NEPOTISM:--Director voting to elect sister violates Section 13 of Article XIV; teacher so elected cannot collect salary under her contract which is void; director becoming member of board after sister has been elected may continue to hold office.

FILED
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11-3

October 31, 1933.

Mr. H. Cunningham,
Tarkio, Missouri.

Dear Sir:

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

> "I would like to have your opinion of the advisability of a member of a school board serving as such, with a relative, a sister as a member of the faculty of the school. What penalty would there be to the school board member, and likewise to the teacher, if any?
>
> Would there by a difference in the interpretation of the law as regards the board member, if the teacher was employed before the member was elected to the board?"

1. Director voting in favor of sister shall forfeit his office.

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 constitutional provision a director who exercises his right to name or appoint his sister as a teacher would forfeit his office as a director. You do not state whether or not the director about which you inquire participated in the election of his sister as a teacher. If the director did not vote for the teacher and she was elected by the votes of the other members of the board, then the director has not violated the above constitutional provision. However, if the director did exercise his right to vote in favor of his sister, then he has violated the provision of the Constitition.

In State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, the Supreme Court passed upon Section 13 of Article XIV of the

Constitution and held that a director who voted in favor of his cousin thereby forfeited his office as director. The court says at page 101:

> "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."

In view, therefore, of the above constitutional provision and the above decision of our Supreme Court, if a member of the school board participated and assisted in electing his sister as a member of the faculty the director has made himself liable for forfeiture of office.

2. Teacher elected by related director cannot collect salary.

Under the above constitutional provision, the ouster of the director is the correction of only one-half of the evil. To permit the related employe to retain the benefits of the appointment would be to defeat the purpose of the amendment. It is clear that the intention of the people under the above provision is that no teacher related within the fourth degree to a director shall be employed. A sister is related within the fourth degree. Under the Constitution, the director cannot legally and directly vote for a relative within the fourth degree and elect him to office. If, after such illegal appointment, the teacher could enforce the contract against the district, that would permit the director to achieve by indirection and subterfuge the very thing prohibited by the Constitution.

In 13 C. J. 421, Sec. 352, it is said:

> "Frequently a statute imposes a penalty on the doing of an act without either prohibiting it or expressly declaring it illegal or void. In cases of this kind the decisions of the courts are not in harmony. The generally announced rule is that an agreement founded on or for

> the doing of such penalized act is void. In accordance with the view of Lord Holt in an old case: 'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, tho' the statute itself doth not mention that is shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho' there are no prohibitory words in the statute.' As a qualification of this rule it is stated that, if the penalty is imposed for the protection of the revenue, it may be presumed that the legislature only desired to make it expensive to the parties in proportion as it is unprofitable to the revenue, and that their contracts are not void. And it would seem that in all cases the true rule is that the question is one of legislative intent, and the courts will look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and thepurpose sought to be accomplished in its enactment; * * *."

In Downing v. Ringer, 7 Mo. 585, the Supreme Court held that a contract entered into concerning an act forbidden by law is void, saying:

> "The penalty inflicted by the act concerning Plats of towns and villages, implies a prohibition against the sale of lots before the requisitions of the act are complied with, and the courts will not enforce a contract entered into against the spirit and policy of the statute."

In answer to the second part of your inquiry it is our opinion that if the teacher was elected as a result of a related director voting for her appointment that her appointment is void and that she cannot collect her salary from the district.

3. Where related teacher was employed before director became member of board, he may hold his position on board.

Under the foregoing constitutional and statutory provisions it is the naming or appointing of related teacher that is prohibited. The violation of the Constitution occurs when the related teacher is appointed or elected. If, as you state in your inquiry, a teacher is elected to office at a time when there are no related directors on the board her appointment would be absolutely legal. The fact that after she was elected a person related to her within the fourth degree became a member of the board would not make her appointment illegal, nor change her situation in any respect, nor would the fact that she was related to the director cause him to forfeit his office or prevent him from holding the office of school director. If he became a director after she was elected to office, then he could not have voted to name or appoint her, as prohibited under the Constitution.

4. Conclusion.

It is therefore the opinion of this Department that (1) the director who votes to name or appoint his sister as a teacher makes himself liable for forfeiture of office. (2) That the teacher so elected cannot collect her salary and that her contract of employment is void. (3) That if the sister was elected before the director became a member of the board, neither the director nor the teacher have violated the law; that the teacher may enforce her contract and the director may continue to serve as a member of the board.

Very truly yours,

Frank W. Haynes

Assistant Attorney General.

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APPROVED:

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Attorney General.