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COURT PROCEDURE—TRIAL—JURY—SECTIONS 11575, 11576, 11578, 11580, 11599, 11600, 11631 and 12223-7, GENERAL CODE, AMENDED BY HOUSE BILL NO. 170, 96 GENERAL ASSEMBLY AND SECTIONS 11576-1, 11601-1, GENERAL CODE, AS ENACTED IN SAID ACT, NOT APPLICABLE TO ACTIONS PENDING, OCTOBER 11, 1945, EFFECTIVE DATE OF HOUSE BILL NO. 170.

SYLLABUS:

Sections 11575, 11576, 11578, 11580, 11599, 11600, 11631 and 12223-7 of the General Code, as amended by House Bill No. 170 of the 96th General Assembly, and sections 11576-1 and 11601-1 of the General Code, as enacted in said act, are not applicable to actions pending on October 11, 1945, the effective date of said House Bill No. 170.

Columbus, Ohio, October 8, 1945

Hon. Frank T. Cullitan, Prosecuting Attorney  
Cleveland, Ohio

Dear Sir:

This will acknowledge receipt of your communication, which reads as follows:

"I have been requested by Leonard F. Fuerst, Clerk of Courts of Cuyahoga County, to ask your opinion as to the duty of the Clerk in the following situation:

In the last session of the legislature, House Bill No. 170 was passed amending General Code sections 11578 and 11599, amongst others.

Such sections in general provide that upon the rendition of a verdict in a jury case a journal entry of judgment in conformity with such verdict shall be approved by the Court in writing and filed with the Clerk for journalization and that application for new trial must be made within ten (10) days after such journal entry has been filed with the Clerk. These sections of course change the procedure heretofore provided by General Code section 11599 providing the clerk shall enter judgment on the verdict only when the Court has sustained such verdict by overruling a motion for a new trial.

The act goes into effect on October 11th, next, and contains no provision for its application to pending lawsuits.

In these circumstances the Clerk is confronted with the following questions.

(1) If, in a presently pending case, a verdict is rendered by a jury on October 10th, are the subsequent proceedings in such case controlled by the former statutes so that a motion for new trial must be filed within three (3) days thereafter and the duty of the Clerk to enter judgment does not arise until the overruling of such motion?

(2) If, in a presently pending case, a verdict of a jury is rendered after October 11th, are the subsequent proceedings controlled by the amended statutes so that no duty of the Clerk arises to enter judgment on such verdict until a journal entry of judgment in conformity to the verdict has been approved by the Court in writing filed with the Clerk for journalization?

If General Code section 26 providing for the effect on pending actions of the amendment or repeal of statute limits the application of the sections above referred to to the new actions, manifestly to avoid confusion and mistakes that might result in grave injustice, it will be necessary that the Clerk provide some effective means to differentiate those actions which were begun before and after the effective date of such act."

Under the terms of House Bill No. 170 of the 96th General Assembly, which becomes effective on October 11, 1945, sections 11575, 11576, 11578, 11580, 11599, 11600, 11631 and 12223-7 of the General Code are

amended, and supplemental sections 11576-1 and 11601-1 of the General Code are enacted.

Since all the sections of the General Code affected by the passage of said act deal either with a new trial or the time for perfecting an appeal, they are remedial in character. In other words, the statutes amended or enacted affect the remedy only and not the cause of action. While such amendments and supplemental enactments change certain procedure in court, they do not affect the rights of the parties. Therefore, relating to the remedy, such amendments must be considered in light of section 26 of the General Code, which reads:

“Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

An examination of House Bill No. 170 will disclose no language contained therein which expressly provides that the amendments effectuated by the passage thereof should affect pending actions. In this regard, your attention is directed to a number of decisions of our courts wherein it was held in each instance that unless otherwise expressly provided, pending actions, prosecutions or proceedings are not affected by the repeal or amendment of any statute which relates to the remedy.

In *Dellenbarger v. Hunger, et al.*, 1 C. C. (N.S.) page 94, decided May 25, 1903, the then Circuit Court of Cuyahoga County, after quoting from the provisions of section 79 of the Revised Statutes, which section was superseded by and contained language identical to section 26 of the General Code, stated:

“It not being expressed in the act of May 2, 1902, (95 O.L., 351), regulating the time of entering judgment on a verdict, that said act shall apply to pending actions, prosecutions and proceedings, it does not apply to actions pending at the time of its passage.”

Similarly, in *Elder, et al., v. Shoffstall, et al.*, 90 O. S. 265, it was declared (page 271):

“\* \* \* This act of the general assembly is remedial in its nature and must be considered and construed in connection with section 26 of the General Code, for so long as that section remains the law of Ohio all subsequent legislation must be construed in accordance therewith. \* \* \*

This act amending Section 11455, General Code, did not expressly provide that it should affect pending actions. It is clear therefore, that it can have no application to this case, for this was not only a pending action, but the jury had been impaneled and the trial had proceeded for at least eight days before this law went into effect.”

