2020.

CONTRACT — TRANSPORTATION OF PUPILS WITHIN SCHOOL DISTRICT—WHERE BOARD OF EDUCATION EXECUTED SUCH CONTRACT, EXTENSION BEYOND TERM OF SOME OR ALL MEMBERS OF BOARD — SUCH CONTRACT NOT INVALID IF MADE IN GOOD FAITH AND FOR REASONABLE LENGTH OF TIME — STATUS WHERE STIPULATION FOR SUSPENSION IF SCHOOLS CLOSED — STATUS SURROUNDING CONDITIONS TO TERMINATE CONTRACT.

SYLLABUS:

1. *A contract made by a board of education for the transporting of pupils within the school district extending beyond the term of some or all of the members of the board is not for that reason rendered invalid if the contract is made in good faith and for a reasonable length of time under all the circumstances.*

2. *A contract for the transporting of pupils within a school district containing a provision that the said contract will be suspended during the time the schools are closed for any valid reason and transportation is not furnished, will be enforced according to its terms and a contractor under such a contract is not entitled to payment under the terms of the contract for the time transportation is not furnished on account of the closing of the schools for the reasons mentioned in the contract.*

3. *Where in a contract for transporting pupils it is provided that the contract may be terminated by the board of education if it is not satisfied with the performance thereof by the contractor, the dissatisfaction of the board which will legally justify a termination of the contract must be real and genuine as to performance and may not be arbitrary, whimsical or capricious, but must be based on grounds that would render the performance reasonably unsatisfactory under all the circumstances.*

Columbus, Ohio, March 14, 1940.

Hon. John W. Howell, Prosecuting Attorney,
Gallipolis, Ohio.

Dear Sir:

This is to acknowledge receipt of your request for my opinion, which reads as follows:

"I submit for your opinion the following questions:

1. Is a contract made by a Board of Education of a rural school district, with a school bus driver, owner of the bus, for the transportation of pupils, for a period of four or five years, extending in any event beyond the term of all members of the board, valid?

2. Many bus contracts contain the following provision: 'The second party (school bus driver) is subject at all times to the orders and directions of the first party (board of education) and said first party reserves the right to discontinue the services provided for herein, should the same be unsatisfactoy to the first party, or whenever the schools may be closed, because of epidemic or disease, or for other valid reasons.' What are the powers of a board of education to terminate a school bus contract, by virtue of the above quoted provision?

"There have been many contracts made in this county by boards of education with school bus drivers, covering a period, in some cases, of four years and in others, five years. In most instances, prior to entering into the contract, the school bus driver has purchased a standard school bus at a cost of approximately $2000.000, with the understanding that he would be given a four or five year contract. In most cases the school bus driver was induced to make his investment by the offer of a long term contract, and unless he had been awarded such contract, would not have purchased the bus. The question presented has been submitted to me for opinion by several boards of education of this county. It is my understanding that contracts for the periods indicated were entered into upon the suggestion and with the approval of representatives of the Department of Education of the State of Ohio.

Referring to the second question, conditions arise, as to the performance of school bus contracts which would not warrant the board of education to terminate the contract, unless such authority is conferred by the provision quoted. The point involved as to whether or not the board of education has absolute discretion to determine when the services of the school bus driver are 'unsatisfactory' to the board."

I gather from your request, that the contracts about which you in-

quire, are contracts for transportation of school pupils rather than contracts with school bus drivers merely to drive buses which are owned by the board. That is to say, contracts with bus owners to furnish the buses and drivers to effect transportation of school pupils as provided by law.

The first question submitted by you has been the subject of two opinions of a former Attorney General which have been regarded by succeeding Attorneys General as being sound and have been consistently followed by this office and by administrative officials generally. The first of these opinions will be found in the published Opinions of the Attorney General for 1927, page 1472. The syllabus of this opinion reads as follows:

> "Boards of education may in their discretion contract for the transportation of pupils for an entire school year or for a longer period if they deem it advisable, provided the general provisions of law with reference to the making of contracts by boards of education are complied with."

Another similar opinion appears in the published Opinions of the Attorney General for 1928, at page 1733.

In the latter opinion it is pointed out that the law, which has not been modified or changed since, places no express limitation as to time upon the power of boards of education to contract for the transportation of pupils. This fact alone, however, does not give to boards of education unlimited power as to the time for which contracts for public service may be made irrespective of public welfare, reasonableness and good faith. As a general proposition of law, the proper rule to follow is that public officers and boards may not contract for personal services to extend beyond the term of the officer or the life of the board. This rule is not followed, however, in that class of contracts where it is in the interests of the public to make them for a longer term, if they are so made in good faith for a reasonable time under the circumstances.

