

In the other affidavit referred to the statement is made "that for about twenty-five years the said C. E. Still and Warren Hamilton have held actual, continuous, notorious and exclusive possession of said premises without let or hindrance from any person or persons claiming the same or any interest therein." In the absence of a more complete statement of the facts touching the question of the adverse possession of the premises here in question, these affidavits are not satisfactory to this department, in view of the fact that the abstract shows that said Warren Hamilton died in Adair County, Missouri, August 2, 1911, and of the fact that said C. E. Still, and the heirs and next of kin of Warren Hamilton, were residing in Adair County, Missouri, at the time of the execution of their deed conveying their interest in these lands to Forest E. Roberts. If said Forest E. Roberts claims to have and hold the legal title to these lands by reason of the exclusive and adverse possession of the same by himself and his predecessors in interest, the facts relating to such claim of adverse possession will have to be more satisfactorily presented than is done by the affidavits above referred to.

The corrected abstract of title submitted is, therefore, disapproved and the same is herewith enclosed for transmission to Mr. Roberts for such action as he may care to take in the matter.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2380.

INSOLVENT DEBTOR—APPOINTMENT OF COMMISSIONER BY PROBATE COURT IS MANDATORY—INSOLVENT DEBTORS ACT DISCUSSED.

SYLLABUS:

1. *The insolvent debtors' act (Sections 11146 et seq., General Code) does not apply to a person convicted of a misdemeanor and sentenced to pay a fine and costs and to stand committed to a workhouse "until such fine and costs shall be paid or the prisoner be otherwise discharged according to law", since Section 11151, General Code, specifically excepts a case in which the judgment requires imprisonment until the fine, penalty and costs are paid.*

2. *In the event a person is convicted of a misdemeanor and the magistrate sentences him to pay a fine and costs without ordering such person to be imprisoned until such fine and costs are paid and the accused be taken into custody, upon execution, as provided by Section 13718, General Code, to be confined in jail until such fine and costs are paid, or secured to be paid, or the defendant is otherwise legally discharged, after serving sixty days, such prisoner would be entitled to the benefit of the insolvent debtors' act and may secure his discharge as provided by Section 11150, General Code, since the judgment of the magistrate does not require his imprisonment until the fine, penalty or costs be paid.*

3. *By the terms of Section 11146, General Code, it is mandatory that each probate court of the several counties of the state appoint a commissioner of insolvents. By the terms of Section 11180, General Code, when the office of commissioner of insolvents is vacant, the duties of commissioner shall be temporarily discharged by a master commissioner.*

COLUMBUS, OHIO, July 23, 1928.

HON. F. E. SLABAUGH, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads:

"Are the provisions of Section 11150 G. C. concerning relief of insolvent debtors from imprisonment after serving 60 days in a county jail still applicable to persons therein confined?"

As the Commissioner of Insolvents for this county has resigned, is it the duty of the Probate Judge to appoint a new Commissioner?

March 29th, 1927, the Supreme Court overruled a motion to certify the record of the case of *Kohler vs. State*, decided by the Court of Appeals, February 2nd, 1927, and reported in 156 N. E. 510. The Court of Appeals decided:

'Under General Code 11148-11155 insolvent persons convicted in magistrates' courts for violation of the liquor laws under Section 6212-17, sentenced to pay fine and remain in county jail until paid or otherwise discharged by law may be discharged by commissioner on finding of insolvency and after serving sixty days and mandamus will issue to compel such discharge, Section 4129, 4141, referring to workhouses not being applicable.'

On May 9, 1928, the Supreme Court decided:

'Insolvent debtor's act does not apply to person convicted of misdemeanor and sentenced to pay fine and costs and to stand committed to workhouse until such fine and costs shall be paid or the prisoner be otherwise discharged according to law.' See the Ohio Abstract, May 19th, 1928, p. 310.

We have no workhouse in this county and no contract with any other county which has a workhouse for our prisoners, and there are some prisoners here in jail who have served more than sixty days for violation of the liquor laws who were confined in the county jail until the fine and costs are paid or secured to be paid or otherwise discharged according to law."

The Legislature on March 12, 1831 (29 O. L. 329), passed an act entitled:

"An Act—For the relief of insolvent debtors."

which act now appears as Sections 11146, et seq., General Code.

These sections of the General Code were construed by the Court of Appeals of Cuyahoga County in the case of *Kohler vs. State ex rel. Goldstein*, 24 O. App. 233, and published in the Ohio Law Bulletin and Reporter, under date of September 12, 1927. A motion for an order directing the Court of Appeals to certify its record was overruled March 29, 1927. The third, fourth, fifth and sixth paragraphs of the headnotes of the Goldstein case, supra, read as follows:

"3. Imprisonment of insolvent debtor for no other reason except insolvency, which would be excessive for violation of liquor laws, would be in nature of 'imprisonment for debt', which is prohibited by law.

