1684

TEACHERS' TENURE ACT—TEACHER EMPLOYED UNDER LIMITED CONTRACT FOR SCHOOL YEAR 1951-1952—DEEMED TO BE REEMPLOYED FOR SCHOOL YEAR 1952-1953—ALLEGED FAILURE OF BOARD TO GIVE WRITTEN NOTICE OF REEMPLOYMENT—TIME DETERMINED BY PROVISIONS, SECTION 4842-8 G. C., EFFECTIVE AUGUST 24, 1951 AND NOT BY PROVISIONS OF STATUTE IN FORCE AND EFFECT AT TIME OF CREATION OF CONTRACT 1951-1952.

SYLLABUS:

In determining the question of whether a teacher, employed under a limited contract for the school year 1951-1952, in accordance with the statutes of the Teachers' Tenure Act, has been deemed re-employed for the school year 1952-1953 by reason of the alleged failure of the board of education to give written notice of its intention not to re-employ her within the time prescribed by Section 4842-8, General Code, such time is determined by the provisions of such statute in force and effect since its last amendment, effective August 24, 1951, and not by the provisions of such statute in force and effect at the time of the creation of such 1951-1952 contract.

Columbus, Ohio, July 29, 1952

Hon. John Rossetti, Prosecuting Attorney
Stark County, Canton, Ohio

Dear Sir:

I am in receipt of your request for my opinion as to whether or not a teacher employed under a limited contract is deemed to be re-employed where the board of education gave her written notice on April 15, 1952 of its intention not to re-employ her and the teacher's school year ended June 6, 1952. Specifically you inquire as to whether such notice was required to be given on or before March 31, 1952.

Section 4842-8, General Code, in pertinent part, reads as follows:

> "* * * Any teacher employed under a limited contract shall at the expiration of such limited contract be deemed re-employed under the provisions of this act at the same salary plus any increment provided by the salary schedule unless the employing board shall give such teacher written notice of its intention not to re-employ him or her *on or before the thirtieth day of April or thirty days prior to the termination of such teacher's school year, whichever date occurs the earlier.* * * *" (Emphasis added.)

This section was amended by Amended Senate Bill No. 29, passed by the 99th General Assembly May 18, 1951, effective August 24, 1951. Prior to such amendment this section provided for the giving of such notice "on or before the thirty-first day of March."

It is obvious that the notice of April 15, 1952 was given within the time prescribed for such notice by Section 4842-8, General Code, as amended August 24, 1951. Your request for my opinion, however, raises the question of whether the language of the former statute is governing in view of the fact that such former language was in force and effect at the time of the execution of the 1951-1952 contract with the teacher in question. You have informed me that the 1951-1952 contract with such teacher made no mention as to the date of notification of intention not to re-employ. However, it appears that the teacher in question is contending that the law, as it then read, became a part of her 1951-1952 contract and that under such law any notice by the board of its intention not to re-employ her, given after March 31, 1952, would be of no force and effect.

In construing a contract, it is a well-recognized principle that to the extent that the law of the time and place of the making of such contract affects its validity, construction, discharge or enforcement, such law enters into and becomes a part of such contract. 9 Ohio Jurisprudence, 414; 12 American Jurisprudence, 769; Banks v. DeWitt, 42 Ohio St., 263; Holbrook v. Ives, 44 Ohio St. 516; Palmer & Crawford v. Tingle, 55 Ohio St. 423. This principle has been followed universally at least since the announcement of such principle by Mr. Justice Washington of the United States Supreme Court in the case of Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606, in the year 1827. Such law does not affect contracts thereafter entered into, however. I quote from the opinion of Mr. Justice Washington:

> "Again, it is insisted that if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity, construction, or duration. * * *"

Since particularly as it relates to the construction of a contract as opposed to its validity, the above principle has ordinarily been applied as the basis of determining the *intention* of the parties, the application of such rule, in construing an existing teacher's "contract," would seem doubtful in view of the fact that the *construction* of such "contract" is predicated entirely on the terms of the statutes of the Teachers' Tenure Act, regardless of the actual intention of the parties.

In the case of State, ex rel. Gordon v. Barthalow, 150 Ohio St., 499, the Supreme Court held that public officers and public general employes served *ex lege* and not *ex-contractu*. The first paragraph of the syllabus of this case reads as follows:

> "A public officer or public general employee holds his position neither by grant nor contract, nor has any such officer or employee a vested interest or private right of property in his office or employment. (The holding in the case of City of Cleveland v. Luttner, 92 Ohio St., 493, to the effect that there is a contract between a public officer and the public he serves, overruled.)"

While the term "contract" is used both as to "continuing contracts" and "limited contracts" in the Teachers' Tenure Act, I believe it clear that such term is used in its generic sense and that the status of teachers is governed not by the terms of the "contract," but by the specific provisions of the law defining and protecting such status. As stated in the opinion in the case of State, ex rel. Bishop v. Board of Education, 139 Ohio St., 437, 438, the Teachers' Tenure Act "bears a resemblance to the older civil service laws."

