

5346.

APPROVAL—BONDS OF CITY OF TOLEDO, LUCAS COUNTY,  
OHIO, \$5,000.00.

COLUMBUS, OHIO, April 13, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

5347.

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5348.

MOTOR VEHICLE LICENSE TAX—LEVY AND DISTRIBUTION  
FEATURES OF SECTIONS 6291 AND 6309-2, G. C.,  
STILL IN FORCE.

*SYLLABUS:*

*Sections 6291 and 6309-2, General Code, as they existed prior to their purported amendment and repeal in House Bill No. 40, enacted in the regular session of the 91st General Assembly (116 O. L., 561), are still in full force and effect.*

COLUMBUS, OHIO, April 13, 1936.

HON. FRANK WEST, *Registrar of Motor Vehicles, Columbus, Ohio.*

DEAR SIR: I am in receipt of your communication, which reads as follows:

“With reference to H. B. 40 passed by the last General Assembly amending sections 6291 and 6309-2 of the General Code, the provisions of which were held unconstitutional by the Supreme Court, will you give us your opinion relative to the status of the annual license tax levied under section 6291, G. C., and

the distribution of the fees provided for under section 6309-2, G. C.?

In view of the unconstitutionality of said law, should this bureau be guided by the provisions of the said sections which were in effect immediately prior to the time the same were amended by H. B. 40?

Because of the necessity of making an initial distribution of the 1936 registration year fees to the various political subdivisions at the earliest possible date, not later than April 15 if possible, we ask that you give this your immediate attention."

House Bill No. 40, enacted at the regular session of the 91st General Assembly (116 O. L., 561), contained 14 sections, namely, sections 2293-52, General Code, to and including 2293-63, section 13 amending section 6291, General Code, which provides the tax levy upon the operation of motor vehicles on the public roads and highways in this state and the purposes of such tax, and section 6309-2, General Code, providing for the distribution of motor vehicle license funds, and section 14 of the act, which purported to repeal the then existing sections 6291 and 6309-2, General Code.

The purported amendment of Section 6291, General Code, in so far as it is material to your inquiry, merely provided an additional purpose of the motor vehicle license tax levied for "retiring county, township and municipal bonds issued pursuant to law, to refund road or highway bonds issued prior to January 1, 1935, and refunding prepaid special assessments in connection therewith."

The purported amendment of section 6309-2, General Code, the section providing for the distribution of license tax money, in paragraph No. 5, provided:

"(5). Ten per centum of all taxes collected under the provisions of this chapter shall be paid by the registrar into the state treasury to the credit of the 'state road bond retirement fund', certifying the amount so paid in the manner provided by Section 6309 of the General Code. Said fund shall be appropriated and used for retiring county, township and municipal bonds issued pursuant to law to refund road or highway bonds issued prior to January 1, 1935, and refunding prepaid special assessments in connection therewith."

Section 6309-2, General Code, before its purported amendment, provided for a 100 per cent distribution of license tax money and provided that 47 per cent should be for the use of the county for the construction,

reconstruction, improvement, maintenance and repair of roads and highways. Section 6309-2, General Code, as amended by section 13 of House Bill No. 40, also provided for a 100 per cent distribution of license tax money, but by paragraph 5 of section 6309-2, quoted supra, 10 per cent was to be used for bond retirement, and the amount to be used by the county for the purposes above enumerated was reduced from 47 per cent to 37 per cent.

In the mandamus case of *State, ex rel. Cooley v. Thrasher, County Auditor*, decided by the Supreme Court of Ohio on February 26, 1936, reported in the Ohio State Bar Association Report for the week of March 2, 1936 (130 O. S., 434), the respondent challenged, among other statutes, the constitutionality of sections 6291 and 6309-2, General Code, as amended in House Bill No. 40 (116 O. L., 561). The court in a per curiam opinion, discussing mainly paragraph 5 of section 6309-2, General Code, quoted supra, held these amended sections unconstitutional as violative of section 26 of article II of the Constitution of Ohio.

The precise question raised by your inquiry is whether or not sections 6291 and 6309-2, General Code, as they existed prior to their purported amendment and formal repeal, are now in effect.

