

By the same course of reasoning, a board of education which provides, or is under the duty of providing transportation for elementary school pupils, should it find it impracticable to have the conveyance pass within one-half mile of the residence or the private entrance thereto of a school pupil as provided by Section 7731, General Code, may fulfill its obligation to the pupil with respect to this matter by paying the parent or guardian for the transportation, and that unless transportation is furnished by a conveyance which runs within one-half mile of the residence or private entrance thereto, of a pupil, transportation is not being furnished to the extent and in the manner contemplated by the law. Should a board of education find it impracticable to have the conveyance for the transportation of pupils pass to within one-half mile of the residence of the pupil or the private entrance thereto the board can not by mandamus be compelled to furnish the transportation in this manner, but must in such cases provide it otherwise.

I am therefore of the opinion in specific answer to your questions that:

1. When a local village or rural district board of education refuses to reopen a school which has been suspended by authority of Section 7730, General Code, after a proper petition has been filed therefor, it is the duty of the county board of education under the power conferred upon it by Section 7610-1, General Code, to reopen such school provided there is a suitable school building in the territory of such suspended school as it existed prior to suspension. This duty is not dependent upon the issuance by the court of an order of mandamus to compel the opening of the school.

2. It is the duty of a rural or village board of education to furnish transportation for elementary school pupils who reside more than two miles from the school to which they have been assigned, and the conveyance for the transportation of such pupils must pass within one-half mile of the residence or the private entrance thereto, of the pupils so being transported. If transportation is not furnished in this manner because of its being found to be impracticable to do so, or for any other reason, it is the duty of the board to pay the parent or other person in charge of the child or children for the transportation of said child or children to school a rate determined for the particular case by the local board of education for each day of actual transportation.

3. When local boards of education in rural and village school districts neglect or refuse to provide transportation for pupils according to law, the county board of education may provide such transportation, and the cost thereof shall be paid as provided in Section 7610-1, General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4195.

REMONSTRANCE—ELECTOR SIGNING REMONSTRANCE UNDER SEC. 4736,
G. C., MAY WITHDRAW SIGNATURE WHEN.

SYLLABUS:

The right of an elector who has signed a remonstrance against the creating of a new school district by force of Section 4736, General Code, to withdraw from said remonstrance, is a political right and cannot be waived by the elector so as to preclude him from withdrawing or cancelling his signature to a remonstrance which he may

have signed, within the thirty day period fixed by the statute for the filing of a remonstrance.

COLUMBUS, OHIO, April 27, 1935.

HON. PAUL T. KLAPP, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Recently the Board of Education of Miami County, Ohio, passed a resolution ordering the combination of two school districts into one school district, and took the other necessary steps toward the combining of said district such as the designation of a new Board of Education and the division of funds and indebtedness.

Thereafter there were circulated in these two districts petitions of remonstrance, copy of which I attach hereto, and should like you to consider as part of this request for an opinion. Said remonstrances were filed within the thirty day period as required by law.

I call your attention to the last line contained in the remonstrance, which reads as follows:

‘We further waive the right to withdraw our names from this remonstrance.’

This last line was contained in all of the remonstrances filed. Thereafter there was filed with the Board a petition signed by a part of those persons who had previously signed said remonstrance petitioning the County Board of Education to withdraw their names from said remonstrance; copy of that petition is also hereto attached.

The question which the County Board now desires to have your opinion upon is whether or not they may now grant the petition of these individuals who ask to have their names withdrawn from the remonstrance, or are those people bound and precluded from removing their names by the waiver contained in the last line of said remonstrance?”

It appears that on March 11, 1935, the county board of education of the Miami County School District passed a resolution creating a new school district to consist of all the territory of two existing districts. This action was taken in pursuance of Section 4736 of the General Code of Ohio, which reads:

“The county board of education may create a school district from one or more school districts or parts thereof, and in so doing shall make an equitable division of the funds or indebtedness between the newly created district and any districts from which any portion of such newly created district is taken. Such action of the county board of education shall not take effect if a majority of the qualified electors residing in the territory affected by such order shall within thirty days from the time such action is taken file with the county board of education a written remonstrance against it. Members of the board of education of the newly created district shall be appointed by the county board of education and shall hold their office until the first election for members of a board of education held in such district after such appointment, at which said first election two members shall be elected for two years and three members shall be elected for four years, and thereafter their successors shall be elected

in the same manner and for the term as is provided by §4712 of the General Code. The board so appointed by the county board of education shall organize on the second Monday after their appointment."

