2196.

APPROVAL—BONDS, YOUNGSTOWN CITY SCHOOL DISTRICT, (FORMERLY COITSVILLE TOWNSHIP RURAL SCHOOL DISTRICT), MAHONING COUNTY, OHIO, $12,000.00, PART OF AN ISSUE DATED APRIL 1, 1924.

COLUMBUS, OHIO, March 30, 1938.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Youngstown City School Dist., (formerly Coitsville Twp. Rural S. D.), Mahoning County, Ohio, $12,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of school building bonds in the aggregate amount of $150,000, dated April 1, 1924, bearing interest at the rate of 5% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said school district.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

2197.

CONTRACT—BOARD OF EDUCATION AND BUS DRIVER FOR TRANSPORTATION SCHOOL CHILDREN—PERSONAL SERVICE CONTRACT—CANNOT BE ASSIGNED, WITHOUT CONSENT BOARD OF EDUCATION—RESPONSIBILITY, SURETIES ON BOND—ASSIGNOR—ASSIGNEE—STATUS WHERE BREACH OF CONTRACT.

SYLLABUS:

1. *A contract entered into by and between a board of education and a bus driver for transportation of school children to and from school,*

is a contract for personal services, and therefore the bus driver cannot assign such contract without the consent of the board of education.

2. *Where a bus driver assigns a contract for the transportation of pupils to and from school, and the assignee of such contract proceeds to transport the pupils, and the board of education without consenting to such assignment notifies the sureties on the assignor's contract bond that it will hold "them responsible for the services on" the assignor's bus route, the sureties on the assignor's bond are not liable for the faithful performance of the contract by the assignee.*

3. *Where a bus driver assigns a contract for the transportation of pupils to and from school, and the assignee of such contract proceeds to transport the pupils without securing the consent of the board of education to such assignment of contract, the assignee cannot recover for services rendered as driver of such school bus, in the transportation of the pupils to and from school over the route specified in the contract between the board of education and the assignor.*

4. *Where a contract exists between a board of education and a bus driver, for transportation of school children to and from school by the bus driver, and the bus driver without the consent of the board of education, assigns such contract, there has been a breach of the contract and said bus driver or assignor cannot recover for services rendered by him or his assignee in driving the school bus after assignment of such contract.*

5. *Where a bus driver assigns a contract that he entered into with a board of education for the transportation of school children to and from school and the board of education has not consented to such assignment and the assignee has not given bond and received a certificate of qualification as provided for in Section 7731-3, General Code, the assignee cannot drive a school bus for the transportation of pupils to and from school over the route specified in the contract between the board and assignor.*

6. *Where a bus driver, without the consent of the board of education, assigns a contract that he has entered into with the board of education for transportation of school children to and from school, there has been a breach of his contract and the board of education may enter into a new contract for the transportation of pupils to and from school over the route specified in the contract between the bus driver and the board of education.*

COLUMBUS, OHIO, March 30, 1938.

HON. JOHN W. HOWELL, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication which reads as follows:

"In May, 1937, the Board of Education of H. Township Rural School District entered into a contract with C. for a period of five years, to transport certain children of the district to a high school in G. a city school district. The contract was in writing, on a form prescribed by the Director of Education, and provided for payment to C. of 'state schedule'; on the margin of the contract these words were written: 'Owner to drive his own bus except with the consent of the board.' The phrase quoted was part of the contract when it was signed by both parties, and was in fact understood by both to be a part of the contract.

C. gave bond for the faithful performance of his contract, the usual form, D. and E. executing the bond as sureties. C. is the holder of a certificate from the County Board of Education under the provisions of Section 7731-3, G. C.

In December, 1937, C. sold his school bus to one G., and since that time G. has been transporting the children to the high school, in accordance with the terms of C.'s contract. On December 6, 1937, the board notified D. and E. the sureties on C.'s contract bond that the Board was 'holding them responsible for the services on C.'s bus route.'

In December, 1937, as aforesaid, C. sold his school bus to G., G. paying C. $210 in excess of the cost of the bus, when it was new, the consideration being the assignment of the contract to G., as well as the transfer of title to the school bus.

The Board of Education did not consent and has not consented to the transfer of C.'s contract to G. G. is not holder of a certificate from the county board of education, under Section 7731-3, although he has been driving the bus, and has owned it, for forty-five days or more.

Questions—

1. May the board of education refuse to pay either C. or G. for the period G. has transported children, without the consent of the board?

