SCHOOLS: Approval of substitute bus driver is within provisions of anti-nepotism law; clerk of common school district cannot be removed without cause and without a hearing.

October 26, 1942

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Mr. A. C. Hammond
Clerk of the County Court
Forsyth, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "Would your office be kind enough to give this office an opinion on the following two matters:
>
> "1. The anti-nepotism provision in the Missouri Constitution prohibits School Board Members from hiring relatives of the fourth degree or less as bus drivers etc. Now can a school board hire a bus driver and then this bus driver hire a substitute who has to be approved by the board and who is related by such degree to a majority of the board or to the majority approving the said substitute?
>
> "2. Can the Clerk of a common school district be removed by the board without cause and without a hearing?
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> "These questions are before me and the matter is causing some trouble. The County Treasurer and I need to have an opinion from you because of the matter of paying some warrants drawn under such conditions and the clerk refusing to sign them and a new clerk be appointed and the old clerk claiming to hold over."

I.

Your first question has to do with the anti-nepotism provision of the Missouri Constitution, which is Section 13 of Article XIV, and which reads as follows:

> "Any public officer or employee 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."

A school director is a public officer. It was so held in the case of State ex rel. McKittrick v. Whittle, 63 S. W. (2d) 100, wherein the court used the following language:

> "Thus it also appears that a school director is a public officer within the meaning of said section of the Constitution."

The section of the Constitution there being considered was the anti-nepotism section.

It follows, therefore, that a school director cannot name or appoint a relative within the prohibited degree to render service to the school district, which is a political subdivision of the state.

Your request states that the directors require that a substitute bus driver be approved by them before he can

operate a bus. That being true, the approval of the directors is necessary to allow him to render service and receive compensation. The approval by the directors is, therefore, equivalent to an appointment or designation by the directors, and would be prohibited by the anti-nepotism provision of the Constitution.

It is a general rule of law that what a person cannot do directly under the law, he cannot do indirectly or by subterfuge. In the case of Eisensmith, et al. v. Buhl Optical Co., et al., 178 S. E. 695, the Supreme Court of West Virginia said:

> "A person * * * individual or corporation may not do by indirection what he or it is precluded from doing directly."

Likewise, in the case of State ex rel. McKittrick v. Dudley & Co., 102 S. W. (2d) 895, the Supreme Court of Missouri, in discussing the right of a corporation to practice law through its paid attorneys, said, l. c. 900:

> "'As it cannot practice law directly, it cannot do so indirectly, by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.'"

If the directors could appoint substitute drivers who are within the prohibited degree of relationship to them, then the effect of the anti-nepotism law would be destroyed because they could always name as the principal driver a person who is not related to them and then designate a relative as a substitute. This would be a subterfuge and a clear evasion of the anti-nepotism law.

CONCLUSION

It is, therefore, the opinion of this office that school directors who require that their approval be given

to a substitute bus driver before he can operate a bus, cannot approve a substitute bus driver who is related to such directors within the fourth degree, either by consanguinity or affinity.

II.

Your second question has to do with the method and procedure for the removal of the clerk of a common school district.

A clerk of a school district is a public officer. The same reasoning which holds that a school director is a public officer would compel the conclusion that the clerk of the district is likewise a public officer. His office is created by law and he exercises some governmental functions. (See State ex rel. McKittrick v. Whittle, 63 S. W. (2d) 100.)

Section 10442, R. S. Missouri, 1939, provides for the appointment of a clerk of a common school district. It reads, in part, as follows:

> "The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. * * * * "

While no term is specifically provided in the foregoing section, yet said section requires that the clerk shall enter upon his duties on the fifteenth day of July following his appointment. The section requires the appoint-

ment of a clerk after each annual school meeting. Therefore, it must follow that the term of the clerk is from the fifteenth of July of one year to the fifteenth of July of the following year.

Section 10424, R. S. Missouri, 1939, reads as follows:

> "The board shall have power to remove the district clerk from his office for dereliction of duty and appoint another in his place, to whom the former incumbent shall immediately deliver his books and papers pertaining to the office."

The right to remove public officers from office and the correct procedure in such cases has been before the courts of this state on numerous occasions. The rule as to whether the appointing power has the right to remove an officer at will has been definitely established. The rule was stated in the case of Horstman v. Adamson, 101 Mo. App. l. c. 124, as follows:

> " * * * The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results: These principals have been frequently recognized in numerous decisions,

> alike by the Federal courts as well as by the courts of many States, including our own." (Citing numerous cases.)

