

Opinion No. 319**Nepotism—Schools—Trustees
—Teachers.**

HELD: The failure of the Board of Trustees to notify a teacher, who is the wife of a member of the board, that her services are no longer required (according to Sec. 1075, R. C. M. 1921, as amended) constitutes a violation of the Nepotism Act.

August 22, 1933.

You have inquired (1) whether it is a violation of the Nepotism Act, Chapter 12, Laws of 1933, where the trustees of a school district fail to notify a teacher before May 1, as provided in Section 1075, R. C. M. 1921, as amended by Chapter 87, Laws of 1927, that her services will no longer be required, with the result that the teacher, who is the wife of one of the members of the board was re-elected and insists upon the right to teach; and (2) whether the teacher has such right.

Section 10721, R. C. M. 1921, defines a crime as follows: "A crime or public offense is an act committed or **omitted** in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: * * *." This definition is similar to the definition set forth in 16 C. J. p. 50, Section 2, and 4 Blackstone Comm. p. 5. See also 16 C. J. p. 83, Section 51.

A school district is a political subdivision of the state. (*State v. Myers*, 65 Mont. 124, 210 Pac. 1064). The Nepotism Act is a declaration by the legis-

lature of the public policy of the state with reference to the appointment of relatives. The trustees, being public officers, were charged with the duty of obeying the law and of taking such steps as were necessary to carry out the public policy and to prevent the appointment and employment of the wife of the chairman as a teacher of the district. (See opinion No. 234, this volume.) To accomplish that purpose it was their duty to the State of Montana, and their school district to notify their teacher, (conceding that the teacher was entitled to such notice in view of the Nepotism Act) that her services were no longer required. Whether they met and formally voted not to notify her or refrained from voting or neglected to vote at all, in either event they failed to discharge their duty. Whether it was an act committed or an act omitted, is immaterial under our statute. It is the rule generally that an omission may be a crime when the omission is connected with a legal duty to the state, or an individual. (Bishop New Crim. Law, Vol. 1, Sections 217 (3), 314 and 316; Wharton Crim. Law (12th Ed.) Vol. 1, Sec. 198.)

The fundamentals of this question are treated by Wharton *id.*, Section 167:

"Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested, though in such cases they may constitute indictable offenses. There is no such thing, in fact, as an omission that can be treated as an absolute blank. A man who is apparently inactive is actually doing something, even though that something is the abstinence from something else that he ought to have done. Even sleeping is an efficient act, and may become the object of penal prosecution when it operates to interrupt an act on the part of the defendant which the law requires of him with the penalty of prosecution for his disobedience. As, therefore, an omission takes its character from the prior responsibility that it suspends, that responsibility must be scrutinized when we undertake to estimate the penal character of an omission to perform it. And as a general rule in this respect we may say, that when a responsibility specifically imposed on

the defendant is such that an omission in its performance is, in the usual course of events, followed by an injury to another person or to the state, then the defendant is indictable for such an omission."

Also by Bishop *id.* Section 433:

"Neglect an Act.—There are circumstances wherein men are indictable for what the law calls neglect. It is in the legal sense an act,—a departure from the order of things established by law, a checking of action. It is like a man's standing still while the company to which he is attached moves along, when we say, he leaves the company."

It is therefore my opinion that the trustees violated Chapter 12, Laws of 1933, by reason of their omission to discharge their duty to notify the teacher that her services were no longer required.

Answering your second question, this office has heretofore held that a contract entered into in violation of the act, is void. (Opinion No. 179, this volume.)