

that not having received bids for three distinctive types of highways competitive bidding had not been assured and the statute had not been followed, the court then sustained the lower court in awarding of contracts contemplated by the Commission.

We are not advised as to whether or not any steps have been taken pursuant to the resolution of the Commission on January 6th, or if any contracts have been signed with the firm to which the contract was awarded. And we assume that this office has heretofore passed upon the purely formal parts of this or similar contracts. But the Attorney General is required to pass upon both the form and legality of contracts and it does not require argument to assert that a contract is illegal if any of the high contracting parties are without power and are not authorized to sign and execute a contract otherwise valid in all respects.

In view of the foregoing, it is my opinion that the Commission was not authorized to award Contract I to Bates and Rogers Construction Co. and that any contract or contracts implementing or attempting to consummate any such action of the Commission are illegal and void.

OFFICIAL OPINION NO. 7

February 5, 1953.

Hon. Otto K. Jensen,
State Examiner,
State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

I have before me your letter of December 8, 1952, which is as follows:

“A judge of a circuit court has asked that we request your official opinion upon the following:

“1. Which statute prevails, or are both statutes effective as to the appointment of an agent to return a person from another state charged with the commission of a crime in this state:

OPINION 7

“(a) The provisions of that part of the Uniform Criminal Extradition Act, Burns’ 9-440, 9-441, or,

“(b) That part of the 1905 Public Offenses Act being Burns’ 9-418, 1951 Supplement?”

“In requesting the opinion, we are mindful of O. A. G. 1943, page 199, as to fees and expenses ‘as now provided by law’.”

The applicable provision of the United States Constitution and the Indiana Statutes, and decisions thereunder on this question are as follows:

Section 2, Clause 2, of Art. 4 of the United States Constitution provides:

“A person charged in any state with treason, felony, or other crimes who shall flee from justice, and be found in another state, shall on demand of the executive authorities of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.”

This provision in the Constitution was intended to provide an effective proceeding by the use of which the closely associated states of the Union could aid one another in bringing to trial persons accused of crime by preventing their finding in one state an asylum against the prosecution of justice of another. *Biddinger v. Police Comr.*, 245 U. S. 128, 38 S. Ct. 41, 62 Law. Ed. 193.

The executive authorities of the state in which a fugitive has taken refuge is under duty to cause his surrender upon proper demand by executive authorities of the state from which he has fled. *Ross v. Connolly*, 111 U. S. 624, 4 S. Ct. 544, 28 Law. Ed. 542.

In 1905 the General Assembly of Indiana enacted a law dealing with public offenses. Acts 1905, Ch. 169, Section 25, page 584. Sections 25 through 42 dealing with “fugitives from justice.” Sec. 42 of this Act provided as follows:

“When any person charged with a felony has fled to any other state, territory or country, and the governor

has issued a requisition for such person, or has requested the President of the United States to issue extradition papers, the county commissioners may *pay to the agent designated in such requisition or request* to execute the same, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just, out of any fund in the county treasury which shall have been appropriated by the county council for that purpose.” (Our emphasis)

This section on the question of the appointment of an agent refers to him as the agent designated in such requisition or request as issued by the Governor.

In 1909 the General Assembly amended said section 42 to read as follows:

“When any person has committed a crime in any county in the State of Indiana, which is punishable by imprisonment in the state’s prison, and has fled to any other county, state, territory, or country, and the governor has issued a requisition for such person or a grand jury indictment or affidavit charging said person with said crime has been filed, *the judge* before whom the said indictment or affidavit is filed, shall issue a warrant for the arrest of said criminal, *and designate an agent in said warrant* to make the arrest and return the criminal to the court, upon the request of the prosecuting attorney or his deputy for the county in which the crime was committed * * *.” (Acts 1909, Chapter 66, Section 1, pages 165 and 166). (Our emphasis)

This amendment provided for extradition for criminals “punishable by imprisonment” and also provided that if a grand jury indictment or affidavit had been filed the judge before whom said indictment or affidavit was filed should issue a warrant for the arrest of said criminal and designate an agent in said warrant to make the arrest and to return the criminal to the court upon the request of the prosecuting attorney or his deputy for the county in which the crime was committed.

In 1921 the General Assembly of Indiana again amended Section 42 to read in part as follows:

OPINION 7

“* * * the judge of the circuit, superior, criminal or city court, or the justice of the peace before whom the said indictment or affidavit is filed, shall issue a warrant for the arrest of said criminal, and designate an agent in said warrant to make the arrest and return the criminal to the agent, upon the request of the prosecuting attorney or his deputy for the county in which the crime was committed. The agent shall return the criminal by the shortest possible route and shall receive the following mileage. * * *” (Acts 1921, Chapter 8, Section 2, page 18.)

This amendment enumerated and defined what judges and what courts had authority to issue warrants for the arrest of said fugitive criminal and provided for mileage.