Following the action of the said county board of education and within the thirty day period fixed by the statute therefor a remonstrance was filed with the county board signed by a large number of electors residing in the territory affected by the action of the board in creating the new district. This remonstrance was in the usual form protesting and remonstrating against the creation of the said new district. The remonstrance also contained the following language:

"We further insist and demand that the aforesaid School Districts be and remain separate districts of the Miami County School District.

We further waive the right to withdraw our names from this remonstrance."

Thereafter and yet within thirty days from March 11, 1935 a petition was filed with the county board of education signed by a number of the persons who had previously signed the remonstrance. This petition read as follows:

"PETITION

To the County Board of Education,
Miami County, Ohio.

We, the undersigned, who have signed a remonstrance against the action of the County Board of Education in creating the Tippecanoe City School District out of the territories included in the Monroe Township Rural School District and the Tippecanoe Village School District by resolution of March 11, 1935, do hereby withdraw our names from said Remonstrance and request your honorable Board to disregard and consider void our former action in signing said Remonstrance."

The question now presented is whether or not the signers of the so-called petition should be regarded as not having remonstrated against the creation of the new district, inasmuch as they had when signing the remonstrance in express terms waived the right to withdraw their signatures from the remonstrance.

It has been held in several cases decided by the Supreme Court of Ohio that remonstrants under the provisions of Section 4736, General Code, may withdraw or cancel their names signed to a remonstrance within thirty days from the time action is taken by the county board of education under the statute. *State ex rel. Owen, et al. vs. Carroll County Board of Education*, 129 O. S., 262; 2 O. S., 157; *Neiswander vs. Brickner*, 116 O. S., 249; *Board of Education vs. Board of Education*, 112 O. S. 108. See also *Corpus Juris*, Vol. 56, 222; *Opinions Attorney General 1933*, 984. In the Owen case, *supra*, it is held as stated in the syllabus:

"1. Any signer to a remonstrance under the provisions of Section 4736, General Code, may withdraw or cancel his name within thirty days from the time action is taken by the county board of education.

2. When there has been a number of such withdrawals or cancellations sufficient to invalidate a remonstrance, a resolution subsequently adopted by a board of education purporting to sustain such remonstrance is a nullity."

It is well settled that a state legislature has full and exclusive power subject to constitutional limitations to create, organize, establish or lay off school districts or to divide, unite or enlarge the boundaries of, or otherwise alter existing districts and may delegate that power to such officers, boards or subordinate agencies as it may designate or establish. It may exercise or provide for the exercise of, such power without the request or assent, and even against the protest, of the affected district or districts or of the inhabitants of the affected district. *State vs. Schneider*, 103 O. S., 492; *Corpus Juris*, Vol. 56, pages 198, 199.

The legislature in extending to the county board of education the power to create new school districts, as it has by the enactment of Section 4736, General Code, has reposed in such boards a discretion which is subject to the will of the electors residing in the territory affected by the exercise of that discretion, to the extent that such electors may protest against the action of the county board and if the majority of them do so protest or remonstrate in the manner provided by the statute the discretion of the board is overridden and its action nullified.

The right extended to the electors by force of this statute, Section 4736, General Code, is not a property right nor a constitutional or civil right nor a purely personal right, but a political right, a right to participate in the creation of school districts which may be created by force of the statute.

Political rights are those which may be exercised in the formation or administration of the government; the power to participate directly or indirectly in the establishment or management of the government; those rights which belong to a nation or to a citizen or to an individual member of a nation so distinguished from civil rights. *Amer. & Eng. Enc. of Law*, 2nd Ed., Vol. 22, page 942; *C. J.*, Vol. 12, page 935; *C. J.*, Vol. 49, page 1076. Political rights are defined by Black, in his *Law Dictionary*, as follows:

“Political rights consist in the power to participate directly or indirectly in the establishment or administration of government such as the right of citizenship, that of suffrage, the right to hold public office, and the right of petition. *Friendly vs. Olcott*, 61 Oreg., 580, 588, 123 Pac. 53.”

