3890.

INSURANCE—DULY CERTIFIED AGENT OF DOMESTIC CASUALTY COMPANY—MAY SOLICIT WITHOUT BEING LICENSED BY SUPERINTENDENT OF INSURANCE—OPINION NO. 3437 RECONSIDERED AND REAFFIRMED.

SYLLABUS:

Opinion No. 3437, dated July 16, 1931, reconsidered and reaffirmed.

COLUMBUS, OHIO, December 28, 1931.

HON. CHARLES T. WARNER, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Reconsideration has been requested on certain questions heretofore considered by me in Opinion No. 3437, addressed to you under date of July 16, 1931. The questions considered in said opinion were presented in a communication addressed by you to me, which communication reads as follows:

> "The Department of Insurance would be pleased to have your construction and interpretation of Section 654-1 and Section 644 of the General Code of Ohio, in the following particulars to-wit:
>
> 1. Does the Superintendent of Insurance have jurisdiction to license agents for Domestic Casualty Companies under Section 654-1, or is his authority limited only to revoking certificates of agents for causes enumerated in said section?
>
> 2. What application, if any, has Section 644 to the question of licensing agents for Domestic Casualty Companies?"

In the consideration of the questions here presented, it is noted that at the time section 654-1, General Code, referred to in your communication, was originally enacted in 1915, sections 644 and 654 of the General Code of 1910 provided as follows:

> Sec. 644. "No person, company or corporation in this state, shall procure, receive, or forward applications for insurance in any company or companies not organized under the laws of this state, or in any manner aid in the transaction of the business of insurance with such company, unless duly authorized by such company and unless duly licensed by the superintendent of insurance."
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> Sec. 654. "By resolution of its board of directors or managers, an insurance company not organized under the laws of this state may appoint one or more general agents with authority to appoint other agents in this state. A certified copy of such resolution and appointment shall be filed with the superintendent of insurance, and agents so appointed by such general agents, shall be deemed to be the agents of such company as if directly appointed by such company. Agents for such company may be appointed in writing by the president, vice-president, chief manager or secretary thereof, and when so appointed shall be deemed to be the agents of such company as fully as if appointed by the board of directors or managers thereof."

On May 5, 1915, section 654-1, General Code, referred to above, was enacted. Said section provided as follows:

> "Every insurance company organized under the laws of this state and transacting the business of life insurance, or the business of casualty insurance, shall certify under the hand of one of its principal officers or of its duly authorized officer or agent, to the superintendent of insurance of this state, the names and addresses of the persons authorized by it, as its agents, to solicit or place insurance. The authority of such agent shall continue until cancelled by the company by like certificate filed with the superintendent of insurance, unless the authority of the agent shall be revoked by the superintendent of insurance.
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> The superintendent of insurance shall record the names and addresses so certified in such manner that duly authorized agents and their respective companies may conveniently be inspected.
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> No person shall act as agent for such company in soliciting or placing insurance, unless the unrevoked certificate of his authority is so filed with the superintendent of insurance.
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> Upon conviction of any such insurance agent, for the violation of any insurance law of this state, the superintendent of insurance may revoke the authority of such agent for not more than one year and cancel his name on the records of the superintendent of insurance, and notify the agent and his company or companies of such revocation; and thereafter, such agent shall not act as an insurance agent or transact any insurance business for or on behalf of any insurance company until new certificate or certificates of his authority, by the company or companies thereafter appointing him, shall be duly filed with and approved by the superintendent of insurance.
>
> No other license or evidence of authority of such insurance agent shall be required, and there shall be no fee or other expense in connection with such certificates of authority." 105-106 O. L. 241.