Likewise, in the case of State ex inf. Attorney General v. Hedrick, 294 Mo. 21, the Supreme Court of Missouri said, l. c. 64:

> "If the simple power to appoint is conferred and no term is fixed by law and nothing else appears, then the appointee may be removed at pleasure, by the appointing authority, without notice, the preferment of charges or the assignment of reasons. (Throop on Public Officers, sec. 354; Mechem's Public Officers, sec. 445.) The reason of the rule is found in the unreason of its alternative, which, as Mr. Mechem says, would be that the tenure of such appointee then would be 'subject to no will but his own;' i. e. he would, in such case, hold at his own pleasure, a predicament in which courts have refused to place the public. This is the law in this State. In State ex rel. Campbell v. Police Commissioners, 14 Mo. App. l. c. 502, it was said: 'It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint.' This decision was fully approved by this court on appeal. (88 Mo. l. c. 145.) In another particular this case was disapproved in State ex rel. v. Johnson, 123 Mo. l. c. 51, but the language above set out was approvingly quoted and the rule it states was applied as decisive of the case then under consideration. The same rule was followed in State ex rel. v.

> Alt, 26 Mo. App. l. c. 676. In this case a formulation of the rule by Thayer, J., then on the circuit bench, was approved. Other decisions are in point. (State ex rel. v. Brown, 37 Mo. App. l. c. 204; Horstman v. Adamson, 101 Mo. App. l. c. 124, 125, and cases cited; State ex inf. v. Crandall, 269 Mo. l. c. 51.) A like principle is approved in State ex rel. v. Stonestreet, 99 Mo. l. c. 377; State ex rel. v. Hawes, 177 Mo. l. c. 378. The rule is said to be 'universal' in 29 Cyc. pp. 1370, 1371, 1408; and 'general' in 22 R. C. L. secs. 266, 267, pp. 562, 563; and 'uniform' in note to Wright v. Gamble, 136 Ga. 376, in Ann. Cases, 1912C, p. 374, et seq. Numerous authorities are cited in this note--State, Federal and English. Others may be found in note to Trainor v. Board (Mich.) 15 L. R. A. 95. * * *"

Again, l. c. 65, the court held:

> "It thus appears that when the Legislature provides for the appointment of one official by another, if it does nothing more, adopts no means to forestall it, the act authorizing the appointment will inevitably raise the power to remove at pleasure. * * * *
>
> "This power may be defeated by specific provisions which destroy it or by the fixing of a tenure, which is inconsistent with it. * * * * *"

Under the foregoing authorities it must be clear that the right of the appointing power to remove a public officer at will is destroyed if either one or both of two situations prevail. The first is, if the officer has a definite term

provided by law, and the second is, if the law has placed specific limitations on the right of the appointing power to remove such officer.

In the case of the clerk of a common school district, the law actually provides a term for his tenure of office. While not naming such period a term, the effect of the law is to create a tenure of one year, from July 15th of the year of his appointment to the following July 15th, when a successor would automatically enter into the office. Therefore, it would seem that since the clerk of the school district has a definite term of office, the school board could not remove him at will.

Furthermore, Section 10424, supra, places a further limitation upon the right of the board to remove the clerk. It provides that the board may remove him "for dereliction of duty." Therefore, the law has not conferred the simple power to appoint upon the board, but with that power of appointment has also provided when the clerk may be removed. Under the law the clerk has many important duties to perform in connection with the administration of the public schools, and undoubtedly the Legislature contemplated that he should be a more or less established officer for his term. We think the Legislature has, therefore, limited the power of the board to remove the clerk to a finding by it that he has been derelict in his duties.

In the case of Hudgins v. School District, 312 Mo. 1, 10, the Supreme Court used some language which at first glance might seem to refute the above principle. In that case the court was discussing the right of a board to appoint a clerk temporarily and the legality of the acts done by such temporary clerk. In discussing the office of clerk the court mentioned several statutes, including the statute regarding the removal of the clerk, and in that connection said:

> "While the authority of the board to remove him (Sec. 11217) is unqualified, it is solely a power of the board and bears no such relation to the statutes defining his powers and duties as to change their character."

The foregoing statement might indicate that the court was holding that the authority of the board to remove a clerk is unqualified or unlimited. However, from a reading of the facts in the case in connection with the question which the court was discussing, it will be seen that the court was in no way passing upon the right of the board to remove the clerk. The court was considering the validity of the acts of a temporary clerk, and there was no occasion for a holding as to when or how the board could remove a clerk. That question was not in the case, and the foregoing language, if holding that the power of the board to remove the clerk is unlimited, is certainly dictum and not controlling.

It is also well established that where the power of removal of a public officer is limited, such officer cannot be removed except upon charges made and a hearing had. The rule is stated in State ex rel. Denison v. City of St. Louis, 90 Mo. 1. c. 22, as follows:

> "Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. Field v. Commonwealth, 32 Pa. St. 478; Ex parte Hennen, 13 Peters, 230. But where the appointment is during good behavior, or where the removal must be for cause, the power of removal can only be exercised when charges are made against the accused, and after notice, with a reasonable opportunity to be heard before the officer or body having the power to remove. Gaskin's case, 8 Term Rep. 209; Field v. Commonwealth, supra; State v. Bryce, 7 Ohio St. (part 2) 82; Dillon on Mun. Corp. (5 Ed.) secs. 250 to 254."

This rule has been uniformly followed in this state.

CONCLUSION

It is, therefore, the opinion of this office that the clerk of a common school district cannot be removed by the board without cause and without a hearing on charges placed against him.

Respectfully submitted

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APPROVED:

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