

1953

Ralph V. Backman and Mathias C. Tanner v. E. Allen Bateman and Board of Education of Ogden City : Brief of Plaintiffs

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

RALPH V. BACKMAN,

Plaintiff,

— vs. —

E. ALLEN BATEMAN, State Superintendent of Public Instruction, and
BOARD OF EDUCATION OF
SALT LAKE CITY, a municipal corporation,

Defendants.

Case No. 8052

MATHIAS C. TANNER,

Plaintiff,

— vs. —

E. ALLEN BATEMAN, State Superintendent of Public Instruction, and
BOARD OF EDUCATION OF
OGDEN CITY, a municipal corporation,

Defendants.

Case No. 8064

BRIEF OF PLAINTIFFS

FILED

JUL 10 1953

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IN THE SUPREME COURT of the STATE OF UTAH

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Defendants.

Case No. 8052

MATHIAS C. TANNER,

Plaintiff,

— vs. —

E. ALLEN BATEMAN, State Superintendent of Public Instruction, and
BOARD OF EDUCATION OF
OGDEN CITY, a municipal corporation,

Defendants.

Case No. 8064

BRIEF OF PLAINTIFFS

The above entitled cases are distinct and separate suits. By order of the court they have been consolidated for hearing. This brief covers the facts and argument for both cases. The cases are similar but not identical and the differences will be pointed out in the Statement of Facts and in the argument.

STATEMENT OF FACTS

Plaintiffs have filed their complaints asking for writs of mandate to compel the defendant E. Allen Bateman to withdraw a ruling that plaintiffs may not be employed by their respective Boards of Education and to compel such Boards to enter into written contracts with plaintiffs for the school year 1953-1954. Defendants who are represented by the Attorney General have filed answers. The essential facts relied upon by the plaintiffs are admitted by the defendants and the questions presented are substantially matters of law.

From the complaints and the answers of the defendants the following are the undisputed facts:

(a) BACKMAN VS. BATEMAN, et al.

Defendant Board of Education of Salt Lake City is a municipal corporation of the State of Utah whose boundaries are co-extensive with Salt Lake City and the Board has the statutory function of administering the school system in Salt Lake City. The defendant E. Allen Bateman is the State Superintendent of Public Instruction of

the State of Utah and as such is the executive officer of the State Board of Education, which Board is charged with the general superintendence of district schools. As such Superintendent he advises with school officers upon matters involving the welfare of schools and when requested he must give written answers to school officers upon all questions concerning school law. This legal obligation is specifically provided for by Section 53-3-4, Utah Code Annotated 1953, as follows:

“Decisions by superintendent — Validity. — The state superintendent shall advise with superintendents and with school boards and other school officers upon all matters involving the welfare of the schools. He shall when requested by superintendents or other school officers give them written answers to all questions concerning the school law. His decisions shall be held to be correct and final until set aside by a court of competent jurisdiction or by subsequent legislation.”

The plaintiff Ralph V. Backman is a professional teacher and has been employed by the defendant Board of Education from 1926 to and including the school year 1952-1953. His employment has been as a teacher or supervisor, and since 1948 as the principal of South High School. During all of this time he has held a certificate issued by the State Board of Education as a requisite to his being employed in the various capacities. At the present time he holds a certificate of school administration which expires June 30, 1956. These certificates are issued upon requisites of merit as provided in Chap-

ter 2, Title 53, Utah Code Annotated 1953, and the Rules and Regulations of the State Board of Education. The laws of the State of Utah (Section 53-2-21) provide that no persons shall teach in a public school (which includes employment as a principal) in any school district unless he has the required certificate from the State Board of Education. The plaintiff has spent a great deal of time qualifying himself for his profession, having received an A.B. degree from the University of Utah, an M.A. degree from Stanford University, taken postgraduate work consisting of 74½ “quarter hours” at Stanford University, 28 “quarter hours” at the University of Utah and 18 “quarter hours” at Utah State Agricultural College. Under the rules and regulations plaintiff must take certain minimum courses of study during each five-year period in order to receive a renewal of his certificate.

Defendant Board of Education employs all of its teachers, supervisors and principals under an annual written contract and has a tenure policy of renewal of these contracts when its teaching personnel (including principals) are doing entirely satisfactory work. Plaintiff's contract expired with the school year 1952-1953 and he applied for reemployment for the school year 1953-1954. He was recommended for reemployment by the Superintendent of Salt Lake City schools, and the defendant Board of Education at a regular meeting accepted the recommendation of its superintendent and voted to employ the plaintiff for the school year 1953-1954. A question being raised as to the legality of the employment

of plaintiff, a contract was not entered into by the defendant Board of Education. Pursuant to the above mentioned statutory provision (Section 53-3-4) an opinion as to the legality of employment of the plaintiff was submitted to the State Superintendent of Public Instruction. The factual situation necessitating this opinion is that plaintiff is a brother of LeGrand P. Backman who now is and since 1939 has been a member of the Board of Education of Salt Lake City. LeGrand P. Backman did not vote upon the question of the employment of the plaintiff. Exhibits "D" and "E" are the letters addressed to the State Superintendent and his answer regarding the question of employment of plaintiff. As appears from these exhibits the State Superintendent, on the advice of the Attorney General, gave the opinion that plaintiff could not be employed by the Salt Lake City Board of Education. Plaintiff was then notified that upon the sole ground of the opinion of the State Superintendent he would not be employed for the coming school year. Exhibit "F" is the letter addressed to plaintiff so advising him.

Under Section 53-6-8, Utah Code Annotated 1953, it is provided that the members of each board of education shall fix their own compensation to be received for their services and that such compensation shall not exceed \$100.00 per year in city school districts. The Board of Education of Salt Lake City has fixed its compensation for the year 1953-1954 at \$100.00 per annum.

There were approximately 125 teachers employed in the State of Utah during the school year 1952-1953 whose position with regard to employment for the school year 1953-1954 is the same as that of the plaintiff and who will be unable to secure employment under the ruling of the defendant Superintendent E. Allen Bateman. Substantially every school district in the state is affected by the ruling of the State Superintendent.

