

542.

APPROVAL—BONDS OF CITY OF AKRON, SUMMIT COUNTY,
OHIO, \$7,000.00.

COLUMBUS, OHIO, April 29, 1937.

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

GENTLEMEN :

RE: Bonds of City of Akron, Summit County, Ohio,
\$7,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated October 1, 1935. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of December 22, 1936, being Opinion No. 6567.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

543.

LEGISLATION—486-32 AMENDED BY AMENDED SUBSTITUTE
SENATE BILL 81, 92nd GENERAL ASSEMBLY—EFFECTIVE
MARCH 23, 1937—AMENDED FURTHER AMENDED
SUBSTITUTE SENATE BILL 255.

SYLLABUS :

1. Sections 486-32 and 486-69 of the General Code were amended by the enactment of Amended Senate Bill No. 81, passed by the 92nd General Assembly, as an emergency measure, effective immediately upon signature by the Governor, as of March 25, 1937. Amended Senate Bill No. 81 repealed Sections 486-32 and 486-69 of the General Code, as enacted in 115 O. L. 281, effective October 19, 1933, as of March 25, 1937.

2. Sections 486-32 and 486-69 of the General Code as enacted in Amended Senate Bill No. 81, passed as an emergency measure by the 92nd General Assembly, effective when signed by the Governor on March 25, 1937, are amended by the enactment of Amended Senate Bill No. 253,

passed by the 92nd General Assembly March 11, 1937, signed by the Governor March 25, 1937, and filed in the office of the Secretary of State on March 26, 1937, effective as of June 25, 1937. Amended Senate Bill No. 253 repeals Sections 486-32 and 486-69 of the General Code, as enacted in Amended Senate Bill No. 81, effective March 25, 1937, as of June 25, 1937.

COLUMBUS, OHIO, April 30, 1937.

HON. WILLIAM J. KENNEDY, *Secretary of State, Columbus, Ohio.*

DEAR MR. KENNEDY: Your recent request for my opinion reads as follows:

"On March 26th, Amended Senate Bill No. 253 was filed in the office of the Secretary of State, File No. 31, and Amended Senate Bill No. 81 was filed on March 29th, File No. 33, the latter act being an emergency measure. Both of the above bills were approved by the Governor on March 25th.

Among other sections Amended Senate Bill No. 253 amends Sections 486-32 and 486-69, G. C., and these same two sections are amended in Amended Senate Bill No. 81, the emergency act.

We will ask you to render us your opinion as to which act prevails in so far as the sections herein referred to are concerned."

The State Employees' Retirement System Law was first enacted in 113 Ohio Laws, page 231, effective October 19, 1933, and was codified as Sections 486-32 to 486-75, inclusive, of the General Code.

Amended Senate Bill No. 81, "to amend Sections 486-32 and 486-69, of the General Code, relative to the state employes retirement system, and to declare an emergency" was passed by the General Assembly March 9, 1937, and approved and signed by the Governor on March 25, 1937. It was passed as an emergency measure and went into immediate effect. The reason for the emergency being, "it is necessary to reduce the rate of interest required to be paid on contributions from members of the state employes' retirement system, such rate now being higher than can be earned from conservative investment of the funds." It was filed in the office of the Secretary of State on March 29, 1937.

Section 2 of Amended Senate Bill No. 81 provides:

"That existing Sections 486-32 and 486-69 of the General Code be, and the same are hereby repealed."

Amended Senate Bill No. 253 was passed by the 92nd General Assembly March 11, 1937, and signed by the Governor on March 25, 1937, and filed in the office of the Secretary of State on March 26, 1937. It was not passed as an emergency measure. It is therefore effective June 25, 1937, unless repealed in whole or in part or is subjected to a referendum vote by the electorate. This was an act "to amend Sections 486-32 * * * 486-69 * * *, and to enact supplemental sections * * * , and to repeal sections * * * of the General Code, relative to the state employes' retirement system." It provides, under Section 2, "that existing Sections 486-32 * * * 486-69 * * * of the General Code, be, and the same are hereby repealed."