It has been held in this State that contracts made by public boards for a period of time extending beyond the term of the official making it unless made in good faith in the interests of the public and for a time reasonable under the circumstances are against public policy and void. County Commissioners of Franklin County vs. Ranck, 9 O. C. C., 301. Professor Page, in his work on the law of contracts, Section 1901, says with respect to this subject:

> "The power of the officers of a public corporation to enter

into a contract which is to be performed after the expiration of the term of office of the officers by whom the contract was made, depends in part upon the nature of the contract. Public officers can not make a contract which relates to the exercise of administrative, governmental or legislative functions which will bind their successors unless the power so to do is granted expressly. On the other hand, contracts which are in exercise of the public powers of a public corporation are governed by the same rules as those which govern the contracts of natural persons; and such contracts bind the successors in office of the officers by whom they were made. A public officer or a board can not ordinarily appoint subordinates for terms beyond the terms of the board which appointed them. However, a county board may appoint a morgue-keeper for a period of a year, although such appointment is made just before the term of office of such board expires.

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Contracts which are entered into for the purpose of supplying the public with water, for furnishing lighting, and the like, are regarded as an exercise of the business power of the public corporation, and accordingly, such contracts bind successive officers, but they must go into full effect during the term of the officers who enter into them. Under statutory authority to enter into a contract for public printing for a term of two years, a board may make such contact just before the expiration of its term of office, although such contract will last during almost the entire term of the successors of such board.

Unless in good faith, for a reasonable time, and for the public interest, a contract extending beyond the term of the officials making it, is void."

With respect to the same subject, Professor McQuillin in his work on Municipal Corporations, Second Edition, Section 1356, has this to say:

"Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business or proprietary powers. With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist. Consequently independent of statute or charter provisions, it is generally held that the hands of successors cannot be tied by contracts relating to legislative functions but may as to contracts relating to business affairs."

In Ohio Jurisprudence, Volume 32, page 942, Section 81, it is said:

"Boards have two classes of powers, governmental or legisla-

tive, and proprietary or business. In the exercise of the governmental or legislative powers, a board, in the absence of statutory provision, cannot make a contract extending beyond its own term. But in the exercise of business or proprietary power, a board may contract as any individual, unless restrained by statutory provision to the contrary. Thus, it becomes important to ascertain the power to be exercised by a board in determining the binding effect of the contract. It is generally held that a board may contract for water supply, street lighting, gas supply, and the like, which is binding upon subsequent boards, such contracts being made in the exercise of the city's business or proprietary powers. A contract of this kind, however, must be reasonable in the length of time for which it is to extend."

See also:

Tate vs. Board of Education (Mo.) 23 S. W., 2d., 1013; 70 A. L. R., 771, and an exhaustive quotation on the subject in 70 A. L. R., page 794;
Kerlin Brothers Company vs. Toledo, 20 O. C. C., 603;
King City Union High School vs. Waibel, 2 Cal. App., 2d, 65; 37 Pac., 2d, 861;
Ferkin vs. Board of Education, 300 N. Y. S., 885;
State ex rel. vs. Board of Education, 97 Mont. 121, 33 Pac., 2d, 516, 523.

I come now to a consideration of your second question, which should be considered in two aspects. First, with respect to the effect of a clause in the contract of the kind mentioned, which authorizes the school board to discontinue the contract during the period that the schools may be closed because of an epidemic or for other valid reason, and, second, with respect to the right of the school board to discontinue the services provided for by the contract should the same be unsatisfactory to the school board.

With respect to the first of these aspects, there can be little argument or difference of opinion. It seems clear that where a contract contains a clause authorizing one of the parties to suspend the contract or to discontinue the services provided for therein during a period of contingency, the contract means what it says, and that if the contingency arises, the right is extended to suspend the services of the other contracting party during the period of such contingency. In the case of Montgomery vs. Board of Education of Liberty Township, 102 O. S., 189, the Supreme Court held as stated in the syllabus of the case, as follows:

"One who entered into a contract, entire in its nature, with a board of education, providing that he should convey pupils to and from school during a school year, of eight and one-half months, at a stipulated compensation payable monthly, is entitled to such compen-

> sation during a period of suspension of the schools by the board of education, though it be upon the direction of the board of health as a precautionary health measure, there being no provision in the contract relative to such contingency and it appearing that the suspension was temporary and the person so employed was required to and did continue ready and willing at all times to perform his duties under the contract, which he in fact did upon the resumption of school after such period of suspension."

The corollary of the proposition of law there decided is clearly that if the contract had contained a provision relative to such contingency, such a provision would be controlling and the direct opposite would be held. Indeed, the court said in deciding the case:

> "The contingency which here occurred was one which might well have been foreseen and provided against in the contract, but was not. The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract."

It seems clear that when a contract for the transportation of pupils provides that the same shall be suspended during the time the schools are closed, because of an epidemic or for any other valid reason, it means precisely what it says, and that if the schools are closed for any valid reason, or during an epidemic of disease the contractor could not recover for transportation not furnished during that period.

Questions relating to the performance of contracts which by their terms require them to be performed to the satisfaction of another party to the contract or his agent or architect or engineer have been the subject of many and varied decisions of courts, not only in this state, but elsewhere. From these decisions it is somewhat difficult to deduce a definite rule with respect to the nature and extent of the "satisfaction" that is required when the mere statement of satisfactory performance in a contract is unaccompanied by any standards by which that satisfactory performance may be measured or limited.

