1931.

APPROVAL, NOTES OF SAVANNAH CLEAR CREEK RURAL SCHOOL DISTRICT, ASHLAND COUNTY, OHIO, $1,606.00.

COLUMBUS, OHIO, November 29, 1933.

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

1932.

APPROVAL, NOTES OF GREEN TOWNSHIP RURAL SCHOOL DISTRICT, SUMMIT COUNTY, OHIO, $454.00.

COLUMBUS, OHIO, November 29, 1933.

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

1933.

LIQUOR—CRABBE AND MILLER ACTS—NOT IMPLIEDLY REPEALED BY REPEAL OF 18th AMENDMENT TO U. S. CONSTITUTION AND ARTICLE 15 OF OHIO CONSTITUTION—TAX LEVY LAW ON MANUFACTURE AND SALE OF INTOXICATING LIQUOR MAY BE DRAWN TO BECOME IMMEDIATELY EFFECTIVE UPON PASSAGE.

SYLLABUS:

1. *The Repeal of the Eighteenth Amendment to the Constitution of the United States and section 9 of Article XV of the Constitution of the State of Ohio does not impliedly repeal the Crabbe and Miller Acts, and these acts will continue to be in force and effect until amended or repealed by the legislature.*

2. *Legislation providing for tax levies on the manufacture and sale of intoxicating liquors, which legislation repeals the Crabbe and Miller Acts in order to effectuate the imposition of such levies and which legislation provides the machinery for the administration of such a revenue law, may be so drawn as to go into immediate effect as a law providing for tax levies under Article II, section* 1d *of the Constitution, notwithstanding the fact that such law may not be passed as an emergency measure.*

COLUMBUS, OHIO, November 29, 1933.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR WHITE:—Your letter of recent date is as follows:

> "May I request your formal opinion relative to the effect that the repeal of the Eighteenth Amendment will have on December 5th with regard to the existing enforcement laws upon the statute books of Ohio,

and with respect to the effect that such repeal will have upon any federal statutes enacted under the authority of the Eighteenth Amendment?

It has been informally suggested to me that the Ohio enforcement laws, such as the Crabbe and Miller Acts, will remain in full force and effect until repealed by the General Assembly."

It has been held by the courts of this country that state constitutions are not grants of power but are rather limitations on the legislative power of the law-making bodies. In other words, the state legislatures have plenary power of legislation and may pass any law not forbidden by the constitution of a state or of the United States. 6 R. C. L. 132. This rule of law is supported in this state by judicial pronouncement and by constitutional provision. See *Gum Company, et al.* vs. *Laylin,* 66 O. S. 578, 593, and *Saviers, et al.* vs. *Smith,* 101 O. S. 132. Section 1 of Article II of the Constitution of the State of Ohio reads in part:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided, and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."

The rule of law in reference to the power to enact legislation by the law-making bodies of the several states and federal government is stated in 6 R. C. L., 134, as follows:

"The United States Constitution contains an enumeration of powers expressly granted by the people to the federal government, and accordingly it is treated as an enabling and not a restraining instrument. It is axiomatic that the United States is a government of limited enumerated and delegated powers, and that it cannot exercise any authority not granted by that instrument either in express words or by necessary implication. * * * In construing a law of the United States, we look, therefore, to the federal constitution to see if the power is granted, but, *in construing the law of a state, we must determine whether the legislature is prohibited by express words or by implication* either in the federal or state constitutions, from enacting such a law." (Italics the writer's.)

In view of the fact that state constitutions are considered as limitations on the law-making power and not as grants of power, it necessarily follows that the enactment of the Crabbe and Miller Acts was independent of section 9 of Article XV which reads:

"The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The General Assembly shall enact to make

this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental, or other non-beverage purposes."