Whatever might be said with respect to the application and effect of either section 644 or section 654, General Code, as originally enacted and carried into the General Code of 1910, in view of the provisions of the other of said sections, there was nothing in the provisions of section 654-1, General Code, inconsistent with the provisions of the earlier sections of the General Code above quoted. These sections made certain provisions with respect to the agents of foreign insurance companies, while section 654-1, General Code, related solely to the designation and qualification of agents of domestic life and casualty insurance companies. Thereafter, on March 20, 1917, an act was passed amending said section 644 of the General Code and supplementing said section by the enactment of sections 644-1, 644-2, 644-3, 644-4 and 644-5, General Code. Section 644, as amended in said act, reads as follows:

> "No person shall procure, receive, or forward applications for insurance unless a resident of this state and duly licensed by the superintendent of insurance. Upon written notice by an insurance company authorized to transact business in this state of its appointment of a person to act as its agent the superintendent of insurance shall, if he is satisfied that the appointee is a suitable person, and intends to hold himself

out in good faith as an insurance agent, issue to him a license which shall state, in substance, that the company is authorized to do business in this state and that the person named therein is the constituted agent of the company in this state for the transaction of such business as it is authorized to transact therein. Such notice shall be upon a form furnished by the superintendent of insurance and shall be accompanied by a statement under oath by the appointee which shall give his name, age, residence, present occupation, his occupation for the five years next preceding the date of the notice, and such other information, if any, as the superintendent of insurance may require, upon a blank furnished by him. The superintendent of insurance after the granting of such license, for cause shown, and after a hearing may determine any person so appointed, or any person heretofore appointed as agent, to be unsuitable to act as such agent, and shall thereupon revoke such license and notify both the company and the agent of such revocation. Unless revoked by the superintendent of insurance, or unless the company by written notice to the superintendent cancels the agent's authority to act for it, such license and any other license issued to an agent or any renewal thereof shall expire on the last day of February next after its issue. But any license issued and in force when this act takes effect or thereafter issued, may, in the discretion of the superintendent, be renewed for a succeeding year or years by a renewal certificate without the superintendent's requiring the detailed information required by this act. A foreign company shall pay a fee of two dollars for every such license and for each renewal thereof. While such license remains in force, a foreign company shall be bound by the acts of the person named therein within his apparent authority as its acknowledged agent."

117 O. L. 699.

Section 644-1, General Code, related to the employment of solicitors by agents of insurance companies. Section 644-2, General Code, provided for licensing insurance brokers. By Section 644-3, General Code, as enacted in said act, provision was made for the revocation by the Superintendent of Insurance of licenses issued to agents, solicitors or brokers. Section 644-4, General Code, as thus enacted, provided that it should be unlawful for any insurance company authorized to do business in this state to allow or pay any commission to any person, firm or corporation for negotiating any contract of insurance on property within the state, unless such person, firm or corporation was licensed as provided for in said act.

As will be observed from a reading of its provisions, section 644, General Code, as enacted by the act of 1917, deals in a comprehensive way with respect to the matter of the qualification of agents for all kinds of insurance companies authorized to do business in this state, and provides that such agents shall be persons licensed by the Superintendent of Insurance.

In view of the comprehensive provisions of section 644, General Code, relating to the licensing of agents of insurance companies, and the manifest purpose of the legislature to cover the whole subject with respect to the qualification of agents authorized to do business in this state, it might well have been argued that the legislature in the enactment of the provisions of this section as amended, thereby evinced an intention to repeal by implication the provisions of section 654-1, General Code, which were inconsistent with the later act, in the absence of

some provision in the later act evincing a contrary intent. This result might be said to follow from the rule of statutory construction that a subsequent legislative enactment which deals with the whole subject of a former enactment, and is evidently intended as a substitute therefor, operates as a repeal of the former enactment by implication. Touching this point, the Supreme Court of this state in the case of *Goff* vs. *Gates,* 87 O. S. 142, held:

> "An act of the legislature that fails to repeal in terms an existing statute on the same subject matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former or if the subsequent act revises the whole subject matter of the former act and is evidently intended as a substitute for it."

However, it is noted that in the act of 1917, amending section 644, General Code, so as to read as above quoted, the legislature in and by the enactment of section 644-5, General Code, expressly provided that said act should not have the effect of repealing section 654-1, General Code. Said section 644-5, General Code, as thus enacted, provided as follows:

> "Nothing in this act shall be construed as modifying or repealing the provisions of section 654-1 and section 5438 of the General Code nor shall the provisions hereof apply to insurance companies other than companies organized or admitted for the purposes provided in subdivision 1 of section 9510 of the General Code, nor shall it apply to mutual protective associations nor to companies operating on the mutual or assessment plan, organized under the laws of Ohio."
> 117 O. L. 701.