Plaintiff has been employed by the defendant Board of Education for 27 years and during such period he has become familiar with the practices, problems and procedures of the Salt Lake City Board, has an established good will with such defendant, and plaintiff may not be able to secure employment in another school district. It is also admitted that no other district in the State of Utah has a high school of comparable size with the high schools of Salt Lake City and no other district pays as high a salary for the position of principal of a high school. Plaintiff is 49 years of age, has been a resident of Salt Lake City all of his life, has five children and owns his own home in Salt Lake City. There is established in the Salt Lake City School District a Local Public School Teachers' Retirement Association of which every teacher employed under a written contract by the Board of Education is by law a member. The funds for said retirement association are supplied by deductions from the salaries of teachers, such deductions at the present time being 2% on a maximum of \$2,500.00 and by an equal amount paid into the association by the

Board of Education. Plaintiff has contributed to such association during all the time he has been employed by the defendant Board and to be eligible for retirement benefits from the association he must have taught 30 years and must be a member of the association at the time of retirement. If he is not employed he is not a member of the association. Retirement benefits at the present time are \$600.00 per annum. If plaintiff cannot continue his employment by defendant Board of Education all benefits of the Local Teachers' Retirement Association, including the amounts plaintiff has paid into the association will be lost.

(b) TANNER VS. BATEMAN, et al.

In the case of Tanner vs. E. Allen Bateman and the Board of Education of Ogden City, the facts are similar to the Backman case except as to the following matters. *The Board of Education of Ogden City has voted that the members shall receive no pay for the fiscal and school year 1953-1954.* Mr. Tanner holds a life diploma issued by the State Board of Education which needs no renewal and can be canceled only for cause or the failure of Mr. Tanner to be employed as a teacher for a period of five years. The Board of Education of Ogden City, as in the case of Salt Lake City, has a Local Teachers' Retirement Association. Unless plaintiff is a member of the association at the time of retirement he will lose all benefits of the association including the amounts paid in by him. Termination of employment terminates membership. Payments at the present time are 1% of \$2,500.00 per

annum and the retirement benefits now being paid are \$480.00 per year. Mr. Tanner is 61 years of age, has taught continuously since 1922, and has taught a total of 33½ years all of which has been in the Ogden schools. He is now teaching only the subject of biology in which subject he has specialized, and it is only in the larger schools that a teacher can be employed to teach one subject exclusively.

In the Ogden School District and generally throughout the State of Utah teachers' pay is on a basis of seniority, and Mr. Tanner has reached the maximum pay permitted by reason of seniority. If he cannot continue his employment in Ogden City and secures employment as a teacher in another district he will lose a portion of this seniority and will receive less than the maximum pay.

Plaintiff Mathias C. Tanner is a brother to N. Russell Tanner who has been a member of the Board of Education of Ogden City since 1945. N. Russell Tanner did not participate in or vote upon the question of employment of Mathias C. Tanner for the school year 1953-1954. Exhibits "B", "C" and "D" are similar in form and substance to Exhibits "D", "E" and "F" in the Backman case.

The question in both cases is whether or not the plaintiffs may be employed in the school districts of Salt Lake City and Ogden respectively. It is the contention of

both plaintiffs that if they may not be so employed they have been denied a right to which they are entitled and from which they have been unlawfully excluded by the defendants.

Both plaintiffs have met all requirements for employment by the defendant boards and the question is whether such employment is illegal by reason of the 1953 amendment to Section 52-3-1, Utah Code Annotated 1953, being Senate Bill 235. Plaintiffs contend that they are not prohibited from the employment by such amendment and that by the ruling of defendant E. Allen Bateman and the refusal of defendant boards of education they have been denied a right to which they are entitled and from which they have been unlawfully excluded.

(Itallics throughout this brief are plaintiffs'.)

STATEMENT OF POINTS RELIED UPON

I. THE ANTI-NEPOTISM STATUTE IS UNCONSTITUTIONAL AS APPLIED TO TEACHERS AND OTHER EMPLOYEES OF BOARDS OF EDUCATION REQUIRED BY LAW TO HOLD CERTIFICATES ISSUED BY THE STATE BOARD OF EDUCATION.

- (a) *Question involved is one of police power of the state under the state and federal constitutions.*
- (b) *Plaintiff has an established and vested right to seek employment and make contracts in any school district of the state, which right may not be interfered with by statute.*

- (c) *The control and supervision of the public school system is by our constitution vested in the State Board of Education and the anti-nepotism law is in conflict with such provision.*
- (d) *There is no necessity in the interest of the public welfare for an anti-nepotism statute which prohibits the employment of teachers and other personnel required by law to hold certificates issued by the State Board of Education.*
- (e) *The anti-nepotism law is arbitrary and oppressive and unduly restricts the liberty of plaintiffs guaranteed by the state and federal constitutions.*

II. ANTI-NEPOTISM STATUTE SHOULD BE CONSTRUED SO AS NOT TO APPLY TO TEACHERS AND OTHER EMPLOYEES OF BOARDS OF EDUCATION REQUIRED BY LAW TO HAVE CERTIFICATES OR DIPLOMAS ISSUED BY THE STATE BOARD OF EDUCATION.

- (a) *If so construed the anti-nepotism statute is in conflict with Section 53-2-15, Utah Code Annotated 1953.*
- (b) *Statutes must be construed in the light of their intent and purposes.*
- (c) *Where there are two possible constructions to be given a statute one of which results in the statute being held unconstitutional, the alternative construction should be given.*

III. WHERE BOARD OF EDUCATION RECEIVES NO PAY THE ANTI-NEPOTISM STATUTE IS NOT APPLICABLE.

ARGUMENT

I. THE ANTI-NEPOTISM STATUTE IS UNCONSTITUTIONAL AS APPLIED TO TEACHERS AND OTHER EMPLOYEES OF BOARDS OF EDUCATION REQUIRED BY LAW TO HOLD CERTIFICATES ISSUED BY THE STATE BOARD OF EDUCATION.

For convenience we have divided this argument into subheadings (a), (b), (c), (d) and (e). We think there is a logical segregation of points but the matters are necessarily overlapping and authorities cited under one of these subdivisions may be persuasive under another subdivision or under all of them.

- (a) *Question involved is one of police power of the state under the state and federal constitutions.*

The anti-nepotism statute provides as follows:

“52-3-1. Employment of relatives prohibited.—It is unlawful for any person holding any position the compensation for which is paid out of public funds to retain in employment or to employ, appoint, or vote for the appointment of, his or her father, mother, husband, wife, son, daughter, sister, brother, uncle, aunt, nephew, niece, first cousin, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law in or to any position or employment, when the salary, wages, pay or compensation of such appointee is to be paid out of any public funds; and it is unlawful for such appointee to accept or to retain such employment in all cases where the direct power of employment or appointment to such position is or can be exercised by any

person within the degress of consanguinity or affinity herein specified, or by a board or group of which such person is a member.”