The right of an elector to remonstrate or not, against the action of a county board of education taken in pursuance of Section 4736, General Code, may be likened to the right to vote or the right to be a candidate for office or to hold public office. In a sense it is an official act and is equally cogent so far as results are concerned, as the action of the board of education in the first instance since the judgment of the electors acting through a majority may decide whether the then existing status of districts shall continue.

It is not a mere personal right of the elector, as theoretically at least, it is to be exercised for the benefit of all the people of the affected territory, for the entire public of the territory affected. It is to be exercised with discretion as is the action of the county board of education in the first instance. And in the exercise of the right, the elector in remonstrating or refraining from remonstrating exercises a public duty.

Courts without exception, subscribe to the doctrine that a person of full age and sui juris can waive a statutory or even a constitutional provision in his own favor, affecting simply his property or alienable rights and not invoking considerations of public policy. *Phyfe vs. Elmer*, 45 N. Y., 104; *Knettle vs. Newcomb*, 22 N. Y., 249.

It is a recognized principle of law that everyone may waive a right intended for his own benefit if it can be relinquished without detriment to the community at large. *Fawcett vs. Richmond Leather Mfg. Co.*, 135 Va. 518. Even constitutional provisions intended for the benefit of an individual may be waived by him. *Baker vs. Brown*, 6

Hill, 47; *People vs. Abetti*, 152 N. Y. S., 892. See also R. C. L. Vol. 27, page 906. A waiver is not, however, allowed to be operative where it would infringe upon the rights of others or would be against public policy. R. C. L. Vol. 27, page 907. Examples of such unauthorized waivers are executory contracts waiving exemptions from execution or homestead rights or the defense of usury. *Sears vs. Hanks*, 14 O. S., 298; *Diehl vs. Friester*, 37 O. S., 473; *Rinchoff vs. Buller et al.*, 20 O. N. P. (N. S.) 577; *In re. Beckenhaupt*, 21 N. P. (N. S.) 7; *Dean vs. McMullen*, 109 O. S., 309. The waiver of a right in contravention of state policy. *Branch & Company vs. Tomlinson*, 77 N. C., 388, 391. The waiver of illegality as a defense. *Day vs. McAllister*, 15 Gray, 433, 434; *Schenk vs. Phelps*, 6 Ill. 612.

The law in extending to electors residing in territory affected by the creation of a new district by a county board of education in pursuance of Section 4736, General Code, imposed upon those electors a duty of exercising their honest discretion not for their own benefit but for the benefit of the public of the territory affected, as to whether or not the district should be created, by remonstrating or refraining from remonstrating against the action taken by the board of education. Although the statute does not expressly authorize an elector after remonstrating to withdraw his remonstrance the courts recognize that the right to withdraw a remonstrance already exercised is equal to the right to remonstrate in the first place, and the duty to withdraw if the remonstrant in his discretion feels that it should be done, is equal to the duty to remonstrate in the first place, all to the end that the public of the district should have the benefit of the honest and mature discretion of the electors at the termination of the period fixed by law for the recording of their judgment or discretion.

The right to withdraw from a remonstrance after once having signed the same is a protection to the interested public against the hasty and sometimes thoughtless signing of a remonstrance, oftentimes upon the urging of some friend and sometimes without knowledge of the effect of such signing.

The interested public is entitled to the mature judgment of the electors authorized to act, after reflection and after complete knowledge of the effect of their action in signing a remonstrance or a withdrawal therefrom as the case may be.

The public of the territory affected is interested in the result and the law has provided a method for the determination of that result. The electors residing in the territory affected by the creation of a new school district under and in pursuance of Section 4736, General Code, owe a duty not so much to themselves perhaps, although each of them is one of that public and one of the class designated by law to perform a public duty, but to the entire public of the territory affected by the creation of the district. It is not a personal privilege or a right affecting simply the property or the rights of the individual but it affects the rights of the entire public affected by the creation of the district and is not such a right as in my judgment may be waived.

I am therefore of the opinion, in specific answer to your question, that the signers of the so-called petition if it were filed within thirty days after March 11, 1935, should be regarded as having withdrawn their names from the original remonstrance and may not be counted as remonstrances against the action of the board of education in creating the new school district in question.

Respectfully,
JOHN W. BRICKER,
Attorney General.