APPROPRIATIONS: Deficiency bill pay tuition of Negro students at out-state schools, is valid, even tho obligation was illegally incurred.

January 31, 1944.

FILED
24

Honorable Forrest C. Donnell,
Governor of Missouri,
Jefferson City, Missouri.

Dear Governor Donnell:

Your letter of December 30, 1943, is as follows:

"Section 22 of House Bill No. 657 of the Sixty-Second General Assembly of the State of Missouri reads as follows:

'"There is hereby appropriated out of the State Treasury chargeable to the general revenue fund the sum of Thirteen Thousand Forty-One Dollars and Twenty-Two Cents ($13,041.22) to pay the tuition of Negro students during the biennial period 1941-1942."'

"A message, which accompanied said bill, to the House of Representatives of the Sixty-Second General Assembly of the State of Missouri from myself, reads in part as follows:

'"Although there are approved the following items, namely: * * * *

"(d) the appropriation of the sum, set forth in Section 22, of Thirteen Thousand Forty-One Dollars and Twenty-Two Cents ($13,041.22); * * *

'"I have the assurance of the State Auditor that a warrant will not be issued by him for any part or all of the sum appropriated by any one of said Sections 6, 15, 18, 22, 24, 43 and 50 respectively until and unless either (a) it shall have been adjudged by the Supreme Court of Missouri that such

> warrant should be issued or (b) there shall have been delivered to the State Auditor the written opinion of the Attorney-General of the State of Missouri that, under the law, such part or all respectively of such sum so appropriated can be recovered by suit from the State of Missouri."'
>
> "Your opinion is respectfully requested on the following question:
>
> "Under the law can part or all of the sum appropriated by said Section 22 be by suit, to-wit mandamus against the State Auditor, recovered from the State of Missouri by the holder of a claim for tuition of a negro student during the biennial period 1941-1942?"

Section 22 of House Bill 657 of the 62nd General Assembly appears in Laws 1943, p. 281. It purports to provide funds to pay certain tuition incurred during the 1941-1942 biennium after the exhaustion of the $40,000 provided by the 61st General Assembly for that purpose. (Laws 1941, p. 274, Sec. 2). Our conclusion turns on whether Section 22, providing $13,041.22 for this deficiency, is a valid legislative act.

In order for these claims to have been legally incurred three things must be made to appear:

First, that there is a substantive law authorizing Lincoln University to arrange for the attendance of a student at some other school and to pay his tuition.

> State ex rel. Kelly v. Hackman, 275 Mo. 636,654, 205 S.W. 161;
> State ex rel.Bybee v. Hackman, 276 Mo. 110,116, 207 S.W. 64;
> State ex rel. Bradshaw v. Hackman, 276 Mo. 600,607, 208 S.W. 445.

Second, the arrangement to send the student to the other school and to pay this tuition was made in strict conformity to the requirements of law.

State ex rel. McKinley Pub. Co. v. Hackman, 314 Mo.33, 282 S.W. 1007, 1013;
Spitcaufsky v. Highway Commission, 349 Mo. 117, 159 S.W.(2d) 647, 652;
Sager v. Highway Commission, 349 Mo. 341, 160 S.W.(2d) 757, 759;
White v. Jones, Mo. Sup. No. 38,681 Jan. Call Term 1944, not yet reported;
Dement v. Rokker, 126 Ill. 174, 194.

Third, there was an unexpended appropriation in existence at the time arrangements were made to send the student to the other school, and also an unexpended allotment thereof, sufficient to pay the tuition of such student.

Section 10907, R. S. Mo. 1939.

Our view of the conclusion to be reached, makes it unnecessary to state the above legal rules more fully than we have done, because this opinion rides off on the power of a succeeding General Assembly to pay these items even though they were illegally incurred.

However, it may be conceded that Section 10779, R. S. Mo. 1939, expressly authorizes Lincoln University to arrange for the attendance at other schools by these students and provides for the payment of their tuition. Thus, the first condition to a valid obligation exists. For the purposes of this opinion we must assume that the second condition was complied with. It is very clear, however, that at the time these tuition obligations were incurred, the appropriation and allotments thereof had been exhausted and therefore the third condition was not met. But even though Section 10907 R. S. Mo. 1939, may have been violated in incurring these obligations, such does not prevent a succeeding General Assembly from authorizing their payment, because the constitutional prohibition against payment of obligations illegally incurred is limited to a certain class of obligation.

The Constitutional prohibition is contained in Section 48 of Article 4, as follows:

> "The General Assembly shall have no power to * * * pay nor authorize the payment of any claim * * * created against the State * * * under any agreement or contract made without express authority of law;* *".

We have no doubt but that these tuition obligations are "claims" created against the state without express authority of law, because Section 10907 was violated in their creation, but were they created under an "agreement or contract"?

Those are the words which limit the field to which this prohibition applies.

These words are in the Constitution, and: "Words, especially those of a Constitution are not to be read with * * * stultifying narrowness". United States v. Classic, 313 U. S. 219, 85 L. ed. 1368, 61 S. Ct. 1031, 1039-40. In a broad sense, it is said in Sage v. Wilcox, 6 Conn. 81, 85, that:

> "The word 'agreement,' in its popular and usual signification, means no more than concord; the union of two or more minds; or a concurrence of views and intention. The remote, or proximate, is a distinct thing, which, with little power of discrimination, every mind can perceive. This concord or union of minds, may be lawful or unlawful; with consideration, or without; creating an obligation, or no obligation. Still, by the universal understanding of mankind, proved by daily and hourly conversation, it is an agreement; and it is not the less so, because it is opposed to law, or even to good morals. * * *"

The word contract has much the same meaning. "A contract is the thing upon which two or more people agree." Southern Ry. Co. v. Huntsville Lbr. Co. 67 So. 695, 696 (Ala.). It "arises from the meeting of the minds of the contracting parties, knowingly and understandingly entered into." Windsor v. International Life Ins. Co. 325 Mo. 722, 29 S.W.(2d) 1112, 1116. The terms are in fact synonymous. Michael v. Kennedy, 116 Mo. App. 462, 148 S.W. 983.