Article II, Section 17, of the Ohio Constitution, provides:

"The presiding officer of each House shall sign, publicly in the presence of the House over which he presides, while the same is in session, and capable of transacting business, all bills and joint resolutions passed by the General Assembly."

Article II, Section 16, of the Ohio Constitution, provides in part:

"* * * Every bill passed by the General Assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the Secretary of State * * *"

Article II, Section 1c, of the Ohio Constitution, provides in part:

" * * * No law passed by the General Assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the Secretary of State. * * *"

Article II, Section 1d, of the Ohio Constitution, provides in part as follows:

" * * * emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. * * * the reasons for such necessity shall be set forth in one section of the law * * * . The laws mentioned in this section shall not be subject to referendum."

Both Amended Senate Bill No. 81 and Amended Senate Bill No. 253 comply with the above constitutional provisions in so far as proper enactment is concerned. The question now arises as to which of these two acts prevail, in so far as Sections 486-32 and 486-69 of the General Code are concerned.

The Record of Bills passed by the 92nd General Assembly in the

Governor's office shows that Amended Senate Bill No. 253 was presented to the Governor on March 16, 1937, was approved and signed by him on March 25, 1937, and was delivered and filed in the office of the Secretary of State on March 26, 1937. The same Bill Record further shows that Amended Senate Bill No. 81 was presented to the Governor on March 16, 1937, and was approved and signed by him, as an emergency measure, on March 25, 1937, which was the same day on which he signed Amended Senate Bill No. 253. However, according to his executive secretary, the Governor did not sign Amended Senate Bill No. 81 until sometime after he had signed Amended Senate Bill No. 253. This act was not filed in the office of the Secretary of State until March 29, 1937.

This information seems to show that Amended Senate Bill No. 81 was signed by the Governor after he had signed Amended Senate Bill No. 253. However, Amended Senate Bill No. 253 was not filed by the Governor in the office of the Secretary of State until the next day after he had signed Amended Senate Bill No. 81, the emergency measure.

Section 486-69, in both Amended Senate Bill No. 81 and Amended Senate Bill No. 253, is exactly the same. Section 486-32 in Amended Senate Bill No. 81 is exactly the same as it appears in former Section 486-32, enacted in 115 O. L. 281 (1933), except for Sub-Section 12 which relates to the interest rate to be paid on retirement funds. Section 486-32, as contained in Amended Senate Bill No. 253, is considerably different from the form in which it appears in Amended Senate Bill No. 81. It is also considerably different than the form in which it was originally enacted in 115 O. L. 281 (1933).

The question now arises as to what happens to Sections 486-32 and 486-69 of the General Code as contained in Amended Senate Bill No. 253 and Amended Senate Bill No. 81. Does Amended Senate Bill No. 253, which contains a provision for the repeal of existing Sections 486-32 * * * 486-69 * * * of the General Code, repeal these two sections, as contained in Amended Senate Bill No. 81, or does Amended Senate Bill No. 81, which also contains a provision for the repeal of existing Sections 486-32 and 486-69 of the General Code, repeal these two sections, as contained in Amended Senate Bill No. 253?

The case of *State, ex rel. Guilbert, Auditor, vs. Halliday, Auditor of Franklin County*, 63 O. S. 165, provides in the syllabus as follows:

"1. In so far as two statutes are irreconcilable, effect must be given to the one which is the later.

2. A bill can not become a law until it has been signed by the presiding officer of each House; and when one bill was

signed after another bill so signed on the same day, the former is the later enactment." (Italics, the writer's.)