In the case of Jacot v. Secrest, et al, 153 Ohio St., 553, however, the Supreme Court applied such principle in determining the existence or validity of a teacher's contract, holding as indicated in the syllabus:

> "1. The laws which subsist at the time and place the making of a contract and when and where it is to be performed enter into and form a part of the contract, whether such laws affect its validity, construction, discharge, or enforcement.
>
> "2. The provisions of Section 4842-8, General Code, with reference to the re-employment of a teacher under a limited contract are limited by and subject to the provisions of Section 7896-34, General Code, with reference to the retirement of teachers 70 years of age."

The Jacot case involved a situation where a teacher over seventy years of age had not been given notice by the board of education on or before March 31, 1946 of its intention not to re-employ him. Section 7896-34, General Code, however, provided that the Teachers' Retirement Board should retire all teachers at the end of the school year in which the age of seventy was attained, provided the consent of the employer was secured. For the purposes of the Teachers' Retirement Act, the school year ended August 31, 1946. On May 14, 1946, the board of education consented to the compulsory retirement of such teacher. The teacher claimed that since he had not been notified by the board on or before March 31, 1946 of its intention not to re-employ him he was automatically deemed employed under the provisions of Section 4842-8. The court pointed out that under the terms of Section 4842-8 no completed contract of employment was effected until June 1, 1946 since the teacher had until such date to assent to such re-employment, and held that the intervening event of May 14, 1946, when the board consented to his retirement, precluded his automatic re-employment, even though the board had failed to notify him on or before March 31, 1946 of its intention not to re-employ him.

It does not appear that any question was raised in the Jacot case as to whether, under the Teachers' Tenure Act, an *ex lege*, instead of an *ex contractu* status was involved. Instead, both sides assumed that the solution to the question there presented had its answer in the law of contracts. That the Jacot case is not authority for the proposition that an *ex lege* status exists is clear from the first paragraph of the syllabus in the recent case of The State, ex rel. Gordon v. Rhodes, 158 Ohio St., 129, which reads:

> "A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon or raised at the time of the adjudication."

Had this issue been raised in the Jacot case, I believe that the Supreme Court, in accordance with its holding in the Barthalow case, would have held that an *ex lege* status is created by the Teachers' Tenure Act. This, of course, would not have changed its conclusion since the same statutes upon which the decision was based would have been considered in examining into the extent of the status created by operation of law.

Furthermore, it does not appear that the issue in the Jacot case, as contrasted with the issue here, involved the *construction* of an existing "contract." The sole issue was whether a valid "contract" for the school year 1946-1947 was created by operation of law under the statutes then in force and effect. In determining the *validity* of such alleged contract, the court applied the laws which subsisted *at the time* of the alleged creation of such contract. By applying this same test to the issue under consideration, I think it clear that the question as to whether a valid "contract" has been created for the school year 1952-1953 must be determined by the statutes in effect at the time of the alleged creation of such contract and not by the statutes in effect at the time of the creation of the 1951-1952 contract.

Section 4842-8 does *not* provide that a teacher employed under a limited contract shall be deemed re-employed unless the employing board shall give such teacher written notice of its intention not to re-employ her on or before the time provided in such limited contract for the giving of such notice. The pertinent language of Section 4842-8, General Code, provides within itself the method or procedure by which a board of education is presumed to have offered employment to a teacher and by which such teacher is presumed to have accepted such employment. Such language, as it existed at the time the 1951-1952 contract was entered into, affected the validity of *that* contract. When this statute was later amended such amendment in no way affected the validity, construction, discharge or enforcement of the 1951-1952 contract. By the notice of April 15, 1952, the board of education, in compliance with the law in effect at such time, gave the required notice of its intention not to re-employ the teacher for the school year 1952-1953. In other words, such notice having been given, no presumption arose, as a matter of law, that the board had offered the teacher a new contract for the year 1952-1953. Just the reverse is true. No such contract was offered.

Regardless of whether the status of the school teacher under the limited contract of 1951-1952 was *ex lege* or *ex contractu*, it is my opinion that her right to re-employment for the school year 1952-1953 is not governed in any way by the terms, or possible implied terms, of her 1951-1952 contract, but, instead, by the pertinent language of the Teachers' Tenure Act contained in Section 4842-8, General Code. Under the terms of such statute, any teacher in the *status* of employment under any limited

contract is re-employed or not re-employed in accordance with the requirement of such statute as to notice of intention not to re-employ, without regard to the terms of the limited contract then in effect.

When the teacher in question accepted her 1951-1952 contract, she did so with full knowledge that the *statutory* procedure to be followed in case of re-employment the next year was subject to change by the General Assembly. Her 1951-1952 contract made no reference to any right of re-employment in case she was not notified on or before March 31, 1952 by the board of its intention not to re-employ her; nor could any such provision, had it been written into the contract, preclude an amendment of the pertinent language of Section 4842-8, General Code.

In specific answer to your question, it is my opinion that in determining the question of whether a teacher, employed under a limited contract for the school year 1951-1952, in accordance with the statutes of the Teachers' Tenure Act, has been deemed re-employed for the school year 1952-1953 by reason of the alleged failure of the board of education to give written notice of its intention not to re-employ her within the time prescribed by Section 4842-8, General Code, such time is determined by the provisions of such statute in force and effect since its last amendment, effective August 24, 1951, and not by the provisions of such statute in force and effect at the time of the creation of such 1951-1952 contract.

Respectfully,

C. WILLIAM O'NEILL
Attorney General