In 1923 said section was again amended by the General Assembly. This amendment increased the mileage allowance of the agent and provided for reimbursement of expenses in the event of a failure to apprehend said fugitive. (Acts 1923, Chapter 192, Section 1, page 524.)

In 1935 in order to provide a more uniform method of procedure of extradition among the states of the United States, the General Assembly of Indiana enacted legislation known as the Uniform Criminal Extradition Act. (Acts 1935, Chapter 49, page 134.) Sections 22 and 23 of this act provided as follows:

“Sec. 22. Fugitives from this state. Whenever the governor of this state shall demand a person charged with crime in this state from the chief executive of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

“Sec. 23. Manner of applying for requisition. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney of the

county in which the offense is committed shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, and the approximate time, place and circumstance of its committal, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial, and that the proceeding is not instituted to enforce a private claim. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the magistrate, stating the offense with which the accused is charged. The prosecuting attorney may also attach such further affidavit and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment or complaint or information and affidavit shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition."

Section 42 of the 1905 act as amended was not expressly repealed. Therefore, it becomes necessary to determine if Section 42 of the 1905 act and as last amended in 1923 was by implication repealed under the enactment of the Uniform Extradition Act of 1935. Repeals by implication are not favored. Board of Commissioners, Hamilton County v. State *ex rel.* Baker (1916), 184 Ind. 418, 111 N. E. 417; Strauss Brothers Company v. Fisher (1928), 200 Ind. 307, 163 N. E. 225. Where two acts relate to the same subject both are to be given effect if possible. The law does not favor the repeal of statutes by implication and when courts hold that a statute or any provision thereof is repealed by implication, it is done in obedience to the legislative will as manifested in the act. It *must* appear that the subsequent statute revises the whole

OPINION 7

subject matter of the former one and is evidently intended as a subsequent, or that it was repugnant to the old law that both can not stand. (*Water Works Company of Indianapolis v. Burkhart* (1872), 41 Ind. 364.) Where a new statute covers the whole subject matter of an old one, and is repugnant to the former, as a general rule it repeals the old one by implication. (*Board of Commissioners, Vermillion County v. Potts* (1858), 10 Ind. 286.)

The Constitution of the United States provides and places the duty of matters concerning extradition in the executive authority of the state.

The 1935 act, *supra*, dealt only with matters relating to the return of fugitives when requisition of the governor is requested. It does not provide any procedure for the return of fugitive criminals when extradition has been waived. Also, the 1935 act, *supra*, does not provide mileage allowance and fees for the agent so designated to return said fugitive either in the event of extradition or in the event that extradition has been waived. On the contrary, it provides "the expenses shall be the fees paid to the officers of the state on whose governor the requisition is made 'as now provided by law,' for all necessary travel in returning such prisoners." In order to determine what fees shall be paid "as now provided by law," it is necessary to refer to the statute in force at the time of the adoption of the Uniform Criminal Extradition Act of 1935 which defines such fees and expenses. The answer to this question is found in Section 42 of the Acts of 1905 as last amended in 1923, Chapter 192, Section 1, page 564, which sets out the mileage allowance of the agent.

It plainly appears therefore that the 1935 act, "Uniform Criminal Extradition Act," did not revise or cover the whole subject matter of the said Section 42 as amended and therefore was not intended as a substitution for it, and that it is not repugnant to the provision not covered by it. Therefore, the two acts should be construed together *in pari materia* to the extent they are not in conflict. (*Water Works Company of Indianapolis v. Burkhart*, *supra*; *City of Madison v. Smith* (1882), 83 Ind. 502.)

In my opinion, if a requisition of the governor is issued under the provisions of the 1935 act, the governor names the

1953 O. A. G.

agent pursuant to Sec. 22 of said act and in that respect it supersedes the 1905 act as amended. However, the 1935 act does not cover the situation where there is no requisition by the governor, extradition having been waived. In the latter case the procedure would be under the 1905 act as amended and the judge may designate an agent to return the criminal upon the request of the prosecuting attorney. This is in harmony with O. A. G. 1943, p. 199, referred to in your letter.

It must be kept in mind, however, that the 1905 act and subsequent amendments deal only with felony cases and do not apply to misdemeanors. (O. A. G. 1943, page 199.)

OFFICIAL OPINION NO. 8

February 9, 1953.

Mr. Robert B. Hougham,
Executive Secretary,
Indiana State Teachers' Retirement Fund,
336 State House,
Indianapolis 4, Indiana.

Dear Sir:

Your letter of January 13, 1953, has been received and reads as follows:

“Paul Addison, a member of the Indiana State Teachers' Retirement Fund under the provisions of Chapter 142, Acts of 1951, filed with the Fund on October 1, 1951, a verified notice of election of the annuity survivor option in said law, naming his wife as annuity survivor.

“At that time the provisions of Rule 25 governing said annuity survivor relationship had not been completed. When notified of the provisions of said rule, he wrote the Fund as follows October 11, 1951.

“‘After receiving your kind letter explaining the provisions of the co-annuitant part of the retirement law, I would like to withdraw my recent request.’