NEPOTISM:

Section 13 of Article 14 of the Constitution not violated because teacher marries daughter of director, or because daughter of director is elected by other directors when the related director was not present, had no knowledge and does not participate in her election.

September 13, 1933.

9-20

FILED
90

Dr. H. E. Tatum,
Brunswick, Missouri.

Dear Sir:

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

"I am enclosing you an article from the Brunswicker in which our friend Clayton takes two of us school directors to task for remaining on the board after relatives had been employed as teachers.

In regard to Mr. Humo to whom Mr. Clayton refers, he was elected as music teacher before he became Mr. Merrill's son-in-law. In regard to my daughter, --Elizabeth was not an applicant for a teaching position here. She was elected to fill the vacancy occurring by the unexpected resignation of Miss Marjorie Merrill. However, she nor I knew nothing of the vacancy until she was notified of her election to fill it.

As you see, Mr. Clayton's basis for criticism was the decision rendered by Judge Gantt in the case of Otto Whittle, school director, who was ousted for casting the deciding vote to employ his relative, which was considered a violation of the anti-nepotism amendment. From the opinion Judge Gantt rendered, I did not feel that I was violating the anti-nepotism law by remaining on the Board as I was not present when my daughter was elected.

As Attorney General, what would be your opinion as to how the anti-nepotism law applies to a school director who takes no part in voting for a relative for teacher."

You inquire first whether or not a director is disqualified because a music teacher previously employed by the board afterwards becomes the son-in-law of the director. Second, whether or not you are disqualified as a director because of the election to office of your daughter when you were not present at the meeting of the board and did not in any way name or select her as a teacher. You inquire whether or not the fact that both of you have remained on the board since

the transpiring of these events would make you guilty of violation of the nepotism provision.

Section 13, Article 14 of the Constitution of Missouri provides as follows:

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

The mandate of the foregoing constitution provision is that no public officer having a right to name or appoint any person to render service to the State shall name or appoint to such service any relative within the fourth degree. Under the Constitution, it is the exercising of the right "to name or appoint" a person within the prohibited degree that is a violation of the provision. If, by change of circumstances or because of the actions of others, a relative of a member of the board holds a position, the related member does not necessarily forfeit his office.

In State ex rel. Roy McKittrick.v. Otto Whittle (not yet reported), the court says as follows:

> "It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, may officials appointed relatives to positions and thereby placed the names of said relatives upon the public payrolls. The power was abused by individual officials and by members of official boards, bureaus, commissions and committees with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the State and its political subdivisions. * * * 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."

It is apparent from the above decision that if a member of the board exercises his right to name or appoint in favor of a relative within the prohibited degree, he thereby violates the constitutional provision. We believe, however, that it is necessary for him to so exercise the right, and if through means over which the director has no control, a relative is selected by the board, the director has not forfeited his office. To be more explicit, it appears that Mr. Humo was elected a teacher of the Brunswick High School at a time when he was not related to any member of the board. Afterwards, however, it appears that Mr. Humo married the daughter of Mr. Merrill, one of the directors. At the time that Mr. Humo was elected as a teacher, it does not appear whether Mr. Merrill voted for him or not. If he did vote for him, there was no reason why he could not properly do so because at the time of his election, he was not related to Mr. Merrill in any degree. However, if it could be established that there was collusion between Mr. Merrill and Mr. Humo whereby it was necessary for Mr. Merrill's vote to elect him in order that he might be elected before the marriage to Mr. Merrill's daughter, that, we think, would raise a different proposition. Leaving out the question of collusion, which does not appear to exist, according to your inquiry, it is the opinion of this Department that the mere fact that a director happens to become related to a teacher during the course of the ordinary vicissitudes of life, that does not impose upon the director a forfeiture of office under the constitutional provision. The constitutional provision does not prohibit the director from remaining on the board where it happens that a child afterwards marries a teacher employed by the board, and we do not believe it was the intention of such constitutional provision to impose a forfeiture of office upon the director simply because his daughter should marry an employe of the board; there being no collusion to avoid the constitutional provision.

As to your second inquiry, we believe that the constitutional provision and the Whittle case both require that before a forfeiture of office can be declared, that the director exercise his "right to name or appoint" an employe, or failing to exercise the right, he has achieved the same ends by reason of con-

spiracy between the other directors. It does not appear from the inquiry that there was any conspiracy between yourself and the other directors that you should remain away from the meeting or fail to vote in order that you would be relieved from the injunction of the constitutional provision. It appears affirmatively, however, that your daughter was elected to the position by the other members of the board at a meeting when you were not present and neither you or your daughter knew of the vacancy until notified of her election. From the facts given in your letter, you are not guilty of any conspiracy or bad faith in not being present and failing to vote, and the sole question remaining is whether or not the fact that your daughter was elected by the other members of the board without your participation in the election makes you holding office a violation of the constitution.

It is our opinion that you have not violated the constitutional provision. You did not exercise your right "to name or appoint" your daughter, nor did you conspire with others that they should exercise their right to name or appoint her during your absence. Had you been present and had voted in favor of the election of your daughter, or had you been present and acquiesced in her election, we believe you would have been guilty of the violation of this amendment. However, not being present and not taking any part in the election, we are of the opinion that you are not guilty of violating the constitutional provision.

It is, therefore, the opinion of this Department that Mr. Merrill is not guilty of violating Section 13 of Article 14 of the Constitution by remaining upon the board simply because his daughter married one of the teachers after his election to office, and we are of the further opinion that you personally are not guilty of violating said Section by remaining upon the board when your daughter was elected to office by the remaining members of the board, and you did not in any way participate in her election. In answering both of these questions, we are assuming the utmost good faith of both parties and that no collusion existed.

Very truly yours,

Frank W. Hayes.
Assistant Attorney General.

APPROVED:

Attorney General.

FWH:S