

1674.

BOARD OF EDUCATION—WHERE HUSBAND MEMBER OF BOARD VOTES TO EMPLOY HIS WIFE—MAY NOT BE VIOLATION OF SECTION 12932 G. C.—IS VIOLATION OF SECTION 4757 G. C.—EQUITY LEAVES PARTIES WHERE IT FINDS THEM.

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.*

COLUMBUS, OHIO, December 3, 1920.

HON. VERNON M. RIEGEL, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter, which is as follows:

“Section 12932 G. C. provides as follows:

* * * 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.’

When a member of a board of education votes for or participates in the making of a contract with his wife as a teacher in a public school does he ‘act in a matter in which, he is pecuniarily interested’ and thus render himself liable to the pains and penalties provided by this section?

When said board member’s vote has been the deciding vote in the election of his wife as a teacher what will be the status of such teacher in the event your department rules that said board member’s vote was illegal? Will she be permitted to continue to discharge the duties of the position to which she has been elected, if such election is declared illegal by your department?”

Quite frequently this department has been asked to consider questions that have arisen under the statute quoted in your letter, but none of them are found to be exactly the one you now present. It, being unique and unusual, deserves rather extended comment.

For a discussion of this and related sections, you are referred to Opinion No. 457 (Opinions of the Attorney-General, 1919, Vol. I, page 761), although this opinion is not directed to your present inquiry.

Section 12932 G. C., which you quote, is a criminal statute and in this state, according to a well settled rule, must be strictly construed. This section enumerates “father,” “brother,” “mother,” and “sister” as those relatives for whom a member of a board of education may not vote to be employed as a teacher, and it does not name “wife” as one of those who are excluded because of relationship to such member.

So, it cannot be said in a strict construction of this statute that the act of the husband board member in voting to employ his wife as a teacher is a transgression of the letter of the law because of the intimate relationship existing between them.

The wages of the wife are her property, which she may have and use as her own, separate and apart from her husband, and over which he has no control and which he has no interest such as the strict construction of this statute requires. To be pecuniarily interested, he must be shown to have an interest in a part of the money received by the wife as wages.

"Pecuniary" is defined as, "Consisting of money; relating to money." (Century and Standard Dictionaries.) And "pecuniarily" is defined as "In a pecuniary manner; as regards money matters." (Id.)

A direct money interest might be very difficult of proof. In a trial of a case having your question as the issue, the introduction of evidence to show the husband board member's direct interest in the wife's wages, attempted by either of them, would be under a well known rule, excluded because of the relationship existing between them, and in this manner proof might fail or not be made beyond a reasonable doubt.

Yet, the participation in such an act by the husband board member as that of employing his wife as a teacher in the schools under control of his board, is, without doubt, a violation of the spirit of this statute. This statement rests upon the common knowledge of husbands, and people generally, as to what is supposed to be the meaning and intention of such legislation. But in criminal law, an act which is supposed to violate the spirit of the law but is not expressed in the words of the law cannot, under a strict construction thereof, be made to come under its terms. Nor does the fact that the husband's vote, as your statement affirms, was the deciding vote bring his act within section 12932 G. C.

As pointed out in the opinion above referred to, section 12932 G. C. was enacted in 1899. At that time, and it is believed until recently, the very general custom of boards of education was not to employ married women living with their husbands as teachers, and it may be supposed that the knowledge of that custom was before the legislature passing this statute, the satisfactory reason for such a custom deciding them in omitting "wife" in the catalogue of relationships from the law when passed. However, this may be conjecture, but it is pertinent conjecture on an existing general usage.

This leads us to consider another statute in reaching a disposition of this question. Section 4757 G. C. reads in part thus:

"* * * No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board * * *."

Under the law in Ohio the husband is required to support his wife and minor children out of his property or by his labor. It is apparent and a matter of common knowledge that when the wife is receiving wages, the outlay by the husband for her support is not, in a usual case, so great or so urgent, and may be and is in many cases wholly absent. It is very justly to be said that a husband board member voting to employ his wife as a teacher in the schools under control of his board could not be unmindful of the advantages that the wages thus put into the wifely purse might mitigate somewhat against the depletion of the money coming into the husbandly purse and thus add to the comfort of himself and his household. And while that might not be the only reason disposing him to cast a favorable vote, yet it could be a very moving reason not to vote otherwise.

On the other hand, the Ohio law is, that if the husband is unable to support

his wife and minor children the wife must assist him so far as she is able. (See section 7997 G. C.)

