School Houses—Rental—Section 8, Article XI of Constitution.

School houses may not be rented for church purposes as to do so would violate section 8, article XI of the constitution.

Miss Leora M. Hapner, November 12, 1932.
Head of Education Department,
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My dear Miss Hapner:

I have your request for an opinion. You state that a question has arisen in regard to the legality of allowing a religious denomination to hold school in a school building. You wish to know if this can legally be done and whether it makes any difference in the legal aspect of the case if the church paid rental.

This question has never been decided by our supreme court. However, in view of the fact that our statutes (sub-section 12, section 83 of chapter 148, laws of 1931 and sub-section 7 of section 1015 R. C. M. 1921 as amended by chapter 122, laws of 1931) provide that every school board has power "to rent, lease and let to such persons or entities as the board may deem proper, the grade school halls, gymnasium and buildings and part thereof for such time and rental as the board may designate," it becomes necessary to ascertain whether these legislative provisions conflict with constitutional mandates.

Section 8 of article XI of the constitution provides:

> "Neither the legislative assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever."

I wish to call your attention to the particular language of this section "or make any grant of lands or other property in aid of any church."

A grant is defined as "A word having a peculiar and appropriate meaning in the law, and must be construed and understood according to

such meaning; but its meaning, in particular cases, is to be determined from its connection and the manner of its use." As a noun, "The act of granting; a bestowing or conferring; a boon; a concession; a gift; also the thing granted or bestowed." As a contract, "A grant is said to be a contract executed, that is, one in which the object of the contract is performed. Ordinarily, the essential elements of a contract are necessary to constitute a grant; thus the term may imply parties competent to contract, a subject matter, a legal consideration, a mutuality of agreement, and a mutuality of obligation." "The term was originally used to signify a conveyance of an incorporeal hereditament, of such things whereof no livery could be had, of things which lay in grant and not in livery, which could not pass without a deed; a mode of assurance applicable, not to estates in possession of which livery of seizin may be made, but to incorporeal estates, or to estates in reversion or remainder of which livery cannot be made; a generic term applicable to all transfers of real property; the passing of real estate from one to another; and it was said to be only applicable to transfers of real property. But now the word is of far more extended application, in its largest sense comprehending every thing that is granted or passed from one to another, and is applied to every species of property; a nomen generalissimum, applicable to all sorts of conveyances, bargains and sales, charges. confirmations, feoffments, gifts, leases, releases, surrenders, and the like, leases in writing or by deed, and sometimes by word without writing; * * *"—28 C. J. 818-819, 93 Cal. 664, 668, 29 Pac. 256.

Section 6837, R. C. M. 1921 provides: "Property of any kind may be transferred, except as otherwise provided by this chapter."

Section 6841, R. C. M. 1921 provides: "A transfer may be made without writing in every case in which a writing is not expressly required by statute."

Section 6842, R. C. M. 1921 provides: "A transfer in writing is called a grant, or conveyance, or bill of sale. The term 'grant' in this chapter, includes all these instruments, unless it is specially applied to real property."

Section 6859, R. C. M. 1921 provides: "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same, or by his agent thereunto authorized by writing."

In the case of Young vs. Board of Trustees of Broadwater County High School, et al., 90 Mont. 576, 4 Pac. (2d) 725, our supreme court held that the county high school had power to rent a high school gymnasium for dance purposes. In that case Mr. Justice Matthews, speaking for the court, said:

> "As evidencing the legislative intent and progressive thought on the subject, the foregoing section (Chapter 48, Laws of 1929) was amended by the next legislative assembly by eliminating all restrictions and permitting the board to 'rent, lease or let' the described property to any 'person or entities the board may deem

proper' for any purpose and for such time and rental as the board may designate. (Sec. 83, subd. 12, Chapt. 148, Laws of 1931)."

However, the court did not consider the application of section 8 of article XI of the constitution or its application to the question that you have raised.

In the case of Synod of Dakota vs. State, 50 N. W. 632, the court had under consideration a constitutional provision similar to our section 8 of article XI with reference to the following facts:

"By a law of 1887, prior to the adoption of the state constitution, the territorial board of education was authorized to designate private universities, colleges, and academies in which instruction in the methods of teaching, under such rules and regulations as the said board of education should prescribe; the tuition of which students should be paid by the territory."

