SCHOOL BOARDS: (1). Section 10342A, R. S. Mo. 1939 will operate to re-employ a teacher in the event that its provisions are not complied with. (2) A school board member possessing the deciding vote may not vote for a person within the fourth degree of relationship by reason of Section 10342 R. S. Mo. 1939, nor may his failure to vote be ignored where his silence brings Section 10342A into operation.

April 29, 1946

FILED
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5-9

Mr. Ralph B. Nevins
Prosecuting Attorney
Hermitage, Missouri

Dear Mr. Nevins:

This will acknowledge receipt of your request for an official opinion, which letter reads:

> "An opinion on the following situation would be appreciated:
>
> "'The wife of the president of rural school board, was employed by the other two members, in the absence of the president, for the term 1945-1946, and in a recent meeting of this board when the question of whether or not notice should be given the teacher of termination of her employment under Section 10342A, Session Acts of 1943, the husband of the teacher remained silent, while one member voted to give the notice and one voted to retain her'
>
> "Can this teacher continue by reason of the failure of the board to give her notice of termination of her employment?
>
> "Also, did her husband forfeit his office by failing to vote against his wife, or rather in favor of notifying her of termination of her services?"

In answer to your first question, quoted above, we refer you to Section 10342A of the Laws of 1943, page 890, wherein it is provided:

> "Except as may be otherwise provided by law, the provisions of Section 10342 relative to the time and manner of employing teachers

> shall apply only to their original employment; and their reemployment shall be subject to the regulations hereinafter set forth. It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment on the same terms as those provided in the contract of the current fiscal year; and not later than the first day of May of the same year the board shall present to each such teacher not so notified a regular contract the same as if the teacher had been regularly re-employed. Any teacher who shall have been informed of re-election by written notice or tender of a contract shall within fifteen days thereafter present to the employing board a written acceptance or rejection of the employment tendered; and failure of a teacher to present such acceptance within such time shall constitute a rejection of the board's offer. Any contract given a teacher may be terminated at any time by mutual consent of the teacher and the board. When the board of directors of any school district deems it advisable to close the school and send the pupils elsewhere rather than employ a teacher, said board of directors shall have power to terminate any contract continued under the provisions of this section by giving the teacher written notice of such termination not later than the first day of July next following the teacher's re-employment.
>
> "Approved April 23, 1943."

Under the rules for statutory construction, or the application of a particular statute to a set of facts, the general rule is to give effect to the legislature's intent. (See State v. Naylor, 40 S.W.(2d) 1078, 328 Mo. 335; and Key 190 Mo. Digest Statutes, Vol. 26.) Further, where a statute is plain and unambiguous there is no room for construction, but the language must be given effect. (See Fitchner v. Mohr, 165 S. W. (2d)

Under the statute quoted, supra, and under the rules cited, supra, it appears that one requirement of the statute is that the board of education must "notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment." In the present instance the teacher hired by the board for the 1945-1946 term was not given written notice of re-employment on or before the fifteenth day of April. It would appear that the failure to give the notice required by the statute would bring about the re-employment of the teacher in accordance with the statute, on the same basis as the contract for the 1945-1946 term provided, if there is nothing which would render such re-employment invalid.

However, when we keep in mind that Section 10342, R. S. Mo., 1939, prohibits the casting of the deciding vote by a member of the school board for the employment of any one within the prohibited degree of relationship, the question arises as to whether or not the present contract is a valid one, and one under which the teacher may act and be compensated therefor. In 13 Corpus Juris 421, Section 352, we find the following statement:

> "Frequently a statute imposes a penalty for 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 a 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 does not mention that it 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'. * * * * And it would seem that in all cases the true rule is one of legislative intent, and that 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 the purpose sought to be accomplished in its enactment; * * * *."

We call your attention to the last sentence of the above quotation.

The Nepotism Act, Section 6, Article VII, of the Missouri Constitution, 1945, infra, seeks to prevent the establishment of a contract, such as might be believed to have been established by reason of Section 10342A, R.S. Mo. 1939, in this case.

