

**Opinion No. 179****Nepotism—School Districts—Contracts,  
Legality of—Clerk of District.**

HELD: Unable to advise that an appointment on ground of merit is a defense to member of board appointing relative.

(2) A member of a school board violates Nepotism Law where he acts to appoint as clerk a relative of another member of the board.

(3) A contract appointing a relative of a member of school board as clerk is void.

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April 25, 1933.

You have submitted the following questions: "1. May the chairman of a school board break a tie vote for clerk and legally cast his vote for his relative on the ground, as he specifically stated at the time, that he was moved solely by a consideration of merits rather than relationship? 2. Where a relative of the chairman of a school board has been elected clerk, can such relative serve as clerk?"

It has been held by our Supreme Court that a school district is a political subdivision of the state (*State v. Meyers*, 65 Mont. 124) and therefore Chapter 12, Laws of 1933, being the so-called Nepotism Law, applies to school districts and school boards.

This office has rendered an opinion to the effect that it was unable to advise that an officer who appoints a relative to a position even though the appointment is made because of merit rather than relationship would not be violating the law. See opinion No. 117, this vol., March 16, 1933. In doing so, we took into consideration the fact that neither sections 2 nor 3 of the said act, which makes certain acts illegal, make any reference to merit nor do they make an appointment based on merit a defense. In view of the wording of these two sections, I am unable to advise that the chairman did not violate the law.

It is also my opinion that the other members of the board violated the law when they elected or appointed someone who is related to a member of the board. Section 2 of this act reads: "It shall be unlawful for any person or any member of any board, \* \* \* to appoint to any position of trust or emolument any person or persons related to **him or them** or connected with **him or them** by consanguinity within the fourth degree, or by affinity within the second degree."

Section 3 of the act contains identical language. Having used this language, I am unable to escape the conclusion that it was the intention of the legislature to make it illegal for any member of the board to appoint any person related to any member of the board within the degrees mentioned in the act and that they did not intend to make the act operative only when the person appointed is related to each member of the board. The phrase "him or them" is sweeping and was intended to cover the situation where relationship exists with any member of the board even though it does not exist with each member of the board. In my opinion to hold otherwise would be to nullify the plain intention of the legislature to prevent boards from persistently showing preference to some favored relative and to put an end to

a pernicious practice of governmental patronage.

Your second question requires a determination of the question whether the contract with a relative is legal. The act itself is silent as to the legality of the contract. In an old English case (*Bartlett v. Vinor*, Carth. 252, 90 Reprint 750) Lord Holt very aptly said: "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 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." This subject is also dealt with in 13 C. J. 421, Section 352, where it is stated: "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 *Dunlop v. Mercer*, 156 Fed. 545, 556, 86 CCA 435, 212 U. S. 588 mem., it was said: "The true rule is that the court should carefully consider in each case the terms of the statute which prohibits an act under a penalty, its object, the evil it was enacted to remedy, and the effect of holding contracts in violation of it void, for the purpose of ascertaining whether or not the lawmaking power intended to make such contracts void, and, if from all these considerations it is manifest that the legislature had no such intention, the contracts should be sustained and enforced; otherwise, they should be held void."

Keeping in mind the legislative intent and the evil that they intended to remedy, it is my opinion that a contract entered into with the clerk, who is a relative of the chairman of the board, is void.