Section 1, Article I of our State Constitution provides:

“All men have the inherent and inalienable right to enjoy and defend their lives and liberties”

Section 7, Article I of our State Constitution provides:

“No person shall be deprived of life, liberty or property without due process of law.”

Amendment XIV of the Federal Constitution provides:

“. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Under the foregoing constitutional provisions liberty includes the right to work and to sell one's services wherever and under what conditions he may choose. This right cannot be interfered with except for the public welfare and the evil to be corrected must be of a substantial nature before the liberty of citizens may be restricted.

In the case of *Weaver vs. Palmer Bros. Company*, 270 U. S. 402, 70 L. Ed. 654, the State of Pennsylvania

had passed a statute prohibiting the use of “shoddy” as a material to be used in mattresses. The United States Supreme Court made the following statements in holding the statute unconstitutional as an infringement of personal liberty:

“Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 67 L. ed. 322, 325, 28 A.L.R. 1321, 43 Sup. Ct. Rep. 158. *Invalidity may be shown by things which will be judicially noticed* (*Quong Wing v. Kirkendall*, 223 U. S. 59, 64, 56 L. ed. 350, 352, 32 Sup. Ct. Rep. 192), or by facts established by evidence.”

“Shoddy-filled comfortables made by appellee are useful articles for which there is much demand. And it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden. They are to be distinguished from things that the state is deemed to have power to suppress as inherently dangerous.

“Many states have enacted laws to regulate bedding for the protection of health. Legislation in Illinois (Laws 1915, p. 375) went beyond mere regulation and prohibited the sale of secondhand quilts or comfortables even when sterilized or when remade from sterilized secondhand materials. In *People v. Weiner*, 271 Ill. 74, L.R.A. 1916C, 775, 110 N. E. 870, Ann. Cas. 1917C, 1065, the state supreme court held that to prohibit the use of material not inherently dangerous and that might

be rendered safe by reasonable regulation transgresses the constitutional protection of personal and property rights."

"The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger v. Wisconsin*, decided March 1, 1926, 270 U. S. 230, ante, 557, 43 A. L. R. 1224, 46 Sup. Ct. Rep. 260. The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th Amendment. *Adams v. Tanner*, 244 U. S. 590, 596, 61 L. ed. 1336, 1343, L.R.A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; *Meyer v. Nebraska*, 262 U. S. 390, 67 L. ed. 1042, 29 A.L.R. 1446, 43 Sup. Ct. Rep. 625; *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 68 L. ed. 813, 32 A.L.R. 661, 44 Sup. Ct. Rep. 412."

Freedom of contract was discussed by this court in the case of *Block & Griff vs. Schwartz*, 27 Utah 387, 76 Pac. 22 (at pages 395 and 396 of the Utah Report).

"The appellant, however, claims that the enactment interferes with and abridges his inalienable rights, as well as those of others in like situation, subjects of this commonwealth; and for his and their protection against the consequences which naturally flow from such an enactment he appeals to section 1, art. 14, of Amendments to the Constitution of the United States, which, on this subject, provides: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' For like reasons he appeals to section 1, art. 1, of the Constitution of this State, which inter alia, provides; 'All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; . . . to assemble peaceably, protest against wrongs, and petition for redress of grievances;' and also to section 7 of article 1, which provides: 'No persons shall be deprived of life, liberty or property, without due process of law.' These constitutional provisions constitute the supreme law of the commonwealth upon this subject. To that law the executive, the legislative, and the judicial departments of the government alike must bow obedience, as well as every subject. It forbids the abridgement by the State of the privileges and immunities of all citizens. Under its mandate no person can be deprived of life, liberty or property without due process of law, and every person is entitled to the equal protection of the laws, and may acquire property, possess and protect it, as well as defend his life and liberty. These are inherent and inalienable rights of citizens, and are constitutional guaranties. An enactment, therefore, which deprives a person arbitrarily of his property, *or of some part of his personal liberty*, is just as much inhibited by the supreme law as one which would deprive him of life. *And 'liberty,' in the sense in which the term is here employed, is not restricted to mere freedom from imprisonment, but it embraces the right of a person to use his God-given powers, employ his faculties, exercise his judgment in the affairs of life, and to be free*

in the enjoyment and disposal of his acquisitions, subject only to such restraints as are imposed by the law of the land for the public welfare. The word 'liberty,' as thus employed in the Constitutions and understood in the United States, is a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights, including the right in each subject to purchase, hold, and sell or dispose of property in the same way that his neighbor may; and of such liberties no one can be deprived except by due process of law."

The following statement was made by this court in the case of *McGrew vs. Industrial Commission*, 96 Utah 203, 85 P. 2d. 608, the case involving the Utah Minimum Wage Law, (page 208 of the Utah Report) :

"Thus one may be said to have a special property in his profession or calling by means of which he makes his support, and he can be deprived of it only by due process of law. Blair v. Ridgely, 41 Mo. 63, 173, 97 Am. Dec. 248. We refer to this because it is necessary to keep this broad and true meaning of property in mind when considering the constitutional questions here presented. The right to work, the right to engage in gainful occupations, the right to receive compensation for one's work are essentially property rights. So too is the right to enjoy the benefits resulting from the work of one so employed. So also the right to engage in commerce or in legitimate business is property."

The case of *State ex rel Cox vs. the Board of Education of Salt Lake City*, 21 Utah 401, involved the question of whether or not the school board could require vaccination of pupils as a condition of attendance at school. The court held that under the epidemic conditions of that day such a requirement was valid. The following however is a quotation by the court as to the extent of the police power:

“The police power of a State is recognized by the courts to be one of wide sweep. It is exercised by the State in order to promote the health, safety, comfort, morals, *and welfare of the public*. The right to exercise this power is said to be inherent in the people of every free government. It is not a grant derived from or under any written constitution. It is not, however, without limitation, and it can not be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the Legislature to decide when the exigency exists for the exercise of this power, *but as to what are the subjects which come within it is evidently a judicial question.*’ *Champer v. City of Greencastle*, 138 Ind., 339; *Blue v. Beach*, 56 N.E. Rep. 87; *State v. Gebhardt*, 145 Ind. 439.”

The following quotation is taken from the footnote page 1228 of Cooley’s *Constitutional Limitations*, Eighth Edition, Volume Two:

“The police power is not unlimited . . . *Wherever it is invoked in aid of any purpose of legislation, such purpose or legislation must bear some definite and tangible relation to the health,*

comfort, morals, welfare, or safety of the public.' Goldman v. Crowther, 147 Md. 282, 128 Atl. 50, 38 A. L. R. 1455. See also Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479."

The following statement is from the same text, pages 1236 and 1237:

"Freedom of Contract. Freedom of contract is not absolute. It is subject to reasonable legislative regulation in the interest of public health, safety and morals, and, in a sense not resting merely on expediency, the public welfare. But restraints upon such freedom must not be arbitrary or unreasonable. Freedom is the general rule and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances."

We also refer to the case of *Huntworth vs. Tanner*, 152 P. 523, quoted at page 30 of this brief and the case of *Adams v. Tanner*, 244 U. S. 590, 61 L. ed. 1336, quoted at page 33. In the first case the Supreme Court of the State of Washington held that a statute prohibiting employment agencies from collecting fees from employees did not apply to an agency devoted exclusively to the securing of employment for teachers. The second case held the same statute unconstitutional as applied to any employment agency. The United States Supreme Court stated that employment agencies were legitimate businesses which could not be prohibited under the police power. The court found that the prohibition of the collection of a fee from the employee was in effect

a destruction of the business. The quotations from these cases at pages 30, 33 of this brief further outline the limitation upon the police power of the state.

It is our position that the anti-nepotism law when applied to personnel employed by school boards who are required to hold and who do hold certificates issued by the State Board of Education is unconstitutional.

- (b) *Plaintiff has an established and vested right to seek employment and make contracts in any school district of the state, which right may not be interfered with by statute.*

Section 53-2-15 provides for the issuance of certificates and diplomas to professional teachers and states that:

“Such certificates and diplomas shall be valid in any school district of the state in the department of instruction or supervision for which they are issued.”

In the case of Scheibner vs. Baer (Pa. 1896) 34 Atl. 193, the State Superintendent attempted to revoke a teacher's certificate without giving the statutory ten days' notice and an opportunity to be heard. The court held that the certificate was a right which could not be interfered with without due process of law. The court stated:

“‘It is clear that any certificate granted to a teacher is a “license” (see section 12) to him to pursue a certain avocation, and to seek a certain

public employment, which without it, he cannot pursue or seek. That right, during the period for which the certificate is granted to him, is a valuable property in his hands, just as a right to practice as an attorney of a court is property in the hands of him who has been admitted to it. *Ex parte Steinman*, 95 Pa. St. 220, 237. The annulment of a teacher's certificate is the destruction of his property. No man, in this state, can be deprived of his property except by a proceeding judicial in its nature, and as such involving as an indispensable requisite an opportunity of being heard. *Id.*; *Brown v. Hummel*, 6 Pa. St. 86, 91; *Craig v. Kline*, 65 Pa. St. 399, 413; *Palairer's Appeal*, 67 Pa. St. 479, 485; *Philadelphia v. Scott*, 81 Pa. St. 80, 89. That opportunity the act of 1854 (section 41) secures to a teacher in the provision for notice to him previous to the annulment of his certificate; for, as was pointed out by Mr. Justice Field in *Windsor v. McVeigh*, 93 U. S. 274, the requirement of notice necessarily implies the right to appear and to be heard. Remembering that the effect of an annulment of a certificate, in the case of one whose profession is that of a public school teacher, and who has passed the period of life when he can turn his hand to anything, means the destruction of his livelihood, it is surely true that the notice and opportunity for hearing prescribed by the statute are conditions precedent to the exercise of the power of annulment given by it.' "

- (c) *The control and supervision of the public school system is by our constitution vested in the State Board of Education and the anti-nepotism law is in conflict with such provision.*

Section 8, Article X of our constitution provides:

“The general control and supervision of the public school system shall be vested in a State Board of Education, consisting of the Superintendent of Public Instruction, and such other persons as the Legislature may provide.”

The framers of the constitution obviously intended that a State Board of Education should regulate the public school system and such matters as constitute “general control and supervision” may not be taken away from the State Board by an arbitrary statute disqualifying teachers holding certificates. The Legislature has, pursuant to the State Constitution, placed the matter of qualification of teachers in the hands of the State Board of Education. The Legislature is prohibited by the constitution from interfering and the anti-nepotism statute, as applied to certified employees of school boards, is in violation of the constitution.

- (d) *There is no necessity in the interest of the public welfare for an anti-nepotism statute which prohibits the employment of teachers and other personnel required by law to hold certificates issued by the State Board of Education.*

As shown by the authorities cited under subdivision (a) above an interference with the right of employment is justified only when there is some public necessity. Since by constitutional and statutory provisions the only persons who may be employed as teachers or supervisors in school districts are those who have been approved and

certified by the State Board of Education there is no need for an anti-nepotism law covering such personnel. The following statutes relate to the issuance of certificates by the Board of Education. References are to Utah Code Annotated 1953.

“53-2-12. General Powers and duties. — The general control and supervision of the public school system is vested in the state board of education. It shall adopt rules and regulations to eliminate and prevent all unnecessary duplication of work or instruction in any branch or division of the public school system and shall require the governing boards of all branches and divisions of the public school system to put the same into operation.”

“53-2-15. Certificates and diplomas — Professional teachers — Employees of local boards of education. — The state board of education is hereby authorized and empowered to issue professional teachers’ certificates and diplomas of high school, junior high school, grammar, primary and kindergarten grade; and also to issue superintendents’ certificates and diplomas and supervisors’ certificates and diplomas. *Such certificates and diplomas shall be valid in any school district of the state in the department of instruction or supervision for which they are issued.*

“The state board of education is also authorized and empowered to issue certificates to persons regularly employed by local boards of education in classifications of service in the public school system other than those specified in the preceding paragraph.”

“53-2-16. Diplomas valid for life — Qualifications of recipients. — Diplomas of all grades, including superintendents’ and supervisors’ diplomas, shall be issued only to professional teachers, superintendents or supervisors who have reached the age of twenty-three years, have had five years of successful teaching or supervising experience in this state, exhibit satisfactory evidence of good moral character, are free from serious infectious or hereditary disease and are found to possess the requisite scholarship and culture. *These diplomas are valid for life, unless revoked for cause or unless the holder allows a space of five consecutive years to pass without following the pursuant of teaching or supervising.*”

“53-2-17. Certificates — How long valid — Issuance. — Certificates shall be of such rank and classification as the state board of education shall determine, and shall be valid for a period of not to exceed five years. Certificates may be issued to applicants who have not had the teaching or supervising experience in this state required for diplomas.”