The established rule is stated in a note in 60 A. L. R., at page 1483, wherein authorities are collated, to be:

“It is a uniform rule that where there is a valid act and an attempted but unconstitutional amendment to it, the original act is not affected, but remains in full force and effect, even though there are express words of repeal, unless it is clear that the legislature intended such repeal.”

It is also stated in Volume 59 of *Corpus Juris* at pages 939 and 940:

“Unless it (the statute) employs language showing an intent to repeal in any event and irrespective of its unconstitutional provisions, an act which is invalid or unconstitutional and void or inoperative, does not repeal another valid act. The rule is well settled that an unconstitutional enactment will not repeal a former valid law by mere implication, and the rule is the same where the subsequent unconstitutional act declares the repeal of all acts or parts of acts inconsistent therewith, and it is apparent that the repealing statute is to be substituted for the one repealed, there being nothing that can conflict with the void statute. So where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid, unless it shall appear that the

Legislature would have passed the repealing clause even if it had not provided a substitute for the act repealed."

The first three branches of the syllabus in the case of *State, ex rel., Pogue v. Groom*, 91 O. S., 1, shows that the above stated rule is recognized as the law in Ohio:

"1. The act of the General Assembly passed February 16, 1914 (104 O. L., 237), amending Section 5649-3b, General Code, as amended April 16, 1913 (103 O. L., 552), in so far as it purports to designate who shall constitute the county budget commission, is unconstitutional and void.

2. The act of the General Assembly passed April 16, 1913, (103 O. L., 552), purporting to amend Section 5649-3b, General Code, by designating who shall constitute the county budget commission, is to that extent unconstitutional and void, and the repealing clause of the act, in so far as it repeals that portion of Section 5649-3b, is invalid.

3. Where an act of the General Assembly, purporting to provide a substitute for an existing law and in terms repealing the existing law, is declared to be unconstitutional and void, the repealing clause must also be held invalid, unless it clearly appears that the General Assembly would have passed the repealing clause regardless of whether it had provided a valid substitute for the act repealed."

It was also held in the case of *Graves, Secretary of State, v. Janes, et al*, 2 O. App., 383, as disclosed by the first two branches of the syllabus:

"1. Section 6294, General Code, as amended (103 O. L., 763), providing for graded license fees for the use of motor vehicles upon public highways, and Section 6309, General Code, manifesting the legislative purpose, are unconstitutional and void.

2. These sections being unconstitutional, the repealing clause is to that extent void, and the former sections are therefore revived."

See also *State v. Edmondson*, 89 O. S., 351; *State v. Buckley*, 60 O. S. 273; *State v. Heffner*, 59 O. S., 368; *Collins v. Bingham*, 22 Ohio Cir. Ct. (N. S.), 533; *State v. Sayre*, 12 O. N. P. (N. S.), 13; *State v. Schoeff*, 5 O. N. P. (N. S.), 161.

It is clear that the purported amendments of sections 6291 and 6309-2, General Code, in House Bill No. 40 were merely to provide a substitute

for the existing law and since the statutes, as amended, were declared unconstitutional and void in the "Thrasher" case, *supra*, the formal repealing clause in section 14 of House Bill No. 40, purporting to repeal sections 6291 and 6309-2, General Code, must also be held invalid, since it not only does not "clearly appear that the General Assembly would have passed the repealing clause, regardless of whether it had provided a valid substitute for the act repealed", but it is manifest that the General Assembly would not have repealed section 6291, providing the tax levy upon the operation of motor vehicles upon the public roads and highways in this state, and section 6309-2, General Code, providing for 100 per cent distribution of license tax revenue, unless there was a valid substitute for the acts repealed.

Consequently, in specific answer to your inquiry, it is my opinion that sections 6291 and 6309-2, General Code, as they existed prior to their purported amendment and repeal in House Bill No. 40, enacted in the regular session of the 91st General Assembly (116 O. L., 561), are still in full force and effect.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5349.

APPROVAL—CERTIFICATE OF AMENDMENT TO ARTICLES  
OF INCORPORATION OF THE INLAND CASUALTY COM-  
PANY.

COLUMBUS, OHIO, April 13, 1936.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR: I have examined the certificate of amendment to the articles of incorporation of The Inland Casualty Company, and finding the same not to be inconsistent with the Constitution or laws of the United States or of the State of Ohio, I have endorsed my approval thereon.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*