On March 27, 1925, an act was passed by the 86th General Assembly amending section 654-1, General Code, and supplementing said section by the enactment of sections 654-2 to 654-12, inclusive, of the General Code (111 O. L. 125). By this act, which was approved by the Governor, April 9, 1925, filed in the office of the Secretary of State, April 11, 1925, and which went into effect on the 10th day of July, 1925, section 654-1 was amended so as to take from said section the words "life insurance", thereby leaving the section to operate only with respect to the agents of casualty insurance companies organized under the laws of this state. At the same session of the 86th General Assembly, to wit, on March 26, 1925, section 644-5, General Code, above quoted, was amended so as to read as follows:

> "Nothing in this act shall be construed as modifying or repealing section 5438 of the General Code nor shall the provisions hereof apply to companies or associations transacting the business of life insurance or their agents nor shall it apply to associations organized and operating under sections 9593 to 9603, both included, General Code of Ohio." 111 O. L. 185.

This act was approved by the Governor, April 10, 1925, filed in the office of the Secretary of State, April 15, 1925, and went into effect on July 14, 1925. It will be noted that the effect of this amendment was to take from said section

644-5, General Code, which section had been originally enacted at the time section 644, General Code, was amended, the reference to section 654-1, General Code, originally contained therein.

It is important in this connection to consider the effect of the amendment of section 644-5, General Code, in its relation to section 644 and other sections of the General Code originally enacted with it in and by the act of March 20, 1917, above referred to. The general rule is that an amended statute is to be given the meaning that it would have had if it had read from the beginning as amended. In the case of *McKibben* vs. *Lester,* 9 O. S. 627, this rule was stated more comprehensively as follows:

> "Where one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, and repeals the section or sections so amended, the section or sections as amended must be construed as though introduced into the place of the repealed section or sections in the original act, and, therefore, in view of the provisions of the original act, as it stands after the amendatory sections are so introduced."

In the case of *State, ex rel.,* vs. *Cincinnati,* 52 O. S. 419, the court, after quoting in its opinion the rule of construction laid down in the case of *McKibben* vs. *Lester,* supra, above quoted, further held that:

> "An amended section of a statute takes the place of the original section and must be construed with reference to the other sections, and they with reference to it; the whole statute, after the amendment, has the same effect as if re-enacted with the amendment."

In view of these rules of construction with respect to the effect to be given to the amendment of section 644-5 and to section 644, General Code, originally enacted with said section, the further question is now presented as to the effect of the provisions of section 644, General Code, and of its related sections, upon the provisions of section 654-1, as amended by the act passed by the 86th General Assembly, March 27, 1925.

In this connection, the first question here presented is as to which of these acts passed by the 86th General Assembly in March, 1925, is the later act. As to this, it will be noted that the act amending section 644-5, General Code, was passed by the General Assembly on March 26, 1925, one day prior to the time said General Assembly passed the act amending section 654-1. However, the act amending section 644-5 was approved by the Governor on April 10, 1925, one day after the act amending section 654-1, General Code, was approved by the Governor. In this connection, it is further noted that the act amending section 644-5, General Code, was filed in the office of the Secretary of State on April 15, 1925, four days after the act amending section 654-1 was filed in the office of the Secretary of State, and, of course, the act amending section 644-5 went into effect four days later than the other act. With respect to the question at hand, it is to be observed that in acting on the approval or disapproval of bills enacted by the House and Senate, the Governor acts as a branch of the legislative power of the state. See *Lukens* vs. *Nye,* 156 Calif. 498; *State, ex rel.,* vs. *Deal,* 24 Fla. 293; *Cammack, Attorney General,* vs. *Harris,* 234 Ky. 846; *Commonwealth* vs. *Barnett,* 199 Pa. State 161; *State, ex rel. Crocker,* vs. *Jenkins,* 79 Nebr. 532; *Cooper* vs.

