

621.

CONTRACT—BOARD OF EDUCATION AND TEACHER—LATTER'S
FATHER SIGNS AGREEMENT AS BOARD'S CLERK—VALID.

SYLLABUS:

Where a clerk of a board of education who is also a member of such board, signs a contract to employ a teacher of whom he is the father, when he took no action in connection with the board of education determining to make such employment, there is no violation of Section 12932 of the General Code.

COLUMBUS, OHIO, July 15, 1929.

HON. LEROY W. HUNT, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Acknowledgment is made of a communication from your office for an opinion, as follows:

“In May of this year the board of education of the Maumee village school district voted to employ as teacher Miss C. of lawful age, whose father, W. A. C. is a member of said board of education and also clerk of said board. As member of the board of education, he did not vote on this matter, but remained mute when the roll was called. As clerk of the board of education, he, together with the president of the board of education, signed the written contract of employment of this teacher.

Query 1: Was such action of said W. A. C. in signing said contract in violation of Section 12932 of the General Code?

Query 2: Is said contract between the board of education and Miss C. legal and binding?”

Section 12932, General Code, to which you refer, provides:

“Whoever, being a local director or member of a board of education, votes for or participates in the making of a contract with a person as a teacher or instructor in a public school to whom he or she is related as father or brother, mother or sister, or acts in a matter in which he or she is pecuniarily interested, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months or both.”

The section above quoted has been under consideration by the Attorney General and the courts in a number of instances. In Opinions of the Attorney General for the year 1920, at page 1122, it was held as disclosed by the syllabus that:

1. The act of a husband member of a board of education in voting to employ his wife as a teacher may not be a violation of Section 12932, G. C., under every state of facts.

2. Whether such husband board member votes to employ his wife as a teacher or sits mute while such contract is entered into is in violation of Section 4757, G. C., and said contract is null and void.

3. The wife, having rendered services and received payment for the same under such a contract, in the absence of fraud, equity may leave the parties thereto where they are found.”

The above opinion was again cited by the same Attorney General in an opinion

found in Opinions of the Attorney General for the year 1920, at page 1143, in which it was held that a contract employing the wife of a member of a board of education was null and void, by reason of Section 4757, General Code. Said section was in the same form then as it now is, and provided:

"Conveyances made by a board of education shall be executed by the president and clerk thereof. No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."

The Supreme Court of Ohio in the case of *Board of Education of Zaleski School District, et al. vs. Boal*, 104 O. S. 482, held that the wife of a member of the board of education was not included within the terms of Section 12932, for the reason that the statute did not expressly inhibit a contract with a wife or husband. The court further in its opinion reached the conclusion that in view of the rights of women to contract under existing law and own their separate property, such a contract could not be construed as being one in which the husband although a member of the board of education was interested in view of the provisions of Section 12932 or Section 4757. The reasoning in said opinion would apparently overrule the former opinion of the Attorney General hereinbefore referred to, upon the proposition of there being a pecuniary interest in case of the employment of a wife whose husband was a member of the board.

In 1923 the Attorney General in an opinion reported for said year at page 236, held as disclosed by the syllabus:

"The general presumption is that the employment of a minor son of a member of a board of education is such an employment or contract as would be illegal under the provisions of Section 4757 upon the ground that said parent, as a member of the board of education, would have a pecuniary interest in said contract.

Under penal Section 12932, General Code, the employment by a board of education of a minor son of a member of said board of education would raise the same general presumption of pecuniary interest as in the first question under Section 4757 and would be a violation of said penal section."

It is believed that the opinion last mentioned would not be overruled by the Supreme Court in the case of *Board of Education of Zaleski School District, et al., vs. Boal*, supra, for the reason that inasmuch as a minor is involved and a parent would be liable for its support the latter case is clearly distinguishable from the former. However, it may be stated that the facts under consideration in all of the former rulings hereinbefore mentioned are somewhat distinguishable from the facts in the case presented for the reason that the daughter of the member of the board of education is of lawful age. Therefore, the question of interest would not apply as in the case where such child was a minor. However, the Attorney General in the year 1925, in an opinion found on page 548, had under consideration a question very similar to the one which you present, excepting in that case the president of the board of education was the father of the teacher employed. The syllabus of said opinion reads:

"Under the provisions of Section 12932, General Code, the mere facts

alone that a member of the board of education does not cast his vote in favor of a contract employing his son or daughter is not sufficient to place such attempted contract of employment beyond the other provisions and penalties of said section.

