Schools—Residence—Pupils—School Districts — Children —Montana Children's Home.

Children being temporarily cared for by an institution chartered for that purpose and to secure permanent adoption for homeless children are not entitled to attend the district school within which a branch of the institution is located without the consent of the school board of the district.

Mr. Sherman Smith, June 22, 1931.
County Attorney,
Helena, Montana.

My dear Mr. Smith:

You state that Mr. Tom Herrin, of the Helena valley, has requested an opinion as to whether the school district in which he resides, and in which a department of the Montana Children's Home is located, is required to furnish school for the children of this home. You have accompanied your request with an opinion, but you have not included with your request any fact statement as to the character and purpose of the

institution. In order to render an opinion on this matter it is necessary to supply facts relative to the purpose of the institution and the manner in which the children are secured and the length of time they are held at the home.

I find that the articles of incorporation state relative to the character and purpose of the institution the following: "To find approved family homes for homeless and dependent children." Later this was enlarged to include "Securing and caring for neglected and dependent children and to find approved family homes and securing them adoption and supervising the care and education of the children until they are old enough to care for themselves."

The work is carried on throughout the state of Montana with the principal place of business at Helena.

Later still the purposes were enlarged to include building and maintaining a hospital for sick, injured, crippled and deformed children. The society maintains a home for boys in the Helena valley, which is within the school district in question. The institution is charitable in character, paying no tax, and I understand that the number of boys at the institution varies from time to time and by reason of delay in finding suitable permanent homes that the number is sufficient most of the time to require the employment of an additional teacher at the school.

I understand that some of these boys are secured through commitment by various district courts but that the majority of them are secured direct from the parents, or parent or other guardian or nearest relative, who surrenders their custody to the institution.

Section 7 of article XI of the constitution provides:

> "The public free schools of the state shall be open to all children and youth between the ages of six and twenty-one years."

This section must be construed in the light of statutory law existing both before and after its adoption.

State ex rel. Rankin vs. Harrington, 68 Mont. 1, 217 Pac. 681.

Section 32, page 627, Statutes of 1871 provides:

> "Every school unless otherwise provided by special law shall be open for the admission of all children between four and twenty-one years of age, **residing in that school district,** and the Board of Trustees shall have power to admit adults and children not residing in the district, whenever good reasons exist for such exceptions."

It will be observed from this section that the privileges of the school were open to all children between the age of four and twenty-one years who resided in the school district. The school board was given discretion to admit adults and children not residing in the district whenever good reasons existed for making such exceptions.

Section 1797 of the 1895 code, subdivision 15, contained the following:

> "Whenever a pupil resident in one district desires to attend school in an adjoining district, such pupil shall be permitted to do so; provided, that the board may refuse pupils from such

district, upon the ground of insufficient room; and provided further, that any board of trustees shall have power to transfer the school moneys due by apportionment to such pupils to the district in which they may attend school."

This same section also provided that the board of trustees had power, and it was their duty, "to determine the rate of tuition of non-resident pupils."

Sub-section 15 of section 1797 of the political code of 1895 was amended by the seventh session (1901 session laws) to read as follows:

"Whenever a pupil residing in any school district of the State desires to attend school in any other district he shall be permitted to do so upon obtaining permission of the trustees of the district in which he wishes to attend. The money due by apportionment to such pupil shall, upon written request of the school trustees, be transferred to the district in which said pupil attends school. Provided, that nothing herein contained shall be construed as affecting the right of the board of school trustees to charge tuition for non-resident pupils as provided in subdivision 2 of this Section."

Under this section the pupil was required not only to get permission to attend school outside of the district, but the board had the right to charge tuition.

Subdivision 15 of section 1797 was amended in 1903 to read as follows:

"Whenever a pupil residing in one district desires to attend school in another district, such pupil shall be permitted to do so; provided, that the board may refuse pupils from such districts upon the ground of insufficient room, and provided further, that any board of trustees may in their discretion, transfer school moneys due by apportionment to such pupils to the district in which they may attend school."

This section was repealed by the 1913 session laws, page 306.

The law today (section 1015, R.C.M. 1921) follows the act of 1913, making it the duty of the district board of school trustees to determine the rate of tuition of non-resident pupils and to allow pupils residing in other districts to attend in the district of which they have charge, if in their judgment there is sufficient room.

It has, therefore, been the law from 1871 down to the present time that school boards had the power to exclude pupils from other districts where they could not be accommodated without interfering with the rights of resident pupils, or to charge tuition when so admitted.

In the light of this contemporary legislation it is apparent that the word "free" as used in section 7 of article XI of the constitution must be construed as being applicable only to pupils residing within the district. The same constitutional provision was construed in the case of State vs. Joint School Dist. No. 1, 27 N. W. 829, 830, where the court said:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free, and without charges for

tuition to all children between the ages of four and twenty years."