This case of *Guilbert vs. Halliday*, supra, presented the following situation to the court: The General Assembly had enacted two laws, each purporting to amend and supplement a certain section of the Revised Statutes. One of the acts was designated House Bill No. 777 and the other act, Senate Bill No. 309. Each was in conflict with the other. (A situation which is practically the same as the enactment of Sections 486-32, as contained in Amended Senate Bill No. 81 and in Amended Senate Bill No. 253.) Both bills were passed and signed on the same day. However, Senate Bill No. 309 was signed by the President of the Senate and the Speaker of the House after House Bill No. 777 was signed. The court in its opinion says:

"In so far as these two enactments are irreconcilable, effect must be given to the one which is the later law. *State ex rel. vs. Commissioners Shelby Co.*, 36 Ohio St. 326. A bill cannot become a law until it has been duly signed by the presiding officer of each House. Const., Art. II, sec. 17. *State ex rel. vs. Kiesewetter*, 45 Ohio St. 254. It is averred in the petition and admitted in the answer that Senate Bill No. 309 was signed by the president of the Senate and the speaker of the House, after House Bill No. 777 was so signed on the same day. The former is, therefore, the later enactment."

It is conceded, of course, that when the case of *State ex rel. Guilbert vs. Halliday*, supra, was decided by the Supreme Court on June 19, 1900, that no provision in the Constitution of Ohio required the submission of any legislative acts of the General Assembly to the Governor for his approval and signature before becoming a law. This requirement was not effective until Section 16 of Article II of the Ohio Constitution was amended November 3, 1903.

In the case of *The State of Ohio vs. Lathrop*, 93 O. S. 79, decided November 16, 1915, the Supreme Court having before it the question as to the time from which an Act of the General Assembly shall operate, states, in the syllabus:

"Construing Section 1e of Article II with Section 16 of Article II of the Constitution, in so far as both sections relate to the time from which an act of the general assembly shall operate, laws providing for tax levies, appropriations for current expenses of the state government and state institutions, and

emergency laws, as defined in Section 1d of Article II of the Constitution, go into immediate effect when approved by the Governor. *All other acts go into effect ninety days after the same have been filed with the secretary of state, regardless of the date of approval by the governor.*" (Underscoring, the writer's.)

Nichols, C. J., in *State vs. Lathrop*, supra, sets forth some very pertinent principles in the enactment of legislation. I quote from his opinion as follows:

"It appears that the Amendment to the section in question found in 103 Ohio laws, page 340, was enacted into law by the general assembly on the 15th of April, 1913, and two days later, on the 17th day of April, the general assembly again amended the same section by adding opium and its derivatives to the list of prescribed drugs. *The disputed question arises over the fact that the governor, to whom, under the constitution, all bills must be transmitted, after their passage by the General Assembly—inadvertently, we may safely assume—signed the bill later passed first; that is, he signed the Act of April 17 on May 2 and that of April 15 on May 3.*"

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"*The court of appeals based its decision on the fact that the act signed on the 2nd was repealed by the act of the governor in signing the act on the 3d, and counted of no effect the fact that the legislature passed the measure so held to have been repealed two days later than the measure which the court holds repealed it.*

The effect of this decision is that the bill last signed, although first passed, repealed the act first signed, although later passed.

We thus have presented the anomalous situation of the governor being granted an additional power to veto not contemplated by the constitution. *He may, if this decision is permitted to stand, by mere order of the time of signing, determine which of two acts relating to the same subject-matter may survive, and although signing both, may kill the one as effectively as if he had vetoed it; and furthermore—as happened in this instance—may defeat the manifest purpose of the legislature by signing first in order the later expression thereof, and do this, it would appear without intending to do so, and in effect defeat not only the intention of the legislature, but his own as well.*"

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"If the governor, by mere order of the time of approval of measures passed by the general assembly, can make or unmake laws, then, contrary to the express terms of the constitution, he becomes the lawmaking power and his intention, rather than that of the legislature, governs."

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"We are constrained to hold that the act last actually signed did not operate to repeal the act last passed. We are persuaded that the manifest purpose of the lawmaking power should not be defeated by means wholly beyond its control.

It is the plain duty of the court to give effect, if at all possible, to the latest expression of the legislature on a given subject. And rather than vest the executive with the power of selection, which the constitution neither impliedly nor expressly grants to him—and, indeed, which the constitution in terms, by formal exclusion, denies to him—we hold that the act of April 17, as the later expression of the general assembly, must prevail; and we do this the more readily because thereby the clear intention of both the general assembly and the executive is given effect." (Italics, the writer's.)