2. Has C. breached his contract by transferring or assigning it to G.?

3. Has G. in any event, any right to drive the bus without the certificate required by Section 7731-3?

4. If C. has forfeited his right in the contract, may the board make a new contract for the transportation of the pupils on C.'s former route?

It is my opinion that C.'s contract, being for personal serv-

ice, is not assignable. (See *Caracciolo* vs. *Bonnell,* 10 O. O., 205, Ohio Law Reporter, January 24, 1938). I think this position is strengthened by the provision in the contract to the effect that the owner must drive his own bus, except with the consent of the Board. It would appear that the owner of the bus would not have the right, in any event, to employ a driver, who is not the holder of a certificate under 7731-3 General Code.

If Section 7731-3 General Code means anything, it would seem that the board could discontinue the services of G. now, because he is not the holder of the certificate prescribed by that section.

Moreover, it is obvious that C. has traded in his contract as he would deal with a commodity. He purchased a bus new in the summer of 1937. In December, 1937, he sold this bus after it had been driven several thousand miles, and had become strictly a used bus together with his contract for a price of $210 in excess of the purchase price of the new bus. I do not believe the law contemplates a general traffic in school bus contracts.

In view of the fact that the board of education of H. Rural School District is confronted with a situation which requires prompt action, your response at the earliest possible date, will be appreciated."

As stated in the case of *The Starchroom Publishing Co.* vs. *The Threlkeld Engraving Co.,* 13 O. App., 281, at page 283:

> "So-called personal contracts, or contracts in which the personality of one of the parties is material, are not assignable. Whether the personality of one or both parties is material depends upon the intention of the parties, as shown by the language which they have used, and upon the nature of the contract."

It cannot be held otherwise than that a contract entered into by and between a board of education and a bus driver for transportation of school children to and from school, is a contract for personal services. It is obvious that a board of education should and does, consider material the personality, habits and integrity of a bus driver before entering into a contract that covers the comfort and safety of life and limb of the pupils to be transported. The very language, "owner to drive his own bus except with the consent of the board" printed on the margin of the form of contract prescribed by the director of education, in itself, indi-

cates a contract for personal services that is not assignable without the consent of the board of education.

You state in your communication that the board of education did not consent to the assignment of C.'s contract to G. At the outset, I desire to make the observation that consent cannot be presumed from the fact that the board of education is permitting the pupils to be transported to and from high school in the bus which G. purchased from C. and has been operating "for forty-five days or more." Also consent cannot be inferred from the fact that the board notified D. and E., the sureties on C.'s contract bond, that the board was "holding them responsible for the services on C.'s bus route", for the reason that there is not any principle of law whereby such notification by the board to the sureties will bind the sureties. It is important to observe that the sureties entirely ignored this notification by the board of education. There is nothing at all in the facts set forth in your communication which would even indicate that the sureties were willing to guarantee the faithful preformance of G. in the transportation of pupils to and from school. From the fact that the sureties were willing to guarantee the faithful performance of C., it does not follow that they would be willing to guarantee the faithful performance of G. with whom they had no contractual relationship, and whose honesty and personal habits may be entirely opposite to that of C. The principles of law pertaining to contracts and bonds for the faithful performance of such contracts, are applicable herein. It is said in Donnelly on Public Contracts, Section 82:

> "A public contract is measured and governed by the same laws that control natural persons in contract matters, whether it be the nation, state, city, town or village."

As stated in 38 O. J., 417:

> "It is a matter of positive law that the obligation of the surety can only be created by a writing, signed usually by both surety and principal. Being a promise to answer for the default of another, the contract of suretyship is within the Statute of Frauds and nugatory unless in writing."

That a surety can be held liable for faithful performance of a contract only where he has in writing agreed to be bound, is well expressed in the case of *Black* vs. *Albery, et al.*, 89 O. S., 240, wherein at page 243, the court said:

> "The rules by which the surety's liability is determined have regard to the fact that usually he derives no benefit from the

transaction and he is bound only because he has agreed to become bound, there being present no fact which would tend to raise an implied obligation. It is required that this undertaking be in writing. Since he is bound only because he has agreed to be bound, it logically results that he is bound only as he has agreed to be bound. From these and other like considerations there have been formulated and approved certain suggestive precepts representing the surety's obligations. The surety is the favorite of the law; the surety is entitled to stand upon the letter of his obligation; the surety's defense is complete whenever he may say, 'Into this contract I did not enter.' "