The enactment of the Crabbe and Miller Acts was by virtue of the police power of the state. The courts have universally held and it is a well settled rule of law in this country that the police power of a state extends to the prohibition of the manufacture and sale of intoxicating liquors. See *Mugler* vs. *Kansas,* 123 U. S. 623; *Clark Distilling Company* vs. *West Maryland Railroad Company,* 242 U. S. 311, 320; *Eiger* vs. *Garrity,* 246 U. S. 97, 102; and 15 L. R. A. (N. S.) 908.

Incidentally, it was held in the case of *State of Tennessee* vs. *Rhodes,* 242 S. W. 642, that

"The states did not, by the ratification of the Eighteenth Amendment to the Constitution, surrender the right to deal with the subject of intoxicating liquors by appropriate legislation not authorizing or sanctioning what the amendment prohibits."

The court in the course of its opinion said:

"We do not accept the idea that the power of the state over intoxicating liquors now flows from the Eighteenth Amendment to the Federal Constitution as has been suggested."

It is to be noted that the provisions of section 9 of Article XV of the Ohio Constitution are not a grant of power to the General Assembly to enact laws prohibiting the manufacture and sale of intoxicating liquors, but are rather a limitation of the power of the law-making body to enact legislation permitting the manufacture and sale of intoxicating liquors. The constitutional provision in question also contains a mandatory direction to the legislature to enact a prohibition law under the police power of the state. There is no language in that constitutional provision which could be deemed as being a grant of power to the legislature to enact law prohibiting the manufacture and sale of intoxicating liquors and, even if section 9 of Article XV did grant such power it would only be cumulative to and not the course of the power of the legislature to enact prohibition laws. See Section 6212-13, General Code. In other words, even if the provisions of Section 9 of Article XV were given a liberal construction, the legislature would have had full power to enact the Crabbe and Miller Acts with or without the provisions of that constitutional amendment. Thus, the repeal of section 9 of Article XV will not necessarily repeal the Crabbe and Miller Acts since it cannot be said that the legislature derived its power to enact these acts solely from that constitutional amendment. It is also a familiar rule of law that statutes are perpetual and continue to be in force and effect until the continuous power of repeal of the law-making body is exercised, unless otherwise prohibited or limited by state or federal constitution. Lewis' Sutherland Statutory Construction, Vol. I, page 456.

The courts have also held that all statutes in force and effect and not inconsistent with a new constitution or with a constitutional amendment, continue until amended or repealed by the legislature. See 6 R. C. L. 34; Ohio, ex rel, *Evans* vs. *Dudley,* 1 O. S. 437; *Cass* vs. *Dillon,* 2 O. S. 607; *Commissioners* vs. *Nichols,* 14 O. S. 260; and *State* vs. *Cameron, et al.,* 89 O. S. 215. The rule of law is announced in *Cass* vs. *Dillon* as follows:

"The laws of a conquered country being held to remain in full force until repealed, as far as they are consistent with the government of the conquerors, *a fortiori* must it be held, that the laws of a state survive a peaceable change of its constitution, effected by its own people and not varying the general structure of the government, to the full extent to which they are consistent with the new order of things.

The new constitution of Ohio created no new state. It only altered, in some respects, the fundamental law of a state already in existence; and even this was done pursuant to the prior constitution, under whose provisions the convention was called and the new constitution framed.

It follows, that all laws in force when the latter took effect, and which were not inconsistent with it, would have remained in force without an express provision to that effect and all inconsistent laws fell simply because they were inconsistent; in other words, all repugnant laws were repealed by implication.

The rule, that repeals by implication are not favored, is applicable to the inquiry whether any particular enactment has ceased to be in force on account of repugnancy to the new constitution. Ohio, ex rel. *Evans* vs. *Dudley,* 1 Ohio St. 437, approved.

The repugnancy which must cause the law to fall, must be necessary and obvious; if by any fair course of reasoning, the law and the constitution can be reconciled, the law must stand."