Nolan, Treas., 159 Tenn. 379; *Gottstein* vs. *Lister, Gov.,* 88 Wash. 462. "The last legislative act which breathes the breath of life into a statute and makes it a part of the laws of the state is the approval of the Governor." *Stuart* vs. *Chapman,* 104 Me. 17. In the case of *Patterson Foundry and Machine Company* vs. *The Ohio River Power Company,* 99 O. S. 429, the court held:

> "The date of the passage of an act is the date of the last action required to complete the process of legislation and give the bill the force of law."

Referring to the case last cited, the Supreme Court of this state in the case of *Cincinnati Traction Company* vs. *Utility Commission,* 113 O. S. 618, 628, in its opinion said:

> "It has been held by this court in *Patterson Foundry and Machine Company* vs. *Ohio River Power Co.,* 99 Ohio St., 429, 124 N. E., 241, that the passage of an act refers to the date of the signing of the bill by the Governor, or the expiration of 10 days from the time the bill was presented to the Governor, if not signed by him."

In this view, the act amending section 644-5 was the later act. This conclusion, perhaps, likewise follows from the fact that the act amending section 644-5, General Code, went into effect at a later date than did the other act. *State of Ohio* vs. *Lathrop,* 93 O. S. 79.

It is to be observed that there is a marked conflict between the provisions of section 644, General Code, and those of section 654-1, General Code. Section 644, General Code, by its terms, applies to the agents of all insurance companies authorized to do business in this state, and provides that such agents shall be qualified by securing licenses for the purpose from the Superintendent of Insurance. Section 654-1, General Code, as amended, applies to the agents of domestic casualty companies, and as to such agents provides that they shall be qualified by having their names certified by their companies to the Superintendent of Insurance; and the statute further provides that no further license shall be required for such agents. There are other points of conflict in the provisions of these sections. The question is here presented as to what effect is to be given to the provisions of section 654-1, General Code, in view of the later and more comprehensive provisions of section 644, General Code. Touching this question, the Supreme Court of this state in the case of *City of Cincinnati* vs. *Connor,* 55 O. S. 82, 89, in its opinion, said:

> "It is an equally well established rule, that the provisions of a statute are to be construed in connection with all laws in pari materia, and especially with reference to the system of legislation of which they form a part, and so that all the provisions may, if possible, have operation according to their plain import. It is to be presumed that a code of statutes relating to one subject, was governed by one spirit and policy, and intended to be consistent and harmonious, in its several parts. And where, in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring them in harmony with that policy."

Standing alone, the provisions of section 644, General Code, and those of the other sections of the General Code enacted with it, would seem quite clearly to declare a policy with respect to the manner in which agents of insurance corporations are to be qualified to represent and do business for insurance companies in this state. The general policy so declared is that all such agents are required to be licensed by the Superintendent of Insurance. However, it is not possible to construe the provisions of section 654-1, General Code, so as to bring them in harmony with the policy thus plainly declared by section 644, General Code. In this situation, it might be argued that section 644, General Code, was intended to cover the whole law on the particular subject of the qualification of agents of insurance companies, and that by the enactment of said section it was intended to supersede any and all prior enactments on that subject matter, and to furnish in itself alone the whole and only system of statutory law applicable to that subject, with the result that the conflicting provisions of section 654-1, General Code, should be considered to have been repealed by implication by the later and more comprehensive provisions of section 644, General Code. It might be argued that this result follows from the application of the rule of construction noted in the case of *Goff* vs. *Gates,* supra, and other cases that might be cited on this point.

On the other hand, it is argued that, with respect to the agents of domestic casualty companies, effect should be given to the special provisions of section 654-1, General Code, as against the more general provisions of section 644, General Code, and that the provisions of section 654-1, General Code, to the extent that they are in conflict with those of section 644, General Code, should be considered an exception to the provisions of the last named section. As to this, it is noted that in the case of *City of Cincinnai* vs. *Connor,* supra, it was said:

> "We recognize it to be a well settled rule of statutory interpretation that: 'Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one;' and hence 'if there are two acts, or two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also; and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision.' Endlich on Inter. Stat., section 216; Sedwick on Stat. and Const. Law, Section 652. Maxwell on Inter. of Stat. p. 202, Second Ed."