If the husband's inability to furnish support is not such as to prevent his being an active member of the board of education, as is by no means an impossible proposition, and he votes to employ his wife as a teacher, it must be held in such a case that he is, to say the very least, quite a good deal interested pecuniarily in such a contract. Your statement of facts, however, may or may not present the case that we have just mentioned but such a case is by no means impossible. Here is pecuniary interest, surely.

It sometimes happens that boards of education employ teachers within the excluded relationship to a member of the board without such member participating in such action of the board, either by refusing to vote or remaining silent when the action is taken by the board. Yet where, in such a case, the wife of a member is given a contract to teach, the action of the husband board member in so neglecting to act in the hiring of his wife must, in most cases, if not all, be within the law as found in section 4757 G. C. and he does not avoid an indirect interest in the contract with his wife.

As between husband and wife not living apart or estranged, the relationship is so close and so well hedged about and supported by the law and public policy that acts like the one before us must be looked upon to be well within the law against interest in contracts made with those sustaining such relationship to each other.

Referring again to the opinion mentioned above, it is desired to quote the following therefrom in this connection:

"Judge Voris, in the case of *Grant vs. Brouse*, 1 N. P. 145, used the following striking language in the discussion of section 4757 of the General Code:

"We are not undertaking to censure anybody, because we believe that in this transaction the board believed that it was discharging a public duty beneficially to the public; that is, it supposed that this was a more advantageous course to take than to obey the law. I have no doubt that the member of the board, who sold these articles, undertook to make a favorable arrangement for the public. Nothing to the contrary is asserted, and it is urged in fact, by the defendants, as a reason why this court should not interfere with its jurisdiction, that no *pecuniary injury* in fact resulted.

But we cannot look upon it in this light. The dollar and the cent advantage is the lowest order of consideration that can be urged, when a public wrong, a vicious example is encouraged under high official sanction; the example, the public wrong, the prostitution of public virtue is vastly more than mere matter of dollars and cents. The law was made in the interest of sound public policy, and while in some cases it may appear to be more advantageous to ignore than to obey the law, yet we think no public officer can violate a direct provision of the law, directing the performance of his duty, or prohibiting certain acts, and have his conduct judicially approved, and where the matter comes before the court it ought to carefully see to it that public policy is upheld. I know of no better way of preserving the virtue of the public than to have its officers understand and act as if they were public servants, always recognizing that a public position constitutes a public trust that may be sacredly carried out."

Under section 12932 G. C. the guilt of the husband board member voting to employ his wife as a teacher, or using his influence to have the remaining members

of the board so act, he, himself, not being, by the minutes of the board or otherwise, shown to have participated in the action, will depend upon the weight of the evidence showing his pecuniary interest; that is, it is a matter of proof and is for the jury. Proof of guilt would in such instance render the contract with the wife void and of no force.

Another matter supporting what is before said concerning section 4757 G. C. is to be found in *Railroad vs. Glenn*, 66 O. S., 395. The syllabus is:

“At common law, a husband has a right of action against one who wrongfully, or through negligence injures his wife, to recover for the resulting loss of her services, and for his necessary medical, surgical and other expenses in healing her injuries; and this right of action is not abridged or affected by the legislation embraced in sections 3108 to 3117 R. S. (7995 to 8004 G. C.).”

Caution and the application of good business principles should move the board to secure from the husband board member a waiver of this right or indemnity from probable loss should a right of action arise against the board, if such action is one which may be brought against a board of education. If such waiver or indemnity is given it is a tacit admission of pecuniary interest in the wife's contract. On the other hand, if it is held that the husband board member's acquiescence in or vote for the employment of the wife by the board is taken as an implied relinquishment of this right, such implied release of the husband imports an interest of pecuniary value in the wife's contract.

It is therefore the opinion of this department that the contract with the wife as a teacher, made by a board of education, one of the members of which is her husband, is null and void. Under such circumstances she may not enter upon the discharge of the duties of a teacher as an employe of the board. If she has done so and has been paid by the board for the services rendered then it may be presumed that equity in the absence of fraud may leave the parties to such illegal contract where it finds them. Whether the money thus illegally paid under any state of facts may be recovered back is not discussed. The wife may not continue to teach for the board and receive wages.

From the foregoing, the attorney-general is constrained to hold,

(1) That the act of a husband board member in voting to employ his wife as a teacher may not be a violation of section 12932 G. C., depending upon the circumstances of the case;

(2) That a husband who is a member of the board of education that employs his wife as a teacher, whether such husband votes when such contract is entered into or sits mute, such contract is in violation of section 4757 G. C., and is therefore null and void;

(3) That when such employment has been entered upon by the wife of a member of the board and payment has been made for the services rendered by the wife to the board, equity in the absence of fraud may leave the parties where they are found.

Respectfully,

JOHN G. PRICE,

Attorney-General.