It is apparent from these principles of law that the repeal of section 9 of Article XV will not impliedly repeal the Crabbe and Miller Acts unless the provisions of the acts are inconsistent with the Constitution of the State of Ohio. It must be conceded that if the Crabbe and Miller Acts had been enacted after the repeal of section 9 of Article XV, their existence would be consistent with the other provisions of the Ohio Constitution and they would be valid and subsisting laws enacted under the police power of the state. Likewise, the repeal of a constitutional limitation, such as section 9 of Article XV of the Constitution of the State of Ohio, would not affect acts which are similar to the purpose and objective of the constitutional amendment.

From the principles of law stated herein, it is my opinion that the repeal of the Eighteenth Amendment to the Constitution of the United States and section 9 of Article XV of the Constitution of the State of Ohio does not impliedly repeal the Crabbe and Miller Acts, and these acts will continue to be in force and effect until amended or repealed by the legislature.

With respect to your inquiry as to the effect the repeal of the Eighteenth Amendment to the Constitution of the United States will have upon federal statutes enacted under authority of that amendment, I have already indicated in the quotation from 6 R. C. L., supra, the answer to this question. You do not inquire as to the authority of Congress to legislate upon the matter of trafficking in alcoholic beverages in interstate commerce and I presume that your inquiry concerns the matter of the power of Congress to enact intrastate prohibition laws. It is my opinion that such laws will be invalid and inoperative on the effective date of the repeal of the Eighteenth Amendment to the Constitution of the United States.

Article II, section 1d of the Ohio Constitution provides that "Law providing for tax levies * * * shall go into immediate effect", and accordingly such laws are not subject to referendum.

There are several cases decided by the Supreme Court dealing with this

question. The most recent is the case of *State, ex rel.* vs. *Brown,* 112 O. S. 590, in which the first paragraph of the syllabus is as follows:

> "House Bill No. 44 (111 O. L. p. 294) is a law providing for a tax levy and comes within the provisions of section 1d of Article II of the Constitution of Ohio, 'laws providing for tax levies * * * shall not be subject to the referendum'."

In Opinions of the Attorney General for the year 1929, Vol. I, page 587, the case of *State, ex rel.* vs. *Brown, supra,* was referred to as follows:

> "In the case of *State ex rel.* vs. *Brown* (112 O. S. 590), it was held that said H. B. No. 44 (111 O. L. 294) was a law providing for a tax levy within the provisions of section 1d of Article II of the Constitution of Ohio and as such, went into immediate effect on its passage by the General Assembly, notwithstanding the objections of the Governor. Inasmuch as all of the sections of said act relating to excise tax other than the section thereof imposing the tax, were merely incident to the tax so levied in a definite way, and by way of providing for administrative measures with respect to the computation and collection of the tax, and by way of appropriations of the proceeds of said tax for the purposes for which the same was levied, the Supreme Court in the case above cited, held that the act itself, and not only the section thereof providing for the imposing of the tax, was exempt from the referendum reserved and provided for by section 1 and 1c of the State Constitution."

It is, of course, impossible to determine in advance whether or not any proposed legislative act will in its entirety be a "law providing for tax levies". If as a matter of fact the purpose of a section of the law is to provide revenue, it is not subject to referendum, whether such a law refers to the taxation for revenue purposes of intoxicating liquor or other substance.

In view of the decision of the Supreme Court in *State, ex rel. Brown, supra,* and the construction placed thereon by this office, it is my opinion that legislation providing for tax levies on the manufacture and sale of intoxicating liquors, which legislation repeals the Crabbe and Miller Acts in order to effectuate the imposition of such levies and which legislation provides the machinery for the administration of such a revenue law, may be so drawn as to go into immediate effect as a law providing for tax levies under Article II, section 1d of the Constitution, notwithstanding the fact that such law may not be passed as an emergency measure.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1934.

APPROVAL, BONDS OF WHITEHOUSE VILLAGE SCHOOL DISTRICT, LUCAS COUNTY, OHIO—$84,385.00.

COLUMBUS, OHIO, November 29, 1933.

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