Again, in *State, ex rel. v. Atkinson, et al.*, 138 O. S. 157, it is stated (page 163) :

“Section 26 is a salutary statute and should be preserved against emasculation by judicial interpretation. Its nature is such as to require it to be read in connection with every amending and repealing statute which affects pending actions, prosecutions or proceedings or existing causes of action, prosecutions or proceedings for purposes of statutory construction. It is with knowledge of the existence of the general saving provision and its effect upon every revision or repeal of remedial statutes that the General Assembly acts. Moreover recognition has been given by the legislative body of the state to the necessity for express provision in order to affect the remedy in pending proceedings.”

The most recent expression of our Supreme Court on the subject appears in *Toledo v. Jenkins*, 143 O. S. 141, decided April 5, 1944, wherein the court, speaking through Williams, J., said (page 160) :

“As it was not expressly provided in the amending act that it should apply to pending proceedings, the application, having been filed before the amendment became effective, was sufficient without having attached thereto such a certificate or affidavit.”

From the above, it unanswerably follows that all actions pending on October 11, 1945 will in no way be affected by the amendments of the foregoing sections, and all subsequent proceedings in such actions are governed and controlled by the provisions of said sections as they existed prior to October 11, 1945.

In connection herewith it should also be pointed out that the General Assembly, in addition to amending certain existing sections of the General

Code, enacted supplemental sections 11576-1 and 11601-1 of the General Code, by the passage of House Bill No. 170.

Since section 26 in terms refers only to the repeal or amendment of an existing statute, the question as to whether or not the above two sections, after the effective date thereof, would be applicable to pending actions, immediately arises. This precise question, arising under circumstances similar to those herein, was before our Supreme Court in the case of *State, ex rel. v. Ach*, 113 O. S. 482, wherein it was held:

“Where a legislative enactment materially changes the procedure required to be followed by any governmental agency by requiring certain steps to be taken which were not theretofore necessary, such legislation amounts to an amendment of the laws theretofore existing, and is therefore subject to the rule of interpretation provided by section 26 of the General Code.”

In the opinion of said case it was stated by Marshall, C. J., (pages 485 and 486):

“It is insisted, however, that that rule of interpretation may not be applied, because Section 26 by its terms applies only to an amendment or repeal of an existing statute. It is insisted that the enactment of July 23, 1925, is neither an amendment nor a repeal of any existing legislation, but, on the contrary, is, a new statute. By reference to 111 Ohio Laws, p. 494, we find that the title of the act states that it is intended to supplement Section 5654, General Code, by enacting supplementary Section 5654-1. The declaration of the Legislature in the title to the act that it is only supplementary legislation is by no means controlling, if the effect of the enactment is to change existing laws. A comparison of the enactment of July 23, 1925, with original Section 5654, and other laws relating to the procedure for the issuance and sale of bonds, shows clearly that by that enactment existing laws have been materially changed. That material changes have been made is the basis of this litigation. Except for the change in procedure this lawsuit would not have been necessary. Any change by whatever name it may be called amounts to an amendment. Steps which were not necessary before this enactment have become necessary by virtue of its provisions. We are therefore forced to the conclusion that Section 26, General Code, does have application, and that this enactment of July 23, 1925, when interpreted by the rule declared in Section 26, can have no application to the bonds approved by the people in 1919, the issuance of which was provided for by resolution of the board of education on June 8, 1925.”

Sections 11576-1 and 11601-1, as enacted in House Bill No. 170, respectively read as follows:

"An application for a new trial shall not be necessary as a prerequisite to obtain appellate review as to matters specified in subdivisions 6 and 8 of section 11576 of the General Code provided such matters have been submitted to the trial court and the evidence to be considered or the error claimed appears as a part of the record, or as to any other matter which the record shows was called to the attention of the trial court by objection, motion or otherwise.

"In its discretion and on such conditions, for the security of the adverse party as are proper, the court may stay the execution of, or any procedure to enforce a judgment during the time within which a motion for a new trial may be filed and pending the disposition thereof; however, without application to the Court therefor, such stay shall automatically be in effect following the entry of judgment on the verdict of a jury and pending the disposition of an application for new trial made under section 11578 of the General Code."

It becomes at once apparent from a reading of the above sections that each of them is a correlated part of the new procedure prescribed in the act. They not only relate to such new procedure, but expressly refer to the existing sections as amended, and it is scarcely conceivable how either could be considered and applied except in connection with the operation of the amended sections.

Therefore, since said sections are a part of the new mode of procedure prescribed by the act, it would appear that any change effected by such sections amounts to an amendment within the meaning of section 26.

In light of the above, you are advised that in my opinion sections 11575, 11576, 11578, 11580, 11599, 11600, 11631 and 12223-7 of the General Code, as amended in House Bill No. 170 of the 96th General Assembly, and Sections 11576-1 and 11601-1 of the General Code, enacted in said act, are not applicable to any actions now pending or to any actions which are commenced prior to October 11, 1945.

Respectfully,

HUGH S. JENKINS

Attorney General