Therefore, assuming that the bond signed by the sureties D. and E. was for the faithful performance by C. for the transportation of high school pupils to and from school, it must be said that when C., on December, 1937, assigned and sold his contract to G., that the sureties were released from any liability that might arise for failure of performance of the contract after December, 1937, upon the part of G. A case very much in point is *Yolowitz* vs. *Cuyahoga Amusement Company*, 8 Ohio Law Abstract, 701. The facts in that case were that one Hooper, the owner of an amusement park, entered into a contract of lease with the Cuyahoga Amusement Company, and furnished a bond to Hooper providing for payment of rent in accordance with the lease; the sureties on said bond were Rogers and Wells. Thereafter, Hooper assigned the lease to one Sam Yolowitz, who, for some reason failed and neglected to collect the rents, and after termination of the lease brought action and secured judgment by default against the sureties and principal. The court in its opinion said that "while the contract insures the performance of the contract to Hooper, it did not insure the performance of the contract to any other person." The syllabus reads:

"Rights of sureties could not be changed or enlarged, or their liability transferred to another person, without their consent. Sureties have right to say for what they are to be bound and to whom they are to be bound."

Not only can it be said that after C. assigned his contract to G., that the securities were not liable for the faithful performance of the contract by G., but it also can be said that no valid contract existed between the board of education and G., which imposed any obligation upon either the board or the sureties.

In an opinion appearing in Opinions of the Attorney General for 1929, Volume 1, page 827, it was held:

"A so-called contract for the employment of a person to drive a school wagon or motor van is void unless the person who contracts for the services of such driver gives a satisfactory and sufficient bond and procures a certificate of good moral character in compliance with Section 7731-3 of the General Code."

Section 7731-3, General Code, provides as follows:

"When transportation is furnished in city, rural or village school districts no one shall be employed as a driver of a school wagon or motor van who has not given satisfactory and sufficient bond and who has not received a certificate from the county board of education of the county in which he is to be employed or in a city district, from the superintendent of schools certifying that such person is at least twenty-one years of age and is of good moral character and is qualified physically and otherwise for such position. The local board of education or the superintendent, as the case may be, shall provide for a physical examination of each driver to ascertain his physical fitness for the employment; said board or superintendent shall choose the examining physician; and, said examination shall be the only one necessary for a driver to pass. Any certificate may be revoked by the authority granting the same on proof that the holder thereof has been guilty of improper conduct or of neglect of duty and the said driver's contract shall be thereby terminated and rendered null and void."

It is to be observed from the provisions of Section 7731-3 supra, that it is a mandatory condition precedent that no person can be employed, by contract or otherwise, as a driver of a school bus unless he has given bond, received a certificate from the county board of education, or, in case of a city school district, from the superintendent of schools, certifying that he is at least twenty-one years of age, of good moral character, and is qualified physically and otherwise, for such position.

It is obvious that the main purpose of such a bond is to guarantee to the board of education the faithful performance of the contract. However, another purpose is the protection that such bond affords in the case of the negligent operation of a school bus. This purpose was well set forth in an opinion appearing in Opinions of the Attorney General for 1928, Vol. I, page 22, wherein it was held:

"1. The driver of a school wagon or motor van used in the transportation to and from a public school is required to execute a bond conditioned upon the faithful discharge of his duties as such driver.

2. A driver of a school wagon or motor van, used in the transportation of pupils to and from the public schools, is individually liable for injuries caused by the negligence of such driver in the operation of such wagon or motor van, even though such driver was at the time employed by a board of education and was engaged in the performance of a public duty required by law to be performed by such board of education. Such liability may be enforced in a civil action sounding in tort. In addition, under the holding of the Supreme Court of Ohio, in the case of *United States Fidelity and Guaranty Company* vs. *Samuels,* 116 O. S., page 586; 157 N. E. 325, a driver of a wagon or motor van, used in the transportation of pupils to and from the public schools, together with his sureties, are liable on the bond for the negligent operation of the school wagon or motor van by such driver, in the performance of the duties for which he was employed, and such liability may be enforced against the driver and his sureties in a proper action brought for that purpose."

To the same effect is the opinion for the same year, at page 254. G, having failed to secure the consent of the board of education to the assignment of the contract from C., and thereafter to furnish such bond and certificate as provided for in Section 7731-3, supra, cannot recover for services rendered in the transportation of pupils over the route specified in C.'s contract as driver of the school bus he purchased from C.