“53-2-18. Scholarship qualifications of applicants — Change. — The state board of education shall determine the scholarship and training required of applicants for diplomas, and the scholarship, training and experience required of applicants for certificates; *provided, that any change made by the state board of education by which the scholarship, training or experience required for any certificate or diploma is increased shall be announced when made, and shall be effective not less than one year from the date when such change is announced.*”

“53-2-19. Certificates and diplomas from certain institutions acceptable. — Certificates and diplomas issued by the school of education of the University of Utah, when indorsed by the chairman of the state board of education, shall have the force of certificates and diplomas of corresponding rank issued by the state board of education. The state board of education may accept credits, certificates and diplomas of other institutions of learning as meeting in whole or in part the requirements for teachers’ certificates and diplomas, if the work of such institutions of learning is found to conform to standards fixed by the state board of education.”

“53-2-20. Applicants from other states. — The state board of education may issue certificates and diplomas to persons holding certificates and diplomas from other states; provided, such certificates and diplomas are found to be of equal rank with those issued by this state; and provided further, that applicants for diplomas shall have taught successfully at least five years, of which at least two years shall have been in Utah.”

“53-2-21. Teachers, supervisors and superintendents to have certificate. — *No person shall teach in a public school or be employed as supervisor or superintendent in any school district in this state and receive compensation therefor out of any public funds who at the time of rendering such service or at the time of such employment is not the holder of a certificate issued in accordance with the regulations of the state board of education; provided, that this section shall not apply to substitutes employed to take the place of regular teachers who are temporarily absent.*”

“53-2-22. Examination of applicants. — The state board of education may determine by examination or otherwise the qualifications of applicants for certificates and diplomas, prepare examination questions, appoint representatives in the several districts of the state to conduct examinations, and prescribe all necessary rules and regulations relative to examinations.”

“53-2-23. Examiners — Compensation. — The state board of education may appoint persons of eminent educational ability to assist in the preparation of examination questions and the grading of examination papers and fix the compensation for such persons, which shall be paid from money appropriated for the purpose upon vouchers approved by the state board of examiners.”

“53-2-24. Revocation of certificates — Grounds. — *The state board of education shall revoke for immoral or unprofessional conduct or evident unfitness for teaching state diplomas and state certificates issued under the provisions of this chapter.*”

“53-2-25. Teachers in district schools must be physically and mentally fit. — No person shall be employed by any board of education as teacher in any school district in this state and receive compensation therefor out of any public funds who is mentally or physically disqualified to perform successfully the duties of a teacher, by reason of tuberculosis or any other chronic or acute disease. Any board of education may require any applicant for employment as a teacher to furnish satisfactory evidence that he or she is mentally and physically qualified for the duties of a teacher.”

Exhibit "A" (pamphlet attached to complaint consisting of 35 pages) contains the rules and regulations adopted by the State Board of Education covering requirements for teachers, supervisors and superintendents. Pages 3 to 18 cover the significant matters relating to principals and high school teachers, in which classification plaintiffs fall. We suggest that these rules and regulations be carefully read if there is any question as to whether or not the requirements have been well considered. For a statement of the history and evaluation of the requirements of the State Board of Education we suggest that the court take judicial notice of "The History of Public Education in Utah" by John Clifton Moffitt, (1946) pages 308 to 313. The author concludes with the following general statement as to the requirements in 1946 which are substantially the present requirements as outlined in Exhibit "A".

"Current practice in teacher certification. — No teacher, supervisor or superintendent may be employed to work in an educational capacity of public school work and receive compensation unless he or she is 'the holder of a certificate issued in accordance with the regulations of the State Board of Education.' The state board has operated on a long-time planning program and throughout the years of its existence has raised the standards to their present status. The present requirements were announced sufficiently in advance to permit teachers to prepare themselves to meet the higher demands for certification. Present regulations became effective September 1, 1942. The teachers are certified in three major

categories: general secondary, general elementary and special subject certificates. First and second class certificates are awarded in each of the above classifications. First class certificates are valid for five years and renewable for five-year periods upon the completion of seven and one-half quarter hours of acceptable upper division college work. Second class certificates are awarded in each of the three categories, and are valid for two years. Likewise, these are renewable on the completion of seven and one-half hours of credit of upper division college work. The second class certificates are issued to those individuals who have training below the standard established and effective September 1, 1942, and pertains particularly to those teachers or teacher candidates required to hold certificates who have not obtained a Bachelor's Degree or the equivalent thereof. General secondary certificates are valid in four-year high schools, and in junior and senior high schools, and general elementary certificates are valid in all elementary grades. In addition to four years of college training, upon first receiving the certificate the candidate is required to present specified training, including major areas of study. Music, art, and the commercial subjects may be taught by those who hold special subject certificates. Requirements for renewal are comparable to those for the general certificate. In addition to the general and special subject certificates listed, librarians, coordinators, industrial arts teachers and teachers of vocational agriculture, vocational trade, and industrial education, as well as those teaching home economics, are awarded certificates requiring special study.

“Those working in administrative and supervisory positions are required to hold appropriate certificates in their field. All public school superintendents, and all principals of schools with three or more teachers, must hold administrative certificates. Likewise, supervisors in both secondary schools and elementary schools should hold certificates appropriate to the school level they serve. Administrative and supervisory certification is given upon the basis of experience and training.

“In order to stimulate professional growth, the state board of education has discontinued the former practice of issuing life diplomas, but recognizes those that have been awarded preceding the date of the present policy — providing the holder of such a diploma does not permit five consecutive years to elapse without serving as a regular teacher or supervisor. The state board at its own choice may revoke or refuse to issue any certificate for just cause. During 1945, state appointed representative groups were at work preparatory to making further modification in all divisions of certification.”

From the foregoing and an examination of Exhibit “A” it is apparent that the State Board of Education actively supervises and regulates the issuance of teaching and supervisory certificates. A high standard is maintained and the State Board does all of the “policing” necessary in the interest of public welfare. There is no legitimate basis under the police power of the state to interfere with the supervision of the public school system

by the State Board of Education or to nullify the statutory provision which states that certificates issued by the State Board shall be valid in all school districts.