In the case of Haggerty v. Ice Manufacturing and Storage Company, 143 Mo. 238, the court considered a civil suit for damages for the failure of the defendant to properly keep in cold storage during the closed season wild game deposited with the defendant by the plaintiff for storage. The defendant took the position that the contract contemplated the commission of a misdemeanor in that under the Food and Game Laws of the State it was a misdemeanor for any person to take or have in his possession such wild game during the closed season. The court at page 247 concluded as follows:

> "Recurring to the petition, it shows on its face that plaintiffs contracted with defendant corporation for the commission of a misdemeanor. * * * * The law will not stultify itself by promoting on the one hand what it prohibits on the other, and will for this reason leave the parties to this suit where it finds them, unsanctioned by its favor and unaided by its process."

The principle laid down in the above quotation, we believe, is applicable to the situation here presented for answer. In other words we believe that this contract of re-employment is a void contract in the light of the law. To hold that this is a valid contract, entitling the teacher to re-employment and compensation for said employment, would be to nullify the purpose of Section 6, Article VII, Mo. Const., 1945, and the intent of the Legislature, as evidenced in Section 10342, Mo.R.S. 1939, which prohibits the casting of the deciding vote for one within the prohibited degree of relationship.

In the Constitution of Missouri, 1945, Article VII, Section 6, provides as follows:

> "Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

This section, in principle, is also found in the Constitution of 1875, Article XIV, Section 13. That section was held to be self-enforcing, State v. Ellis, 355 Mo. 154, 28 S.W.(2d) 363, and while the new section in the Constitution of 1945 has not been passed upon, undoubtedly under the holding of the Ellis case, supra, the court would hold that Section 6 of Article VII of the present

Constitution would be self-enforcing. With the above quoted section of the Constitution in mind we proceed to a discussion of your second question.

The second question, asked by your letter, concerns the forfeiture of office by the president of the school board and involves the duty of a member of the school board to act or the failure of said member to act. Section 10342, R.S. Mo. 1939, provides:

> "* * *The board shall not employ one of its members as a teacher; not 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; * * *"

Under the facts of the present case, the three members of the school board, by their failure to reach a decision, brought about the re-employment of the teacher under Section 10342A, supra. As your letter shows, the deciding vote rested with the president of the school board who was required by Section 10342 to cast a negative vote, or, in other words, he was required to vote for giving the teacher notice of termination of her employment. Section 10342, R. S. Mo., 1939. Under the facts of your case the president of the school board could not have voted to retain the teacher without violating Section 10342, supra. The silence of a memberof the school board is construed as voting with the majority. In the case of Bonsack v. Pearce, Inc., etc., 49 S.W. (2d) 1085, l.c. 1088, the general rule is stated:

> "(2) Five of the six members of the school board were present and by their presence constituted a quorum, and it became and was the duty of each and every member to vote for or against any proposition which was presented to them. If under such circumstances, a member does not respond when his vote is called for, but sits silently by when given an opportunity to vote, he is regarded as acquiescing in, rather than opposing, the measure, and is regarded in law as voting with the majority. Such is the rule announced in many authorities. Montgomery v. Claybrooks, 213 Ky. 493, 281 S.W. 469; Ray v. Armstrong, 140 Ky. 800, 131 S.W. 1039, loc. cit. 1049, and cases cited; City of Springfield v. Haydon, 216 Ky. 483, 288 S.W. 337, 341; State ex rel. Young v. Yates, 19 Mont. 239, 47 P. 1004, 37 L.R.A. 205; Rushville Gas. Co. v. Rushville, 121 Ind. 206, 23 N.E. 72, 6 L.R.A. 315, 16 Am. St. Rep. 388; Jensen v. School District, 160 Minn. 233, 199 N.W. 911."

