does not make the violation of every provision of this Act a crime. It simply provides that where the Act has made the violation of certain sections a misdemeanor and does not fix a punishment, that the offender shall be punished as otherwise provided by law. The Legislature has not seen fit to make the violation of Section 13139z8 a crime, and as there is no general section in the Act making such violation a crime, we are of the opinion that a violation of such section would not be a misdemeanor. Of course, if the holder of a permit should keep upon his premises intoxicating liquor he could be prosecuted under the Prohibition Law with which you are entirely familiar.

You next inquire as to the duties of the Prosecuting Attorney in enforcing the anti-nepotism provision of the Constitution.

Section 11316, R. S. Mo. 1929, provides as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county * * *."

Under the foregoing Section it is the duty of the Prosecuting Attorney to bring Quo Warranto proceedings against any official who has violated Section 13 of Article XIV of the Constitution. The state is interested in seeing that people do not usurp public offices. The fact that the Attorney General may also bring such proceedings does not take away from the Prosecuting Attorney the right to bring same or the duty imposed upon him by statute to bring such actions.

It is therefore the opinion of this Department that under the statute it is the duty of the Prosecuting Attorney to bring a Quo Warranto proceeding to oust any official of his county who has violated Section 13 of Article XIV of the Constitution.

Very truly yours,


Assistant Attorney General

FWH:S
APPROVED:

Attorney General.