In addition to the control and supervision by the State Board of Education we consider it worthy of notice that under Section 52-3-1 (the anti-nepotism law) prior to its amendment by the 1953 Legislature the Board member related to the teacher was prohibited from voting on the employment of such teacher. It was therefore a requirement that a majority of the Board should vote for the employment of the teacher without the vote of the related member. This has been an additional safeguard in the employment of teaching personnel.

- (e) *The anti-nepotism law is arbitrary and oppressive and unduly restricts the liberty of plaintiffs guaranteed by the state and federal constitutions.*

The case of *Huntworth v. Tanner* (Wash. 1915) 152 Pac. 523, was an action by the plaintiff doing business as the Pacific Teachers Agency to enjoin the defendant, Attorney General, from enforcing a law prohibiting employment agencies from charging the employees for services in securing employment. The court construed the statute as not applying to employment agencies restricted to the employment of teachers and an injunction was granted. On the question of statutory construction and the police power of the state, the court said:

“If thus construed, it might well be questioned whether the law would be constitutional—granting for present purposes that the act in whole or in part does no violence to the fourteenth amendment to the Constitution of the United States, a question upon which we make no ruling; for an act of the character of the one now before us, in so far as it affects individuals who may have conducted a legitimate business fairly and honestly, would be clearly unconstitutional unless it can be said that the abuses growing out of the conduct of a certain kind of a business are so great as to warrant a holding that the general welfare demands that the innocent must limit or give up their calling for the common good. Such laws are sustained, not because a business is in itself unlawful, but because of the abuses attending its operation. Consequently it is in the abuses, and not the business that the law is rooted. The police power touches those things which offend against the welfare of society. It finds no resting place in that which is inoffensive. If the act be construed as to include ‘any person’ who may accept a fee for procuring employment for another without qualification and without reference to the mischiefs declared in the preamble and sought to be remedied by the statute, it would be an unreasonable restraint, and probably be overturned in its entirety.

“‘The test of the (police) power is found in the effect the pursuit of the calling has upon the public weal, rather than in the inherent nature of the calling itself.’ State ex rel. Davis-Smith v. Clausen, 65 Wash. 156, 192, 117 Pac. 1101, 1112 (37 L.R.A. (N.S.) 466).”

In the case of *Saville v. Corless*, 46 Utah 495, 151 Pac. 51, this court held unconstitutional as not within the police power of the state a statute requiring mercantile and commercial institutions to close at 6:00 o'clock P.M. of every business day excepting six days prior to Christmas. The following is a portion of the court's opinion:

"We think it also offends against constitutional rights to enjoy, acquire and possess property, the most valuable of which is that of alienation, the right to vend and sell. There are things the sale of which may be restricted, regulated, or even prohibited by the Legislature, and enterprises which may be restricted, regulated and controlled. But such legal interference must rest on the police power of the state to promote or preserve public health, public morals, public safety, public convenience, and general welfare. The act here has no such purpose and in no sense tends to promote or preserve public health, morals, peace, order, safety, convenience, comfort or welfare. It is but an arbitrary and an unwarranted interference with a merchant's business. One or a number of merchants may desire to close their stores at six o'clock. They may do that. But they, by legislation, cannot compel every other merchant to close at the same hour. They can run their own business, but not their neighbor's. So employees, for motives of their own, may desire all stores to close at a certain hour. But their employers, whose business and property is affected, have a voice in that. They, if they choose, may consent to close. But they cannot, by legislation, or otherwise, be coerced to do so. An employee

may refuse to work for another after six o'clock. That is his right. But he may not, by legislation or otherwise, prevent his employer from conducting his own business in person, or with other employees who are willing to work for him. That is an unwarranted interference with the rights of others. All this is so self-evident and fundamental as not to admit of argument. Most sweeping amendments to both the federal and state Constitutions are essential to sanction such legislation as indicated in either the title or body of the act before us. If there be one thing more than others to be guarded against encroachment it is the federal and state Constitutions. These we are all sworn to protect and defend. *To disobey them is to jeopardize fundamental rights and liberties of the people, imperil their welfare and happiness, and to menace the very existence of governments."*

In the case of *State ex rel Robinson v. Keefe* (Fla. 1933) 149 So. 638, the plaintiffs, school teachers, brought suit to nullify the anti-nepotism statute prohibiting the employment of school teachers related to members of boards of education. As shown in another portion of this brief (page 36) the court construed the statute as not applying to teachers holding certificates from the state board of education. However the court indicated that an anti-nepotism statute which does apply to teachers holding certificates would not be within the constitutional powers of the Legislature. The court stated:

"The requirements of this separate code of laws (with regard to teachers' certificates) afford adequate protection against appointments other

than upon proved merit, *which is all that an 'anti-nepotism' law can constitutionally be supposed to cover and still remain within the police power under the guise of which it is enacted.*"

At this point we refer the court to subdivision (a) above which sets forth cases defining the limit of the police power of the state. We particularly call attention to the case of *Adams v. Tanner*, 244 U. S. 590, 61 L. Ed. 1336 which involved the same statute as the Washington case of *Huntworth v. Tanner*, *supra*. The United States Supreme Court in this case held the Washington statute prohibiting an employment agency from charging the employee (whether teachers or any employees) for its services unconstitutional as an interference with individual liberty.

There is no necessity in the public welfare to prohibit the employment of a teacher or supervisor having a license to teach in the form of a certificate issued by the state board of education. 'As stated in the case of *State ex rel. Robinson v. Keefe*, *supra*, anti-nepotism statutes are for the purpose of preventing the employment of incompetent relatives. Since the question of qualification is adequately handled by the State Board of Education the anti-nepotism statute when applied to school teachers is an unwarranted interference with liberty, is arbitrary and a violation of the privileges of citizens.

We again refer the court specifically to the case of *Scheibner v. Baer* quoted at page 19 of this brief where it is held that the certificate of the teacher is a "license" which cannot be revoked without just cause and by due process of law.