In the case of *The Patterson Foundry & Machine Co. vs. The Ohio River Power Co.*, 99 O. S. 429, the first branch of the syllabus reads:

"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."

Judge Matthias in his opinion in this case says :

"Under the provisions of our constitution, before a bill passed by both houses may become a law it shall be presented to the Governor and *if he approves the same it thereupon becomes a law. If it is not approved and signed by him, and is not returned to the house where it originated within ten days after having been presented to him, exclusive of Sundays and the day it was presented, it becomes a law in like manner as if signed.*"

In the case of *Schacffer vs. Alva West & Co.*, 21 Ohio Law Abstract, page 262 (264), Judge Hornbeck of the 2d District Court of Appeals in his opinion says:

"It has, however, been judicially determined (*State vs. Lathrop*, 93 Oh. St. 79) that Article II, Section 16, has application only to laws that provide for tax levies, appropriations for current expenses of the state government and state institutions, and emergency laws, as defined in Section 1d, Article II of the Constitution. The section in question * * * not coming within the classification of an emergency law or of any other law contemplated by Article II, Section 16 of the Constitution, is controlled entirely by Article II, Section 1c of the Constitution, and became effective 90 days after being filed in the office of the Secretary of State."

In the case of *Nicholas vs. City of Cleveland*, 125 O. S. 474 (480), the Court, in its opinion, said:

"Section 4594, General Code, provides *inter alia* that the clerk of a police court, when an affidavit has been filed with him, is empowered to issue a warrant for search. This was part of a special act relating to police court clerks only. The legislation of 1929 is much later, and is a general law relating specifically to search warrant procedure. *The two acts cannot ride together, and, since they are irreconcilable, one or the other must fall.* In such a situation this court has frequently declared that, *when there has been incompatible legislation upon a particular subject, the later law prevails. State, ex rel. Guilbert, vs. Halliday*, Aud., 63 Ohio St., 165, followed." (Italics, the writer's.)

In a discussion of when an act of the General Assembly is effective, I find that the courts of Pennsylvania and California have ruled as follows:

"Where there are two statutes containing repugnant provisions, the one last signed by the governor is a repeal of the one previously signed." *Southwark Bank vs. Commonwealth*, 26 Pa. St. 446.

"A statute which was to take effect from and after its passage, takes effect from the moment it is approved by the governor." *People, ex rel., vs. Clark*, 1 Cal. 406.

From an analysis of the rulings of the courts in the cases cited, supra, it is easy to see that the courts are not uniform in their holdings as to just when an act of the General Assembly is a law, or is effective as a law.

In the instant case, I find the General Assembly passed the emergency legislation, Amended Senate Bill No. 81, on March 9th. Two days later, on March 11, they passed the general legislation. Certainly, it would seem that it was the intention of the General Assembly to do last what it did last, that is, to pass the general act after it had passed the emergency act.

Apparently the emergency act was passed for only one immediate purpose and that was to permit the custodians of the state employes retirement fund to reduce the interest rate payable on individual contributions from four to three percent. Outside of this there was no apparent reason why the emergency legislation was adopted.

Having accomplished this purpose, the legislature then proceeded to pass the general legislation to make the whole state employes retirement system effective on a permanent basis. This happened of course to include the amending of Section 486-32, as enacted in the emergency legislation, so as to change the definition of various terms connected with and used in the administration of the system. There is no cause for complaint on this legislative action. The General Assembly always has the right to amend and repeal laws it passes.

There is no question but that Amended Sections 486-32 and 486-69 of the General Code, as enacted in Amended Senate Bill No. 81, are now in full force and effect and will be in effect until at least June 25, 1937, when Amended Senate Bill No. 253 either will or will not repeal them. What happens to Section 486-32, on and after that date, is the only question to be decided here, as Section 486-69 is exactly the same in both acts.