In the case of *Doll* vs. *Barr,* 58 O. S. 113, the court, in its opinion, quoting Endlich on the Interpretation of Statutes, said:

> "In Endlich on the Interpretation of Statutes, Section 216, the rule is stated to be that: 'Where there are in one act, specific provisions relating to a particular subject, they must govern in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone would be broad enough to include the subject to which the more particular relate'. And, 'if there are two acts, or two provisions of the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general

and would, if standing alone, include it also, and if reading the general provisions side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision'."

Further on this question, the following is noted in the opinion of the court in the case of *State, ex rel.,* vs. *Cleveland,* 115 O. S. 484, 488:

"In the case of *City of Cincinnati* v. *Holmes,* 56 Ohio St., 104, 46 N. E., 514, Judge Minshall, at page 115 (46 N. E., 516), adverts to the following rule of construction in such cases:

'I know of no rule of construction of statutes of more uniform application than that later or more specific statutes do, as a general rule, supersede former and more general statutes, so far as the new and specific provisions go.'

The general rule upon the subject is stated thus:

'Where there is one statute dealing with a subject in general comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute.' 36 Cyc. 1151."

In the case of *State, ex rel.,* vs. *Connar, Superintendent of Public Works,* 123 O. S. 310, it was held:

"Special statutory provisions for particular cases operate as exceptions to general provisions which might otherwise include the particular cases and such cases are governed by the special provisions."

Moreover, touching the suggestion that the conflicting provisions of section 654-1, General Code, were repealed by the more general provisions of section 644, General Code, it is noted that the Supreme Court, in the case of *State, ex rel.,* vs. *State Office Building Commission,* 123 O. S. 70, held:

"The presumption against the repeal of statutes by implication is stronger where provisions claimed to be in conflict were passed at nearly the same time."

The court, in its opinion in this case, said:

"The rule is familiar and elementary that repeals by implication are not favored, and the presumption obtains that the Legislature in passing a statute did not intend to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two is irreconcilable. 'The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed

at nearly the same time.' 1 Lewis' Sutherland Statutory Construction (2d Ed.), Section 268."

With respect to the questions presented in your communication, it would seem, therefore, that with respect to the agents of domestic casualty companies they may be qualified by proceeding under the provisions of section 654-1, General Code, and that as to such agents the provisions of section 644, General Code, do not apply.

In the foregoing discussion no comment has been made upon the wisdom or unwisdom of a legislative policy which requires the licensing of all types of insurance agents except the one here under consideration. It is difficult to see the justification for a discrimination of this character, but where the legislative intent is clear, as it seems to be in this case, there remains nothing but to carry out that intent if it can be accomplished without a violation of constitutional rights.

It has been urged in briefs that have been submitted to me that, if it be the fact that agents of domestic casualty companies need not be licensed, the exception is unconstitutional as being a denial of the equal protection of the law. While there is much force to this argument, I have not felt that I could, with propriety, address myself to this phase of the problem. It has been the uniform policy not only of myself but of my predecessors in office to refrain from expressing views upon the constitutionality of existing laws, but to leave these questions to the courts.

Our plan of government divides public functions into three departments, namely, the legislative, executive and judicial. It is the function of the legislative arm to pass the laws, of the executive arm to administer the laws, and of the judicial arm to interpret the laws. Consequently, it has always been exclusively the function of the judiciary to hold unconstitutional, enactments of the legislative branch. It has seemed to follow that any officer of the executive branch should assume the constitutionality of any action by the legislative branch until the courts have spoken to the contrary.

It is for these reasons that the uniform office policy to which I have referred has been adopted, and I feel that, in conformity thereto, it would be an impropriety for me to express any conclusions upon the constitutional question that may be involved.

Accordingly, though realizing the questionableness of the legislative policy and the cogency of the arguments advanced upon the constitutional question, I feel constrained to reaffirm the conclusions already expressed in Opinion No. 3437, addressed to you under date of July 16, 1931.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3891.

APPROVAL, BONDS OF MEIGS TOWNSHIP RURAL SCHOOL DISTRICT, MUSKINGUM COUNTY, OHIO—$800.00.

COLUMBUS, OHIO, December 28, 1931.

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