As a further comment we mention the present situation of the schools of this state of which this court may take judicial notice. Teachers are leaving the State of Utah because of low salaries and uncertainty of contracts. Obviously the effect of disqualifying a large number of teachers from teaching in the districts where they have become well established will result in more teachers leaving the state or changing their profession or occupation. There may be some inducement to continue if a teacher may continue to teach in the district in which he is now employed even though salaries may be low. If however the teacher is required to seek employment elsewhere it is an invitation to leave the state for higher pay or start anew, leaving the teaching profession. It is self-evident that a teacher who has spent twenty or thirty years of his life in one district may not be able to secure employment in another district either within or without the State of Utah. But if he must seek employment elsewhere and if he can find employment in the teaching profession he may as easily find it outside of the State of Utah. The arbitrary disqualification because of a relationship to one board member may very well be the impelling force to cause a well-qualified teacher to seek

professional employment in a state where he will not be plagued with the problems of low salary and well-meaning relatives elected to boards of education.

II. ANTI-NEPOTISM STATUTE SHOULD BE CONSTRUED SO AS NOT TO APPLY TO TEACHERS AND OTHER EMPLOYEES OF BOARDS OF EDUCATION REQUIRED BY LAW TO HAVE CERTIFICATES OR DIPLOMAS ISSUED BY THE STATE BOARD OF EDUCATION.

Under Point No. I we have contended and it is still our contention that the anti-nepotism statute as amended by the 1953 Legislature is unconstitutional. This is for the reason that there is no specific exemption made with regard to employees of local boards of education holding certificates issued by the State Board of Education, and the statute is not warranted under the police power of the state.

Nevertheless there is authority for the proposition that the Legislature may not have intended to include employees required by law to hold certificates as a requisite to employment. We submit the following authorities on this question. For convenience we have divided this argument into subheadings (a), (b) and (c). As under Point No. I we think there is a logical segregation of points but the matters are necessarily overlapping and authorities cited under one of these subdivisions may be persuasive under another subdivision or under all three.

- (a) *If so construed the anti-nepotism statute is in conflict with Section 53-2-15, Utah Code Annotated 1953.*

Section 53-2-15, after authorizing the State Board of Education to issue certificates to professional teachers, supervisors, etc., provides:

“Such certificates and diplomas shall be valid in any school district of the state in the department of instruction or supervision for which they are issued.”

The anti-nepotism statute as applied to employees of local boards of education holding certificates from the State Board of Education nullifies Section 53-2-15, since the right to teach is denied the holder of the certificate in the districts where there is a member of the board related to the teacher within the degrees mentioned.

- (b) *Statutes must be construed in the light of their intent and purposes.*

The case of *State ex rel. Robinson vs. Keefe* (Fla. 1933) 149 So. 638, is in our opinion directly in point. The Florida statute involved in that case was as follows:

“Section 1. That any State Officer, member of State Board, County Officer, member of County Board or Commission, City Official, or his appointee, who shall knowingly employ, either directly or indirectly, any person related within the fourth degree, either by consanguinity or by

affinity, to such State Officer, member of State Board, County Officer, member of County Board or Commission, City Official, or his appointee shall be deemed guilty of misfeasance and malfeasance in office and subject to removal therefor. Provided, however, that the provision of this Act shall not apply to officers above who employ only one person related to him as above set out.

“Section 2. That any State Officer, member of State Board, County Officer, member of County Board or Commission, City Official, or his appointee, violating the provisions of Section One of this Act shall forfeit all compensation salary, fees or emoluments of such office during the time that such State Officer, member of State Board, County Officer, member of County Board or Commission, City Official or his appointee violates the provision of this Act.

“Section 3. All laws or parts of laws in conflict herewith are hereby repealed.”

As can be readily seen from the foregoing there was no specific exception of school teachers. Section 3 of the foregoing act also stated that all laws in conflict with the anti-nepotism statute “are hereby repealed.” The Florida laws, similar to our own laws, required teachers to secure certificates from the state board of education and the laws provided that such certificates should be valid in all districts of the state. The court made the following statement in exempting teachers from the provisions of the anti-nepotism law :

“‘Nepotism’ has been defined as the bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of the merit or ability of the appointee. The Florida act should be construed in the light of its obvious purpose to discourage ‘nepotism’ as above defined.

“And as so contrued, acts of similar import have been either definitely sustained as constitutional, or have been enforced by the courts without serious controversy as to their validity, in at least two other states, although authorities relating to such statutes are few. See *Barton v. Alexander*, 27 Idaho 286, 148 Pac. 471, Ann. Cas. 1917 D, 729; *Redell v. State*, 14 Okla. Cr. 199, 170 Pac. 273; *State ex rel. Ikard v. Russell*, Judge, 33 Okla. 141, 124 Pac. 1092.

“The laws of Florida relating to the nomination and employment of school teachers are complete in themselves. No intention is manifest in the 1933 ‘anti-nepotism’ law, above mentioned, to repeal or modify the general school laws of this state relating to examination, certification, and employment of only qualified school teachers on the basis of their demonstrated merit as attested by the fact of their certificates, as distinguished from employment based largely on the basis of the appointee’s domestic relation, or relationship by consanguinity or affinity, toward officers vested with the appointing authority.

“Our construction of the school statutes is that under these laws teachers are required to be appointed because of their demonstrated and proved ability to teach, or because of their past

practical experience in teaching, and not by reason of their family status, or the usual political considerations that may apply to the ordinary civil offices or positions which are permitted to be filled at the discretion of the appointing power as a means of personal reward to kinsmen or as recompence to the politically faithful.

“So the reason for not applying a statute of this kind to a class of appointees such as school teachers, whose merit must be established before they are permitted to be employed at all, is found in the fact that the Legislature has by other complete statutes not in terms modified or repealed by this one, provided a special system for the appointment and tenure of employment for school teachers. *The requirements of this separate code of laws afford adequate protection against appointments other than upon proved merit, which is all that an ‘anti-nepotism’ law can constitutionally be supposed to cover and still remain within the police power, under the guise of which it is enacted.*”

We also refer the court to the case of *Huntworth vs. Tanner*, 152 Pac. 526, at page 30 of this brief where the court construed a statute with regard to employment agencies as not applying to an agency exclusively engaged in securing employment for teachers.

In the case of *Golding vs. Schubach Optical Company*, 93 Utah 32, 70 P. 2d. 871, injunction proceedings had been commenced by the director of the Department of Registration of the State of Utah against the defendants to prohibit the carrying on of the business of

optometry where licensed optometrists were employed by corporations and the corporations advertised the performance of this service. In holding that the corporation could carry on the business so long as the service was actually performed by the licensed optometrist the court said:

"The right to sell one's services, to accept employment at a salary, and the right to buy another's service, to employ another at a salary, are fundamental rights, limited only by the terms of the contract that may be made between the parties, except where the work to be done is fraught with a public interest, and the state has spoken, and set the limitations necessary to protect the public interest.