Both bills were filed with the Governor on March 16. He signed each bill on March 25. His executive secretary says, the Governor signed the Bill, last passed, first, and the Bill, first passed, last. In other words he signed Amended Senate Bill No. 253, the general legislation, before he signed Amended Senate Bill No. 81, the emergency legislation. Which repealing section, therefore, prevails in so far as Amended Senate Bill No. 81 is concerned, is the question to be decided here.

The logic of the situation would seem to show that it was the intention of both the General Assembly and the Governor that Amended Senate Bill No. 81 should act only as a stop-gap measure and should operate only until the general legislation on the same subject matter could go into effect. This, at least, is the view I am taking on this matter.

Whether or not the Governor signed the emergency act, after the general act, does not seem as important to me as does the fact that the general act was filed in the office of the Secretary of State after he had signed the emergency act. The filing of the general act with the Secretary of State is, in my opinion, the last necessary thing to be done in the

passage of an act to make such legislation operative as a law. I am holding that Amended Senate Bill No. 253 is the last act and by its terms specifically repeals, under Section 2, existing Sections 486-32 and 486-69 of the General Code as enacted in Amended Senate Bill No. 81. The effective date of such repeal will be the effective date of Amended Senate Bill No. 253 as a law, to wit, June 25, 1937. I am further constrained to hold that this is true from an analysis of the case of *State vs. Lathrop*, supra, wherein the court said:

“We are constrained to hold that the act last actually signed did not operate to repeal the act last passed. We are persuaded that the manifest purpose of the lawmaking power should not be defeated by means wholly beyond its control.”

also:

“We hold that the act of April 17, as the later expression of the General Assembly, must prevail; and we do this the more readily because thereby the clear intention of both the general assembly and the executive is given effect.”

It might be contended that the Patterson case, supra, is at variance with the earlier Lathrop case, but in the Patterson case, the decision of the Lathrop case, herein considered, was not overruled. It is recognized that the Lathrop case is not in accord with the weight of authority; however, unless and until it is modified or reversed, I have no alternative but to follow the law as therein declared.

Therefore, in specific answer to your inquiry, it is my opinion that:

1. Sections 486-32 and 486-69 of the General Code were amended by the enactment of Amended Senate Bill No. 81, passed by the 92d General Assembly, as an emergency measure, effective immediately upon signature by the Governor, as of March 25, 1937. Amended Senate Bill No. 81 repealed Sections 486-32 and 486-69 of the General Code, as enacted in 115 O. L. 281, effective October 19, 1933, as of March 25, 1937.

2. Sections 486-32 and 486-69 of the General Code as enacted in Amended Senate Bill No. 81, passed as an emergency measure by the 92d General Assembly, effective when signed by the Governor on March 25, 1937, are amended by the enactment of Amended Senate Bill No. 253, passed by the 92d General Assembly March 11, 1937, signed by the Governor March 25, 1937, and filed in the office of the Secretary of

State on March 26, 1937, effective as of June 25, 1937. Amended Senate Bill No. 253 repeals Sections 486-32 and 486-69 of the General Code, as enacted in Amended Senate Bill No. 81, effective March 25, 1937, as of June 25, 1937.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

544.

RURAL SCHOOL DISTRICT — CONSOLIDATION — JURISDICTION OF BOARDS OF EDUCATION—OPERATING EXPENSE APPORTIONMENT — AVERAGE DAILY ATTENDANCE.

SYLLABUS:

Where a rural school district within the jurisdiction of a county board of education unites for high school purposes with an adjoining school district that is not within the jurisdiction of the said county board of education, the Department of Education in apportioning the total amount of the budget of operating expenses for the county board of education among the several school districts in the county should count the average daily attendance of each and every pupil residing in the rural school district and enrolled in the joint-union high school in computing the total number of pupils in average daily attendance in the rural school district under the supervision of the county board of education.

COLUMBUS, OHIO, April 30, 1937.

HON. LESTER W. DONALDSON, *Prosecuting Attorney, Painesville, Ohio.*

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

“You are respectfully requested to give an opinion upon the following:

The Willoughby Village School District and the Willoughby Rural School District of this county are maintaining a joint high school under the provisions of Sections 7669 to 7671-2, inclusive, of the General Code of Ohio.