In many such cases the courts have said that the entire contract must be considered as a whole and in doing so the question of the measure of satisfaction required in contracts of that kind is after all a matter of construction. It is well settled that a different rule prevails where the work to be performed under the contract is personal in nature, such, for instance as one of confidential relations or the painting of a portrait, than where the contract calls for the performance of some act or acts entirely impersonal, although courts are not in entire accord even on this latter question.

Speaking generally, courts are pretty well agreed at least so far as contracts such as one for the transportation of school children is concerned, that before justification would exist for the cancellation of the contract, if performance is unsatisfactory, the dissatisfaction which would justify the cancellation must not only be real and genuine but must as well not be arbitrary, capricious or whimsical.

In Page on Contracts, Second Edition, Section 2624, it is said:

> "It is occasionally provided that a contract is to take effect and that performance is to begin, but that one of the parties reserves the right to terminate such contract if he is dissatisfied with the performance of such contract. The same principles which apply to performance to the satisfaction of one of the parties, apply to conditions of this sort reserving the right to terminate the contract in case of dissatisfaction. On the one hand, genuine dissatisfaction is necessary in order to justify the termination of the contract under such a provision. A provision allowing a contract to be canceled 'for any good cause' on sixty days' notice by either party, means any cause assigned in good faith. A provision in a mining contract that the owner may terminate it if satisfied that the system of mining was prejudicial to the mine does not give him the right to terminate it arbitrarily. This principle applies to contracts in which the personal element is material, such as a 'contract of agency.'

See also Williston on Contracts, Revised Edition, Volume 1, Section 675A; Elliot on Contracts, Sections 1604 and 1881; 9 O. Jur., page 499, Section 263, page 499, Sections 263 et seq.

The Restatement of Contracts recognizing the general principle offers this comment under Section 265:

> "A promise conditioned upon the promisor's satisfaction is not illusory since it means more than that validity of the performance is to depend on the arbitrary choice of the promisor. His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance of the contract, and his dissatisfaction must be genuine."

Contracts of this kind have been the subject of a number of decisions of courts in Ohio, and it is clear that conditions with respect to the cancellation of contracts where dissatisfaction exists will be enforced in this State but before such cancellation of a contract will be upheld it must appear that the dissatisfaction is real, and is based on good faith. In cases where there is a basis for an objective consideration of whether the defendant is or ought to be

satisfied whether or not it is reasonable for him to be satisfied some contrariety of opinion is found to exist among the Ohio decisions.

See:

Marshall vs. Ames, 11 O. C. C., 363;
Crigler vs. Blair, 44 O. C. C., 324;
Easton vs. Pennsylvania & Ohio Co., 13 Ohio, 79;
McMahon vs. Spitzer, 29 O. App., 44;
Stewart vs. Ruttner, 29 O. C. A., 145; 29 O. C. D., 547;
Schaefer vs. Laws, 13 O. App., 387.

In the case of Clewell vs. Toledo Metal Sign Company, 20 O. C. C. (n. s.) 552, it is held that:

> "Where it is agreed that the subject matter of a contract shall be 'satisfactory' to the purchaser, if the subject matter of the contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship or salability, and other like consideration, rather than to personal satisfaction, as in the painting of a portrait, an agreement that it shall be satisfactory means that it shall be reasonably satisfactory; but if the subject of the contract, such as one to paint a pastel portrait involves personal taste or feeling, an agreement that it be satisfactory to the buyer necessarily makes him the sole judge whether it answers that condition."

Without reviewing these cases further, and upon consideration of them as a whole, it is my opinion that where in a contract for the transportation of school pupils it is provided that the contract may be cancelled by the board of education if it is not satisfied with the performance thereof by the contractor, the dissatisfaction which will justify a cancellation of the contract must be genuine and reasonable as to performance of the contract and may not be arbitrary or capricious, but must be based on grounds that would cause dissatisfaction in the mind of a reasonable man.

In conclusion, and in specific answer to your questions, I am of the opinion:

1. A contract made by a board of education for the transporting of pupils within the school district extending beyond the term of some or all of the members of the board is not for that reason rendered invalid if the contract is made in good faith and for a reasonble length of time under all the circumstances.

2. A contract for the transporting of pupils within a school district containing a provision that the said contract will be suspended during the

time the schools are closed for any valid reason and transportation is not furnished will be enforced according to its terms and a contractor under such a contract is not entitled to payment under the terms of the contract for the time transportation is not furnished on account of the closing of the schools for the reasons mentioned in the contract.

3. Where in a contract for transporting pupils it is provided that the contract may be terminated by the board of education if it is not satisfied with the performance thereof by the contractor the dissatisfaction of the board which will legally justify a termination of the contract must be real and genuine as to performance and may not be arbitrary, whimsical or capricious, but must be based on grounds that would render the performance reasonably unsatisfactory under all the circumstances.

Respectfully,

THOMAS J. HERBERT,
Attorney General.