"The state has spoken on the subject of optometry and optometrists, not for the purpose of conferring any special privilege upon optometrists, nor to put any special restrictions upon them, but to preserve and protect the public against quacks and charlatans, who, however incompetent they might be, would prey upon the desire and necessity of the people to protect their eyesight. Chapter 11 of title 79, R.S. Utah 1933 (the statute referring to optometry), was enacted by the Legislature because that body felt that the protection of eyesight was of public concern, and one not qualified should not be permitted to examine eyes and diagnose and prescribe treatment, or types of glasses, to cure the defects, or preserve the failing sight. *The act must therefore be construed in the light of the purposes back of its enactment*; that is, as a measure to protect the health and eyesight of the people, and when this purpose is accomplished, it is not within the

province or power of the court to extend it beyond such purposes; or to read into it something not designed to protect the public interest and health, but to grant monopolies, regulate private business or relationships, grant special privileges, or curtail the normal human rights and liberties.”

The following statement is taken from the case of *Utah Association of Life Underwriters vs. Mountain States Life Insurance Company*, 58 Utah 579, 200 Pac. 673 (at page 589 of the Utah Report):

“It is elementary doctrine in this jurisdiction that statutes must be construed and applied in furtherance of the purpose or object which induced their adoption. That the statutes governing life insurance contracts must be liberally construed, and so as to protect the public, is held by all the courts having statutes that are like or similar to ours. See Joyce on Insurance (2d Ed.) Sec. 190e. The language of our statute is very broad and comprehensive, and a mere cursory reading of it discloses its dominant intent and purpose. Moreover, we have a right to assume that every provision of the statute which is prohibitive in its effect is based upon some evil which, in the minds of the Legislature, required regulation. Then, again, it is manifest that the statute was enacted for the protection of the public and especially for the protection of those who are solicited to enter into life insurance contracts who may lack the experience and the opportunity to guard themselves against the wiles of the experienced life insurance solicitor. The statute should therefore be construed so as to accomplish its purpose and so as to protect those it intends to protect.”

- (c) *Where there are two possible constructions to be given a statute one of which results in the statute being held unconstitutional, the alternative construction should be given.*

This point is also emphasized in the case of *Huntworth vs. Tanner* cited at page 30 of this brief.

In the case of *University of Utah vs. Richards*, 20 Utah 457, 59 Pac. 96, this court made the following statement (at page 463 of the Utah Report) :

“The law makers did not see fit to embrace in the latter any express words of repeal of the former act. If such former act is repealed, it must be by implication. If the acts are repugnant or are so irreconcilably in conflict with each other and cannot be harmonized together, in order to effectuate the purpose of their enactment, then it may be said the later act may by implication repeal the former. Repeals by implication, however, are not favored by the law. One act is not to be allowed to defeat another if by reasonable construction the two can be made to stand together.”

III. WHERE BOARD OF EDUCATION RECEIVES NO PAY THE ANTI-NEPOTISM STATUTE IS NOT APPLICABLE.

To come within the literal wording of the anti-nepotism statute both the employer and the employee must be receiving pay out of public funds. The violation of the statute is a misdemeanor. Being penal it must be strictly construed. Members of boards of education do not necessarily receive pay out of public funds. Section 53-6-8, Utah Code Annotated 1953, provides :

“Board members — Compensation and expenses.—The members of each board of education shall fix the compensation to be received for their services; in city school districts at a sum not to exceed \$100 each per annum; and in county school districts at a sum not to exceed \$150 each per annum and traveling expenses not to exceed \$100 each per annum; provided, in county school districts any member living more than 75 miles from the place of meeting may receive not to exceed \$200 per annum for traveling expenses, and each board member shall be required to submit an itemized account of traveling expenses, sworn to by him and approved by the board.”

This is not a situation where the school board member is simply refusing to accept his pay but the school board itself, pursuant to statute, must determine what pay, if any, the members shall receive. As pointed out in the statement of facts the Board of Education of Ogden City has passed a resolution fixing the pay for the members of the board for the school year 1953-1954 at nothing. In the case of *Tanner vs. Bateman*, in addition to all of the arguments heretofore made in this brief, there is the argument that since the board members in Ogden City will receive no pay the statute does not cover employees of that board.

It may be argued that the last clause of the statute relating only to the acceptance of employment by the appointee does not require that both the board member and the employee be paid out of public funds. This clause is as follows:

“ . . . and it is unlawful for such appointee to accept or to retain such employment in all cases where the direct power of employment or appointment to *such position* is or can be exercised by any person within the degrees of consanguinity or affinity herein specified, or by a board or group of which such person is a member.”

The words “such position” refer to the first part of the section which specifically states that the position is one where both of the related persons must receive pay out of public funds.

While there is no factual situation now before the court involving the question of hiring employees not required to hold certificates by the Board of Education where a member of the board is a relative of such employee, such personnel may be affected by a ruling of the court on the point herein presented.

CONCLUSION

It is the position of the plaintiff that the act of the 1953 Legislature in amending Section 52-3-1, Utah Code Annotated 1953, is invalid as a violation of the state and federal constitutions and not within the police power of the state. This for the reason that by its terms it prohibits the employment of teachers and other personnel required by law to hold certificates issued by the State Board of Education and as to such employees there is no basis in the interest of the public welfare to warrant the interference with individual liberty and the right to

seek employment wherever a citizen may choose. The act of the Legislature is further unconstitutional as an attempt to take from the State Board of Education the general control and supervision of the public school system conferred by Section 8, Article X of our State Constitution.

As a matter of statutory construction it may be that the Legislature did not intend Section 52-3-1 to apply to school teachers and other personnel required by law to secure certificates from the State Board of Education as a prerequisite to being employed by local boards of education. If such construction be given to the anti-nepotism statute, plaintiffs (as in the case of unconstitutionality of the statute) are entitled to a writ of mandamus requiring the respective local boards of education to enter into contracts for the year 1953-1954.

As a further basis for the employment of the plaintiff Mathias C. Turner, his employment will constitute no violation of the anti-nepotism law for the reason that members of the Board of Education of Ogden City for the fiscal year 1953-1954 will be entitled to receive no compensation from public funds.

Respectfully submitted,

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