The signing of such a contract by a board member as president of such board would be participation in the making of such contract, and would come within the inhibition of said section."

As above indicated it will be noted that in the case you present the clerk of the board of education who is also a member of the board and the father of the teacher, signed the written contract of employment, whereas in the opinion last mentioned, the president of the board of education signed the contract, and was the father of the teacher employed.

A search of the statutes will disclose that there are no specific provisions as to the manner in which a contract employing a teacher shall be executed. Section 4757, supra, does specifically state that all "conveyances" shall be executed by the president and clerk. However, while it is thought that the practice generally adopted by boards of education is to have contracts signed by the president and clerk in the same manner that conveyances are executed it is believed there is no mandatory requirement to follow such procedure. It is probable, of course, that the board of education by following such a practice either under a general rule adopted, or as a matter of general practice, could be said to have adopted such a rule so that action undertaken in the execution of such contract could be construed to be, at least by implication, under the rule of the board.

In any event consideration must be given to the fact that a clerk may or may not be a member of the board. In the instant case, if the clerk had not been a member of the board no question could have arisen. In other words, as clerk he could have signed the same contract without any question arising as to its validity notwithstanding that he was the father of the teacher employed; but when the clerk is also a member of the board, and he votes for the employment of the teacher, he acts in the capacity of a member of the board. On the other hand, when he signs a contract in pursuance of a resolution of the board, he acts in the capacity of clerk in the performance of a ministerial duty, and it is believed that in the event that he was directed by the board of education to execute a given contract, he would have no discretion as to whether or not he should execute the same. That is to say, it is the duty of the clerk to carry out the directions of the board, and it is believed that the fact he is a member of such board would not change his duties as clerk, especially in those instances where he did not participate in the action of the board.

It will therefore be seen that the case you present is distinguishable from the case under consideration by the Attorney General in the 1925 opinion hereinbefore referred to. I am frank to say that there is considerable doubt as to the former opinion being basically sound for the reason that in all probability the duties of the president of the board of education can be separated from his duties as a member of the board of education. However, for the purposes of this opinion, it is unnecessary to overrule said opinion to reach the conclusions that have been reached with reference to the clerk.

It must be kept in mind that Section 12932, General Code, is a criminal statute and must be strictly construed in favor of the accused, which, of course, is another argument in favor of the conclusion herein reached.

Based upon the foregoing and in specific answer to your first question, it is my opinion that where a clerk of a board of education who is also a member of such board, signs a contract to employ a teacher, of whom he is the father, when he took no action

in connection with the board of education determining to make such employment, there is no violation of Section 12932 of the General Code.

The conclusions that have been hereinbefore reached, dispose of your second inquiry.

Respectfully,
GILBERT BETTMAN,
Attorney General.

622.

APPROVAL, BONDS OF CALEDONIA VILLAGE, MARION COUNTY,
OHIO—\$13,000.00.

COLUMBUS, OHIO, July 15, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

623.

APPROVAL CONTRACT FOR PAVING ON ACCOUNT OF GRADE
SEPARATION.

COLUMBUS, OHIO, July 17, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of proposed contract for Section "H" Bridge, State Highway No. 303, with reference to paving on account of grade separation.

I note that the work of eliminating the grade crossing was completed about four years ago, except as to that portion thereof providing for an eighteen foot pavement; that it is now the desire of the State and the county commissioners to increase the width of the pavement six feet, which increased cost is to be borne by the state and county. The Wabash Railway Company desires to pay its share of the cost of the eighteen foot pavement agreed to at the time the contract was let, but no more.

Finding said contract in proper legal form, I have this day noted my approval thereon as to form, and return the same herewith to you.

Respectfully,
GILBERT BETTMAN,
Attorney General.