

1979

JURY TRIAL—SECTION 13443 G. C.—AUTHORIZES JURY TRIAL IN ANY COURT FOR VIOLATION, ANY ORDINANCE ANY MUNICIPALITY—CASES WHERE PENALTY EXCEEDS \$50.00—LEGAL EFFECT—QUALIFYING PROVISIONS OF SECTION 4538 G. C.—MAYOR OF MUNICIPALITY AUTHORIZED TO IMPANEL JURY FOR TRIAL OF ACCUSED PERSON.

SYLLABUS:

The provision of Section 13443, General Code, authorizing a jury trial in any court for the violation of any ordinance of any municipality in cases where the penalty involved exceeds \$50.00 has the legal effect of qualifying the provisions of Section 4538, General Code, so as to authorize a mayor of a municipality in such a case to impanel a jury for the trial of an accused person.

Columbus, Ohio, June 30, 1950

Hon. Ray Bradford, Prosecuting Attorney
Clermont County, Batavia, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I would like to have your opinion concerning the following:

“We have a village in our county which has an ordinance on the books, for the violation of which ordinance the sole penalty prescribed is a fine not exceeding \$100.00. In the event a person should violate this ordinance and be brought for trial before the mayor of the village whose ordinance is violated, in what manner may such ordinance be enforced against the person violating this ordinance?

“In checking through the General Code, Section 13443, it gives the accused the right to trial by jury but the mayor has no authority to summon a jury except under the provisions 4538 of the General Code, State of Ohio, and this section fails to authorize the mayor so to do except where imprisonment is a part of the punishment. The mayor has no authority to recognize the accused to the Court of Common Pleas except under the terms of Section 4539 of the General Code, State of Ohio, and apparently the mayor is not by this section so empowered, because it seemingly establishes as a prerequisite to such action of recognizing that the mayor ‘decline to permit the trial, mentioned in the last section.’ The ‘trial, mentioned in the last section’ is one

of the violation of an ordinance involving a penalty of imprisonment. Therefore, presumably, recognizing an accused to the Court of Common Pleas is not possible in connection with violations of ordinances whose penalties are limited, as here assumed, to fines. Nor can the Court of Common Pleas otherwise acquire jurisdiction. This gives rise to a complete frustration of the enforcement of all village ordinances involving fines of over \$50.00, but not also involving imprisonment.

“Will you please advise me as to what action should be taken in order to enforce the ordinance against the accused.”

The question which you have presented is, in essence, whether an accused person may be tried by a jury in a mayor's court in a case where the provisions of Section 13443, General Code, authorize a trial by jury despite the provisions of Section 4538 of the General Code limiting the authority of the mayor to impanel a jury to those cases where imprisonment is a part of the prescribed punishment. The language of these two sections is as follows:

Section 13443, General Code.

“At any trial, in any court, for the violation of any statute of the state of Ohio, or of any ordinance of any municipality, except in cases where the penalty involved does not exceed a fine of fifty dollars, the accused shall be entitled to be tried by a jury drawn in the manner prescribed by law for the selection of jurors.” (Effective June 23, 1933.)

Section 4538, General Code.

“He may summon a jury, and try the accused, in any prosecution for the violation of an ordinance, where imprisonment is a part of the prescribed punishment, and the accused does not waive a jury, and in such case, judgment shall be rendered in accordance with the verdict, unless a new trial, for sufficient cause, is granted.” (Enacted in the General Code revision in Senate Bill No. 2, approved February 15, 1910.)

It is readily apparent that if the restrictive language in Section 4538, General Code, should be given full effect it would, as you suggest, completely frustrate the clear legislative intent as expressed in Section 13443, General Code. That legislative intent is that the accused is to have a jury trial in *any court* for the violation of any ordinance of a municipality except in cases where the penalty involved does not exceed a fine of \$50.00. The conflict between these two statutes is clear and it becomes the duty of the courts in such cases to construe them so as to give effect

as much as possible to each statute within the limits of the intention of the legislature.