In an opinion appearing in Opinions of the Attorney General for 1928, Volume IV, page 2800, it was held:

"The driver of a school wagon or motor van who does not give a satisfactory and sufficient bond, and who has not received a certificate of good moral character as provided by Section 7731-3, General Code, cannot recover for his services as such driver."

To the same effect, and very much in point, is the case of *Solomon Chapin* vs. *William N. Longworth,* 31 O. S., 421. The facts in that case were:—that, on May 4, 1872, one Chapin entered into a contract with a certain firm, Doran, Deniston and Brothers, whereby he agreed that the firm should have the use and control of the patterns and models for a lathe he had invented. The firm agreed to employ Chapin for five

years, with the stipulation that whenever it failed to pay him such wages, it should forfeit the patterns, models and right to manufacture the lathes. Later, on March 17, 1873, the firm sold its factory to Longworth who in consideration of the assignment to him of its right and interest in the contract with Chapin and its transfer to him of the lathes, patterns and models, with the same right to manufacture, that had been granted to the firm, promised, and agreed, to and with the firm, that he would perform the conditions contained in the contract between Chapin and the firm. Thereafter, Longworth operated the factory and paid Chapin his weekly wage until February 7, 1874, and retained and used the models, lathes, etc. Thereafter Longworth operated the factory until August 22, 1874, but refused to pay Chapin for tendering of service in accordance with the contract between him (Chapin) and the firm. He commenced an action against the firm and Longworth. The defense of Longworth was that no privity of contract between him and Chapin was disclosed in the petition. The Court held that this objection was well taken; that it was an executory contract for the performance of particular personal services by Chapin for the firm, at a specified rate to be paid each week; that such a contract was not assignable; that the petition did not aver the release of the firm by Chapin, or that Chapin in any way assented to the transfer of the lathes, etc., to Longworth. The syllabus reads as follows:

> "1. An executory contract for personal services, to be paid for as performed cannot be assigned by the employer, unless the employe assents to the substitution of the assignee as employer.
>
> 2. In an action by the employe against the employer and his assignee, the allegation that subsequent to the agreement of the employer to assign, the employe rendered the same service for the assignee during part of the time embraced by the contract, and received compensation from him at the rate therein specified, does not show substitution."

From the foregoing, and in specific answer to your questions, it is my opinion that:

1. The board of education may refuse to pay either C. or G. for the period G. has transported children, without the consent of the board.

2. That C. has committed a breach in the performance of his contract by transferring and assigning the same to G.

3. That G. having failed to furnish a bond and secure a certificate of qualification for a school bus driver, as provided for in Section 7731-3, General Code, cannot, therefore, render services as a school bus driver in the transportation of pupils to and from school over the route specified in the contract between the Board and C.

4. That C. having committed a breach in the performance of his contract, the board of education may enter into a new contract for the transportation of the pupils on C.'s former route.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

2198.

TRUCK CHASSIS—TAR AND ASPHALT DISTRIBUTOR OR CEMENT MIXER—EQUIPMENT USED IN ROAD CONSTRUCTION WORK—NOT MOTOR VEHICLE—EXEMPT FROM ANNUAL MOTOR VEHICLE LICENSE TAX.

SYLLABUS:

An "asphalt and tar distributor" or a "cement mixer" is equipment used in road construction work and not designed for or employed in general highway transportation. Therefore, such equipment is excepted from the legislative definition of the term "motor vehicle," and is accordingly exempt from the annual motor vehicle license tax.

COLUMBUS, OHIO, March 31, 1938.

HON. PAUL F. MICHEL, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: I am in receipt of your request for my opinion as to whether or not an asphalt and tar distributor, which is a truck chassis, but which is built with a tar tank and other distributing equipment, and which is used exclusively for the spreading of tar and asphalt on highway construction projects, is exempt from the annual motor vehicle license tax.

The Prosecuting Attorney of Franklin County, Ohio, has also requested my opinion on the question as to whether or not the language used in Section 6290, as amended by House Bill No. 772, is comprehensive enough to except from the definition of the term "motor vehicle" concrete mixers used in construction work.

As a matter of expediency, both of these questions will be here considered.

Section 6290, General Code, as amended by Amended House Bill No. 773, passed by the 92nd General Assembly, and effective January 1, 1938, provides, in so far as pertinent to the questions to be considered, as follows: