804.

HABITUAL CRIMINAL ACT—PERSONS CONVICTED TWO OR MORE TIMES NOT HABITUAL CRIMINALS UNLESS THIRD OR FOURTH CONVICTIONS WERE FOR OFFENSES COMMITTED AFTER JULY 2, 1929.

SYLLABUS:

Under the terms of House Bill No. 8, generally known as the Habitual Criminal Act, passed by the 88th General Assembly, which became effective July 2, 1929, a person who had been separately prosecuted, tried and convicted two or more times for felonies specified in the act cannot be adjudged an habitual criminal and punished under the provisions of the act, unless his third or fourth convictions were for offenses committed after the act became effective.

COLUMBUS, OHIO, August 28, 1929.

HON. OTHO L. MCKINNEY, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which is as follows:

> "House Bill No. 8, enacted by the last Assembly, and known as the Habitual Criminal Act, which went into effect July 2nd, provided that a person *convicted* in this state of certain enumerated offenses, who has been previously convicted twice or three times as the case may be, shall be adjudged a habitual criminal. The act also provides the proceedings, making it the duty of the prosecuting attorney to cause indictment to be returned, etc.
>
> The question upon which I desire an opinion is whether the act will apply to offenses that were committed prior to July 2nd, 1929, but where there was no trial or conviction until after the effective date of the act. There are one or two cases pending in this county in which this is the situation and I would appreciate an early opinion from your department."

House Bill No. 8, which was passed by the 88th General Assembly on the 15th day of March, 1929, and became effective on the 2nd day of July, 1929, is generally known as the Habitual Criminal Act. Sections 1 and 2 of the act are as follows:

> "Section 1. A person convicted in this state of arson, burning property to defraud insurer, robbery, pocket-picking, burglary, burglary of an inhabited dwelling, murder of the second degree, voluntary manslaughter, assault to kill, rob or rape, cutting, stabbing, or shooting to kill or wound, forcible rape or rape of a child under twelve years of age, incest, forgery, grand larceny, stealing motor vehicle, receiving stolen goods of the value of more than $35.00, perjury, kidnapping or child-stealing, who shall have been previously two times convicted of any of the hereinbefore specified felonies separately prosecuted and tried therefor, either in this state or elsewhere, shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense; provided that any of such convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purpose of this section as one conviction.
>
> Section 2. A person convicted in this state of any of the offenses in the next preceding section specified, who shall have been previously convicted three times of any of the said offenses, separately prosecuted and tried there-

for either in this state or elsewhere, shall be adjudged an habitual criminal, and shall be sentenced to imprisonment for the term of his or her natural life; provided that any of such convictions which result from or are connected with the same transaction, or result from offenses committed at the same time shall be counted for the purposes of this section as one conviction."

Section 28 of Article II of the Ohio Constitution, insofar as the same is pertinent to your inquiry, provides as follows:

"The General Assembly shall have no power to pass retroactive laws. * * * "

Section 10, Article I of the United States Constitution, provides in part as follows:

"No state shall * * * pass any * * * ex post facto law. * * * ."

In the case of *Calder* vs. *Bull,* 3 Dall. 386, 1 U. S. (L. ed.) 648, Justice Chase defined the phrase "ex post facto" as follows:

"(1) Every law that makes an action done before passing of the law, and which was innocent when done, criminal and punishes such action:

(2) Every law that aggravates a crime, or makes it greater than it was when committed;

(3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed;

(4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

The term "retroactive," as used in the Ohio Constitution, is defined by the Supreme Court of Ohio in the case of *Miller vs. Hixson,* 64 O. S. 39, as follows:

"A statute which imposes a new or additional burden, duty, obligation or liability as to past transactions, is retroactive."

The authorities hold generally that a statute enhancing the punishment for a second or subsequent offense is not an ex post facto law, merely because the prior offense occurred before the statute in question was enacted or became effective. 58 A. L. R., p. 21.

In the case of *Graham* vs. *West Virginia,* Vol. 224, U. S., p. 626, Justice Hughes, in the course of his opinion in this case, says as follows:

"The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for an earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."

The Supreme Court of Ohio, in the case of *Blackburn* vs. *State,* 50 O. S. 429, in considering the former Habitual Criminal Act of the State of Ohio, passed in 1885, 82 O. L. 237, which was later repealed, held in the fourth branch of the syllabus as follows:

"The statute, in its operation, does not conflict with Section 10 of Article 1 of the Constitution of the United States, prohibiting 'ex post facto' laws, nor with Section 28 of Article 2 of the Constitution of this state, prohibiting 'retroactive' laws, although one, or both, of the previous felonies, charged against him, was committed, and the imprisonment on account thereof inflicted, before the statute in question was enacted."

The authorities seem to hold that previous convictions may be taken into consideration in punishing individuals under habitual criminal acts, and this is not in violation of constitutional guarantees, on the theory that the offender is not punished again for old offenses, but is punished for an offense committed after the act is in effect. However, the conviction upon which the greater punishment is imposed must be for a crime committed after the effective date of the act.

"A statute fixing a greater punishment for the second or third conviction is not ex post facto, though the earlier convictions were before the passage of the act. But in such case the conviction for which the greater punishment is imposed must be for a crime committed after the passage of the act."

Sutherland, Statutory Construction, Vol. II, p. 1185.

"Heavier penalties are often provided by law for a second or any subsequent offense than for the first, and it has not been deemed objectionable that, in providing for such heavier penalties, the prior convictions authorized to be taken into the account may have taken place before the law passed. In such case it is the second or subsequent offense that is punished, not the first *and the statute would be void if the offense to be actually punished under it had been committed before it had taken effect, even though it was after its passage.*" (Italics the writer's.)

Cooley's Constitutional Limitations, Eighth Ed. Vol. I, p. 553.

In 8 Ruling Case Law, Sections 284 and 285, in discussing habitual criminal acts, it is said as follows:

"These statutes relate to the judgment to be rendered and a sentence to be imposed in cases arising after they go into effect. They are prospective and not retrospective. *They deal with offenders for offenses committed after their passage* but provide that, in considering the nature of an offense and the condition in which the offender is brought by it, his previous conduct may be regarded. With this construction they are not unconstitutional as ex post facto laws." (Italics the writer's.)

It is further said in 8 R. C. L., in the sections cited above as follows:

"If, however, the second offense is committed before the enactment of the statute providing the additional punishment for persons who have been previously found guilty, such statute cannot be enforced for such offense because it could not be applied without inflicting a punishment not authorized when the second criminal act was committed." (Italics the writer's.)

In the case of In re Allen, 91 O. S., p. 323, the Supreme Court of Ohio quotes the language of the Supreme Court in the case of *Blackburn* vs. *State,* 50 O. S. 428, as follows:

"A law cannot properly be considered retroactive when it apprises one

who has established, by previous unlawful acts, a criminal character, that if he perpetrates further crimes, the penalty denounced by the law will be heavier than upon one less hardened in crime. In such case the party is informed before he commits the subsequent offense of the full measure of the liability he will incur by its perpetration, and therefore does not fall within the class that is entitled to the protection afforded by the constitutional guaranty against the enactment of ex post facto, or retroactive laws, *for the object sought by those guaranties, in respect to this kind of legislation, is that no transgressor of a penal statute, shall be subjected by subsequent legislation, to any penalty, liability or consequence, that was not attached to the transgression when it occurred.*" (Italics the writer's.)

It is apparent from a reading of the authorities cited above that if House Bill No. 8, passed by the 88th General Assembly, should be so construed that persons could be adjudged habitual criminals under the terms of the act who had been convicted of two or more felonies specified in the act prior to the effective date of the act, and are convicted of third and fourth felonies after the effective date of the act, for offenses committed prior to the date that the act went into effect, then this act would violate the constitutional guaranties afforded these defendants. However, all statutes are to be so construed if possible as to be valid. Sutherland, in his work on Statutory Construction, Vol. II, p. 1161, says as follows:

"The principle that all statutes are to be construed, if possible, as to be valid requires that a statute shall never be given a retrospective operation, when to do so would render it unconstitutional, and the words of the statute admit of any other construction. It is always presumed that statutes were intended to operate prospectively and all doubts are resolved in favor of such construction."

In view of the authorities cited herein, I am of the opinion that House Bill No. 8, generally known as the Habitual Criminal Act, passed by the 88th General Assembly, which became effective July 2, 1929, should be so construed that persons who had been separately prosecuted, tried and convicted two or more times for felonies specified in the act should not be adjudged as habitual criminals and punished under the provisions of the act, unless their third or fourth convictions were for offenses committed after the act became effective.

Respectfully,
GILBERT BETTMAN,
Attorney General.

805.

MERGER—CLERK OF COUNCIL AND CITY AUDITOR—RIGHT OF LATTER TO FEE ALLOWED FORMER FOR SERVING NOTICES, DISCUSSED.

SYLLABUS:

When the council of a city has provided by ordinance that the clerk of council may receive a fee of twenty-five cents for serving each notice required by law, and thereafter the duties of the clerk of council and the city auditor are merged, by authority of Section 4276, General Code, the said city auditor, as clerk of council after such