In approaching this question it should be remembered that the prime object of judicial construction of legislative enactments which are either ambiguous or conflicting is to give effect to the legislative intent. See Paragraph 4501, Sutherland Statutory Construction, Vol. 2, citing Heydon's case, 3 Co. Rep. 72, 76 Eng. Repr. 637 (1584). In other words, the courts must assume that the legislature will not do a vain thing and that conflicts between statutes must be so resolved as to avoid frustration of the will of the legislature; and in the construction of statutes on the same subject matter which are in apparent conflict, to consider such statutes together to the end that such interpretation of each be made that the apparent conflicts are resolved and each legislative act is harmonized with the other. The question here being considered therefore is reduced to an inquiry of the extent to which the literal provisions of Section 13443, General Code, may be extended by implication so as to expand the category of cases in which a mayor is authorized to impanel a jury.

It is an accepted rule of statutory construction that where there is an irreconcilable conflict between the new provisions and the prior statutes relating to the same subject matter, the former will control as being the later expression of the legislative will. In the case of Metropolitan Life Ins. Co. v. Stoll, 276 Mich. 637 (1936), we find that branch 2 of the syllabus reads:

“Where two laws in *pari materia* are in irreconcilable conflict, the one last enacted will control or be regarded as an exception to or qualification of the prior statute.”

To the same effect are the rules expressed in *Creek County et al v. Robinson*, 114 Okla. 163 (1925), and *State ex rel. Mergens, et al v. Babcock et al.*, 175 Minn. 583 (1928).

Accordingly, since Section 13443, General Code, was enacted later than Section 4538, General Code, it seems clear that any provisions of the former which are in irreconcilable conflict with any provisions of the latter will constitute an exception to or a qualification of the provisions of the latter statute. That there is such irreconcilable conflict between the two statutes is quite clear. Section 13443, General Code, creates a substantial right but if the provisions of Section 4538, General Code, are

literally followed it is impossible that the substantial right so granted can ever be enjoyed.

Courts have long been inclined to extend the literal language of statutes by implication in order to make effective the legislative intent. Thus, in *Gooden and Clark v. Mitchell*, 41 Del. 225, it is said in branch 6 of the syllabus:

“Courts are not compelled to follow the letter of the statutes when it bears away from the true intent and to conclusions inconsistent with the general purpose of the act.”

Again, in *Fleischmann Construction Co. et al. v. United States*, 270 U. S., page 349, it is said in branch 6 of the syllabus:

“The strict letter of an act must yield to its evident spirit and purpose, when this is necessary to effectuate the intent; and unjust or absurd consequences are to be avoided if possible.”

In *Johnson v. United States*, 163 Fed. 30, Circuit Justice Holmes in discussing the implications in a statute requiring its extension beyond the strict literal interpretation said at page 32:

“A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not a discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.”

It is significant to note that the last sentence in the quotation above was quoted with the intimation that it was a proper statement of the law as recently as December, 1948, in *Vermilyer-Brown Co. Inc. et al. v. Connell et al.*, 335 U. S. 377-388.

It seems obvious to me that in the case we are here considering the legislature has not merely ‘intimated’ its will but has rather expressly stated it in Section 13443, General Code, by granting the right to a jury trial to accused persons where the possible penalty exceeds a fine of \$50.00. It is true that the legislature failed expressly to expand the

provisions of Section 4538, General Code, which limits the authority of the mayor to impanel a jury, but it seems to me quite certain that the legislature impliedly has expanded that authority. I think it is apparent that this is a case where the courts ought not to say to the legislature, "We see what you are driving at, but you have not said it, and therefore we shall go on as before." This is especially true in this case where as you have pointed out, under a literal interpretation of Section 4538, General Code, and Section 4539, General Code, the mayor would be unable either to impanel a jury for trial or to recognize the accused person to the court of common pleas, and accordingly the court in such a case could not "go on as before" but would in fact be unable to go on at all.

Therefore, in specific answer to your question it is my opinion that the provision of Section 13443, General Code, authorizing a jury trial in any court for the violation of any ordinance of any municipality in cases where the penalty involved exceeds \$50.00 has the legal effect of qualifying the provisions of Section 4538, General Code, so as to authorize a mayor of a municipality in such a case to impanel a jury for the trial of an accused person.

Respectfully,

HERBERT S. DUFFY,
Attorney General.