Section 10779, R. S. Mo. 1939, is the authority under which these obligations were incurred. It provides:

> "Pending the full development of the Lincoln University, the Board of Curators shall have the authority, if and when any qualified negro resident so requests, to arrange for his attendance at a college or university in some other state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance."

This section contains two grants of authority. They are:

(1) authority to arrange for the attendance of a negro at a college or university in some other state; and,
(2) authority to pay the reasonable tuition fees for such attendance.

But, this authority may only be exercised under certain conditions. Those conditions are:

(1) when requested to do so by a qualified negro resident,
(2) who desires to take a course, or to study a subject provided at Missouri University, but which is not taught at Lincoln University.

The procedure contemplated by this statute is substantially as follows: The negro resident informs the board of his desire to study medicine. In order to be "qualified" his educational background must be such that he will be admitted to a medical school, so the board must ascertain if he has such educational background. A medical course is given at the Missouri University, but not at Lincoln University, so the person is entitled to have the board arrange for his attendance at a university in some other state to study medicine. The university must be selected, its tuition fees ascertained and determined to be reasonable. When that is done, then, upon the entrance of the negro in that university, the Board of Curators of Lincoln University may pay the tuition fees of that student to the other university.

Does an agreement or contract arise out of this, either between Lincoln University and the student, or between Lincoln University and the university in the other state? We think not. As between Lincoln University and the student, there can be no meeting of the mind such as is essential to the creation of a contract. The student presents himself and his qualifications to the board. He is either an eligible resident, or is not an eligible resident. No meeting of their minds is involved in making that determination. The course he desires to take either is or is not taught at Missouri University, and either is or is not taught at Lincoln University. In making that determination no meeting of their minds is involved. The board selects the other University which he is to attend, and while it may, and properly should, defer to the wishes of the student in this respect, neverthe-

less the board must make the decision, so there can be no meeting of their minds in this respect. At least not in the sense of a mutual meeting of the minds arrived at as the result of negotiations between persons with equal bargaining powers. Here the student cannot bargain, he may only request that a certain University be selected for him, but the board is not bound to select the school he requests. The question of reasonableness of the tuition of the selected university does not involve the student, but only involves the board of Lincoln University and the governing body of the other school.

As between Lincoln University and the governing body of the other school, only two things are open. First, will said school admit this student, and, second, what is the tuition. These are both governed by the rules of that school. He is either eligible for admission or he is not, depending upon whether he can meet the entrance qualification laid down by that school. That question is determined by said school by application of its standards of admission to the student's qualifications. That determination is in no way dependent upon negotiations, finally resulting in a meeting of the minds between Lincoln Board and the governing body of the other school. As to the tuition, it is fixed by the governing body of the other university. No school leaves the amount of tuition an open question, to be arrived at by mutual understanding with the student when he presents himself. Therefore, the determination that a particular sum is reasonable, when made by the board of Lincoln, does not involve a meeting of the board's mind with that of the governing body of the other school. The fixed sum charged by the other school either is or is not reasonable. The Board at Lincoln makes that decision itself, without resort to negotiations with the other school.

In other words, the whole arrangement between Lincoln University, the student and the governing body of the other school, involves the ascertaining of whether a certain state of facts exists, rather than a meeting of minds resulting in a contract.

We are convinced that the essentials of an agreement or contract, as above defined, are entirely absent when a negro student is sent to a university in another state under Section 10779. That being so, then, Section 48, of Article 4 of the Missouri Constitution, being limited in its prohibition to obligations having their foundation in an agreement or contract, does not prevent a succeeding General Assembly from paying these obligations, even though they were illegally incurred.

To this point, we have gone on the assumption that Section 10779, R. S. Mo. 1939, was strictly complied with in incurring these tuition obligations. However, certain information coming to us indicates that it was not followed, and, therefore, we must consider what effect failure to follow that section has upon our conclusion. The only effect it would have, as we see it, is that the obligation is illegal under two statutes instead of only one. However, since the conclusion of this opinion is governed only by the limited prohibition of Section 48, Article 4, supra, it is in no way affected. Failure to follow Section 10779 (or Section 10907) in incurring these obligations, is not a factor to be considered, when, as here, we are concerned with the power of the General Assembly to pay, by a deficiency bill, obligations not founded on an agreement or contract. Were these obligations founded upon an agreement or contract, failure to comply with either Section 10907 or 10779 would have been fatal to the validity of Section 22 of House Bill 657.

However, we suggest that Section 10779 be strictly pursued, for failure to do so would justify the State Auditor in refusing to audit for payment a tuition obligation against a current appropriation.

CONCLUSION

It, therefore, is our opinion that Section 22 of House Bill 657 (Laws 1943, page 281) is a valid act of the General Assembly and the funds therein provided may be expended to pay the tuition incurred by negro students at schools in other states during the 1941-1942 biennial period. This being so, then the State Auditor could be compelled by mandamus to audit and approve these claims for payment.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

LLB/LD