4. Under Section 11150, General Code, giving benefit of insolvency statutes to person imprisoned under process of fine, penalty, or costs, sentence of fine of \$500 for violating liquor laws, defendant to stand committed until fine is paid or until otherwise discharged by law, was not in nature of penalty, but a 'debt'.

5. Under Section 13717, General Code, magistrate may impose sentence for violating liquor laws and provided that defendant remain in jail until fine and costs are paid, or is otherwise legally discharged.

6. Under Sections 11148-11155, General Code, insolvent person, convicted in magistrate's court for violation of liquor laws, under Section 6212-

17, sentenced to pay fine and to remain in county jail until paid or otherwise discharged by law, may be discharged by commissioner on finding of insolvency and after serving 60 days, and mandamus will issue to compel such discharge; Sections 4129, 4141, referring to workhouses, not being applicable."

In the opinion, Judge Sullivan, speaking for the Court of Appeals, said:

"It will be noted that Section 11150, General Code, provides that the benefit of the insolvency statutes shall be applied to persons who are imprisoned under process of a fine, penalty, or costs in a criminal proceeding, after an imprisonment for a period of 60 days, unless the judgment in the case requires imprisonment until the fine, penalty, or costs be paid.

It is conceded in the record that the sentence contained the alternative, 'until the fine and costs are paid or security given for the payment thereof, or until otherwise discharged according to law.' The defendant in error insists that under the Insolvent Debtors' Act, the commissioner of insolvents, acting in accordance with the statutes, declared the prisoner insolvent, and thus under that statutory power this order became a discharge of the prisoner, and that therefore the language of the sentence, to-wit: 'or otherwise discharged according to law,' became applicable to the defendant, and that the same is consistent with the sentence itself.

\* \* \* \* \*

It is argued that the principle of imprisonment for debt does not apply to the instant case, for the reason that the fine and costs may be discharged by a credit allowance given the prisoner, which in time would release him by its full payment in that manner. Under the circumstances such as these, however, it is obvious that the insolvent debtor for that reason alone would suffer a period of imprisonment for no other reason except insolvency, which for the offense committed, would under the Constitution and laws be excessive in its character. It cannot be denied, however, that such a situation vitally partakes of that obnoxious doctrine and compels a person to suffer imprisonment in the county jail for debt, which has been practically swept from our law.

It is claimed by the state that the fine and costs imposed in the case at bar are penalties, and not an indebtedness, but this interpretation, we think, does violence to Section 11150, General Code, where it makes clear that the language of the section is applicable to a 'person who is imprisoned under process for a fine, penalty, or costs, in a criminal proceeding.'

As to the question of the right of the magistrate to impose a sentence of the character of the one in controversy, we cite Section 13717, General Code, which provides as to misdemeanors in general that the court may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged."

While this office recognized the fact that a judgment of a court of appeals is not binding authority in any district other than the appellate district of such court, since there was no judicial expression to the contrary, it felt constrained to follow the decision of the Court of Appeals in the case of *Kohler vs. State ex rel. Goldstein*, supra, in two recent opinions. I refer to Opinion No. 1182, dated October 21, 1927, addressed to the Commissioner of Prohibition of Ohio, the syllabus of which reads:

"Section 11171, General Code, prescribing that a probate court may, upon hearing, grant to an insolvent debtor, who had been imprisoned under process for a fine, penalty, or costs, in a criminal proceeding, a certificate of re-

lease or dismiss his petition, as seems just, vests in the court a legal or judicial discretion to be exercised according to law upon the facts found to be true by such court, and if the court finds that an applicant is in fact insolvent and has complied with all of the provisions of law relative to insolvent debtors, such court may not refuse to grant the certificate provided for in said section,"

and to Opinion No. 1196, dated October 24, 1927, addressed to the Prosecuting Attorney of Ashtabula County, the first paragraph of the syllabus of which reads:

"1. An insolvent person who has been sentenced to pay a fine and ordered to remain imprisoned in jail until such fine and the costs be paid, or secured to be paid, or until he is otherwise legally discharged, and who is imprisoned in a county jail under such sentence is entitled to the benefit of the insolvent debtors' act (Sections 11146 et seq., General Code), after such prisoner has been imprisoned thereunder for the period of sixty days."