After the adoption of the constitution the question was raised as to whether this law was in conflict with the constitution. The constitution prohibits the state from making any appropriations or paying any state funds for the benefit of or to the aid of any sectarian school.

The court said:

"Would not the payment of this demand (money due to the institution for services rendered) be for the benefit of or to the aid of the university? Is not the tuition received from every student for the benefit of or to aid the school, to support, to strengthen it? Do not such institutions depend mainly upon the tuition fees of students they can obtain for their support? But the learned counsel for plaintiff strenuously contends that the sum due plaintiff will not be contributed for the benefit of or to aid the university. but in payment for services rendered the state, or to its students, in preparing them for teaching in the public schools. This contention, while plausible, is, we think, unsound, and leads to absurd results. If the state can pay the tuition of 25 students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the institution entirely by state funds? The theory contended for by counsel would, in effect, render nugatory the provisions of the constitution, as the claim that the appropriation was made as compensation for services rendered could be made in all cases. This theory, carried out to its legitimate results, would enable any one leading sect to control the schools, institutions, and funds of the state, as is could claim it was rendering services for the funds appropriated. It was undoubtedly to prevent such possible results that these provisions were inserted in the constitution. It matters not how much consideration has been given by services rendered, the language is emphatic and unqualified that no money shall be given or appropriated for the benefit of or to aid any sectarian school, society, or institution. The paying of the tuition of pupils in the Pierre University to the plaintiff in

this case will, in our opinon, be for the beneft of or to aid such school or institution, and is clearly within the prohibition of the constitution."

In Cook Co. vs. Industrial School, 125 Ill. 540, 18 N. E. Rep, 183, the supreme court of Illinois had under consideration the question of what constitutes "aid" to an institution under section 3 of article VIII of the Illinois constitution, which is as follows:

> "Neither the general assembly, nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose."

The particular facts in the case were that by an act of the legislature of the state certain female infants were required to be committed to the Industrial School of Chicago. This industrial school seems to have been a corporation, but was conducted in connection with two institutions, one known as "The House of the Good Shepherd" and the other as "St. Joseph's Orphan Asylum," both under the control of a sectarian organization. An action was brought by the Industrial School to recover of Cook county some $15,000 for the care and support of the female infants committed to that institution under the law. The defense was that the Industrial School had no real existence, but that the care and maintenance of those committed were furnished by the two institutions above named, and that the money, when collected, would go to them; and as they were sectarian in character, the county was prohibited by the section of the constitution quoted from paying to them any public funds in aid of sectarian purposes. The court sustained the defense in a very able opinion in which was said: "It cannot be said that a contribution is no aid to an institution because such contribution is made in return for services or work done. A school is aided by the patronage of its pupils, even if they do pay for their tuition." It was contended in that case, as in the case of Synod of Dakota vs. State, that these institutions furnished tuition, clothing, care, etc., in return for the money received by them, and, as they earned what they received, and were not the recipients of any gift or donation, nothing was paid in aid of or to help support or sustain them. The court answered this by saying: "If they are entitled to be paid out of the public funds, even though they are under the control of sectarian denominations, simply because they relieve the state of a burden which it would otherwise be itself required to bear, then there is nothing to prevent all public education from becoming subjected, by hasty and unwise legislation, to sectarian influences. * * * The constitution declares against the use of public funds to aid sectarian schools, independently of the question whether there is or is not a consideration furnished in return for the funds so used."

In this case our constitution prohibits a school district from making any grant of lands or any other property in aid of any church, irrespective of whether any rental is paid for the building or not.

In the case of State ex rel. Van Straten vs. Milquet, 192 N. W. 392, the question presented was whether school funds could be paid out for transporting the children to a parochial school. There was a statutory provision authorizing the school district to close its school and send the pupils to an adjoining district and provide for their transportation. The court held the contract for transportation invalid and said: "A contention that a contract of the kind involved in this case is valid wholly ignores the underlying fundamental purpose of our educational system as set forth in the Constitution."

The word "aid" is defined as follows: "to support by furnishing either strength or means to help to success.

To furnish a building to a church for church purposes would certainly be to aid it to succeed and the question of whether rental was paid for the use would, in my opinion, have no effect in taking it out of the provision of the constitution.

Very truly yours,
L. A. FOOT,
Attorney General.