This section places much more emphasis upon the word "free" than does section 7 of article XI of the constitution, and in addition provides for no tuition charge which is specifically prohibited. Yet, the court, in considering it, said:

> "We find ourselves unable to assent to the proposition that a child residing in one school district has any absolute right, under any circumstances, to the privileges of the common school of another district. The constitutional requirement is that 'the legislature shall provide by law for the establishment of district schools.' Inasmuch as there must be school districts before there can be district schools, and inasmuch as the school district system was in full operation in the territory when the constitution was framed and adopted, it is clear that section 3 of article 10 is a recognition of that system, and a mandate to the legislature to preserve and continue its essential features. One feature of that system is, and, so far as we are advised, always has been, wherever the system has prevailed, that the absolute right to the privileges of the school in any given district is confined to children residing in such district, and having the prescribed qualifications. We never before heard this proposition questioned or doubted, and we are aware of no adjudication to the contrary. We do not think any court has ever denied the proposition. Certainly no case to that effect has been cited to us."

The court further said:

> "The proposition we are considering is, in substance and effect, that all or any of the district schools of the state are free to each child in the state within the prescribed ages. The utter impracticability of operating the district schools on any such basis is too plain for discussion. We think, and so hold, that when the legislature has provided for each such child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with. This the legislature has done."

The society does not take these boys for the purpose of adopting them, but, as stated in their articles of incorporation, for the securing of their adoption in suitable homes. The children are obtained from all over the state of Montana and their residence, no doubt, is in the district where the parent or parents or guardian from whom they were obtained resided, or in case of commitment by a court, it remains in the county where the court is situated.

Section 1051, as amended by chapter 118, laws of 1927, relates to the census of school children and contains the following:

> "The clerk of the school district shall make annually between the 15th day of September and the 15th day of October of each year an exact census of all children and youths between the ages of six and twenty-one years residing in the district. The term 'residing' as used in this section shall be defined in such a

way as to include, * * * (2) children temporarily residing outside of such district for the purpose of attending any district school or county high schools or other public institution of learning or any benevolent or private institution, providing that parents of resident children of any district must be residing in the district on the first day of October, * * *. The term 'residing' is further defined in such a way as to exclude * * * (2) children who have never actually resided within the district, even tho their parents or guardians shall reside within the district, (3) children who are residing within the district for the purpose of attending any district school or county high school or other public institution of learning or any private or benevolent institution of learning who shall be listed in the school district where their parents reside, ..."

"The 'exact census' of all school children of school age within a given school district which the clerk thereof is required by section 1051, Revised Codes of 1921, to make contemplates a precisely accurate one, to-wit, one in which only children resident in the district may be included."

State ex rel. Johnson vs. Kassing, 74 Mont. 25, 238 Pac. 582.

"That since the residence of a minor of school age committed to the State Vocational School is where the father or mother resides, inmates thereof sent thereto from the various counties of the state are not resident in the school district in which that institution is located, within the meaning of section 1051, Revised Codes, and that therefore mandamus does not lie to compel its superintendent to furnish a list of them to the clerk of that district for school census purposes." State ex rel. Johnson vs. Kassing, supra.

Peterson vs. School Dist. No. 1, Cascade County, 73 Mont. 442, 236 Pac. 670.

"Residence is a question of fact to be determined by the school board." Peterson vs. School Dist. No. 1, Cascade County, supra.

There must be only one residence. A residence cannot be lost until another is gained. The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor children.

The father is the head of the family and has the right to select the residence of his family.

Residence can be changed only by union of act and intent.

Residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian.

Section 33, Revised Codes of 1921.

The right of children, inmates of charitable institutions, to attend the district school in the locality where the institution is situated has been before the courts of several states.

See: Lake Farm vs. School District, 179 Mich. 171;
Park vs. Graham (Pa.) 1913, 86 Atl. 266, 164 Pac, 607;

26 L. R. A. 581.

In the Lake Farm case the court said:

"Children who are not **bona fide** residents of a family in a school district, but are inmates of an institution of a charitable nature, in such district, engaged in the support and education of homeless and needy minors, and which does not contribute, by paying taxes, to the maintenance of district schools, are not entitled to attend school in the district which has determined not to admit nonresident pupils."

In this case the court further said:

"The parents of these children were not residents of the district, and the children were brought to the farm for the very purpose of giving them proper support and education, which the institution under its charter had agreed to do . . . . Can it be said that, after having assumed this obligation, the institution can shift this responsibility and undertaking to the school district and oblige the school district to do what it has undertaken to do? If it can send two of its boys to the district school for free tuition, it can with equal right increase the number, being limited only by the extent of its facilities to accommodate them on the farm. The injustice and unfairness of thus forcing onto a school district the education of the inmates of such an institution can readily be seen. It might easily result in the denial to the children actually residing in the district and whose parents sustain the school of the facilities they would otherwise have therein."

See also the case of State vs. School District 10,
Ohio St. 448.

It is my opinion that the trustees of the school district in question can exclude the boys from their school where they have not sufficient room. This means, of course, that they have not sufficient room without providing additional accommodations at additional expense to the district.

Very truly yours,

L. A. FOOT,

Attorney General.