However, in the present instance there was no majority. Under the facts, one member of the school board voted for retention of the teacher and one voted for the termination of the teacher's employment. Therefore, the deciding vote was within the power of the president of the school board, but, by the authority of Section

10342, supra, he was prohibited from casting an affirmative vote in favor of retaining the teacher. The only vote, under the present facts, that he could cast was a vote to give notice of termination of the teacher's employment. The question then becomes what was the effect of this failure, on his part, to vote in favor of terminating the teacher's employment as required by the statutes. The president of the school board is charged with knowledge of the law. Being so charged he knew that if he possessed the deciding vote, as he did under the present facts, he could not violate Section 10342 and vote for retaining the teacher, and further, he is charged with knowing that, by virtue of Section 10342A, his failure to vote would bring about the operation of the statute, Section 10342A, supra, and that the teacher would thereby be retained. In the case of State v. Whittle, 63 S. W. (2d) 100, l.c. 101, the following quotation is found:

> "* * *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.* * *"

The Whittle case is discussed and considered in the later case of State v. Becker, 81 S. W.(2d) 948, l.c. 950, where the court said:

> "We are of the opinion that the reason of decision, as it appears in the quotation given, and as stated in the provision itself, does not support relator's position. The essence of the provision and likewise of said decision is the power of appointment vested in one and the successful exercise thereof by him in accomplishing the appointment of his relative. Action, direct or indirect, not inaction is prohibited. The only correlation expressed or implied is a specific kinship existing between two individuals, specifically indicated, and none other. No implication may properly be drawn from what has just

> been said that one clothed with a power of selection or appointment might not through connivance or confederation with his associates who share in such power bring himself within said prohibition. Such is not the present case. Nor have we any call to consider in what circumstances one who acts in connivance in bringing about the appointment of a relative of an associate of his in the exercise of the power of appointment will suffer penalty as for violation of said provision."

The Becker case, supra, may be construed as limiting the Whittle case, supra, by its requirement of "action, direct or indirect, not inaction is prohibited." At first examination it appears that the present set of facts constitute a case of "inaction", and that therefore the president of the school board by his "inaction", did not have any relation to the subsequent employment of the teacher by virtue of Section 10342A's operation. But, when it is remembered that the president of the school board is charged with knowledge of the law, and therefore he knew that by not voting, the teacher would be re-employed by operation of said statute, his failure to vote was such a course of conduct as to bring about the re-employment of the teacher, who was related to him within the fourth degree of affinity (State v. Ellis, supra,) a result he was charged with knowing that he could not procure, by an affirmative vote, under the present facts, by prohibition of Section 10342, supra. In other words, the president of the school board accomplished, by his silence, that which the law prohibits him from doing by a positive action.

It is pertinent to note that the Becker case, supra, was concerned with a set of facts that are distinguishable from those in the present case. In the Becker case the vote of the relative would not have been effectual if cast negatively and would not have done anything but add to the already present majority if cast affirmatively. However, in the present case the president of the school board could do one of three things. First, he could vote to terminate the employment of the teacher, which would have been an effective vote and would have prevented the re-employment of the teacher. Secondly, he could have voted to retain the teacher, but such vote would have violated Section 10342 and would have been illegal. Or, thirdly, he could remain silent, as he did, and procure the re-employment of the teacher by operation of statute, Section 10342A, R. S. Mo. 1939. In the Becker case, the vote of the relative would not

have been an effective vote regardless of how cast, while in the present instance the president of the school board obtained by his silence, that which he could not have obtained by his vote. The conduct of the president of the school board, in the present case, his failure to vote with full knowledge that such failure to vote would bring about the re-employment of the teacher and his further knowledge of his relationship to the teacher, was such conduct as to violate Section 6 of Article VII, Missouri Constitution, supra.

The Whittle case, supra, holds that a school director is a public officer within the meaning of said section of the Constitution (1875).

CONCLUSION

Under the facts of the present case, and the law we deem applicable, it follows that, first, if any contract arose by reason of the operation of Section 10342A, said contract would be void and contrary to the purpose of the Nepotism Act, and violative of the intent of the Legislature, as expressed in Section 10342, Mo. R.S. 1939, and second, that the president of the school board violated Article VII, Section, Missouri Condsitution, 1945, and thereby forfeited his office. Ouster proceedings may be instituted to remove the president of the school board from office.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:dc