Your attention is directed to Section 11150, General Code, which provides:

"Except persons confined in workhouses established by municipal corporations, a person who is imprisoned under process for a fine, penalty, or costs, in a criminal proceeding, shall be entitled to the benefit of the two next preceding sections after he has been imprisoned thereunder for the period of sixty days, unless the judgment in the case requires imprisonment till the fine, penalty, or costs, be paid."

Section 11150, supra, and related sections of the General Code were construed by the Supreme Court of Ohio in the case of *Boyer, Supt. of the Stark County Workhouse vs. State of Ohio ex rel. Halyburton*, being Case No. 20937, decided May 9, 1928, and reported in the Ohio State Bar Association Report for July 10, 1928, the syllabus of which is as follows:

"The insolvent debtor act (Section 11150, General Code), does not apply to a person convicted of a misdemeanor and sentenced to pay a fine and costs and to stand committed to a workhouse 'until such fine and costs shall be paid or the prisoner be otherwise discharged according to law', since that section specially excepts a case in which the judgment requires imprisonment until the fine, penalty and costs are paid. Such prisoner might be 'otherwise discharged according to law,' by pardon, parole or credit upon said fine and costs, as provided by law, until the amount was so paid."

The facts, as stated by the court, were as follows:

"The defendant in error, relator in the court below, was charged with possessing intoxicating liquor, contrary to the statutes of Ohio. He was found guilty by the probate court of Huron County, and sentenced by the judge thereof to pay a fine of \$500.00 and costs, and was by said court committed to the Stark County workhouse until such fine and costs should be paid, or 'until he is otherwise legally discharged.'

Defendant in error was, in compliance with the order and sentence, confined in the Stark County workhouse, in default of the payment of the fine and costs, for a period of more than 60 days. After 60 days had elapsed, the defendant in error, under the Insolvent Debtor's Act of Ohio, Sections 11146 to 11180, G. C., was declared to be insolvent by the commissioner of insolvents of Stark County, Ohio, and said commissioner ordered in writing the release of

the defendant in error, and issued a certificate finding him insolvent and ordering his release. The superintendent of the Stark County workhouse refused to honor the order and certificate of the commissioner of insolvency, whereupon this action in mandamus was brought to compel the performance of the duty on the part of the superintendent of the workhouse of releasing the defendant in error from further imprisonment.

The action was brought as an original one in the Court of Appeals, and the plaintiff in error, defendant below, filed a general demurrer to the petition of the relator, the defendant in error in this cause. The Court of Appeals of Stark County, as shown by the journal entry, page 4 of the record, overruled the demurrer, and, the plaintiff in error not caring to further plead, a peremptory writ of mandamus was issued; and thereupon the defendant in error was ordered released from the workhouse.

This proceeding in error was then brought on the part of the plaintiff in error to reverse the action of the Court of Appeals."

Judge Day, who rendered the opinion of the Supreme Court of Ohio, said:

"It is conceded that the Stark County workhouse was built and is controlled because of a special act of the Legislature and may be regarded as a single county workhouse in contradistinction to a municipal workhouse and that therefore the same is not within the exception under Section 11150, General Code, in reference to 'persons confined in workhouses established by municipal corporations,' but that the Stark County workhouse comes within the general provisions of such section, entitling a person who is imprisoned under process for a fine, penalty or costs in a criminal proceeding to the benefit of the insolvent debtors' act' unless the judgment in the case requires imprisonment until the fine, penalty or costs be paid.

The inquiry in the present case must therefore narrow itself to the point whether, when the judgment requires imprisonment until the fine and costs be paid, it deprives the prisoner of the benefit of the insolvent debtors' act."

The opinion then refers to Sections 13717, 13718 and 13719, General Code, and continues:

"From the foregoing sections it is deducible that when a person is fined and execution is issued against his body for the non-payment of the fine and he is imprisoned in accordance with Section 13718, General Code, then he may only be imprisoned 'until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged.'

What is the meaning of the expression, 'Or he is otherwise legally discharged?' It may be by executive pardon, or by serving sufficient time to receive credit at the rate of one dollar and a half per day for each day's imprisonment but does the provision of Section 11150, General Code, 'unless the judgment in the case requires imprisonment till the fine, penalty, or costs, be paid,' deprive the prisoner of a legal discharge under the insolvent debtors' act?

Fines and penalties imposed upon defendants for violation of state laws are not debts within the meaning of the constitutional inhibition for imprisonment for debts, and therefore a defendant can be imprisoned for non-payment thereof. \* \* \* Therefore, we think it is well settled that commitment to jail in default of payment of fine and costs is not imprisonment

for debt; consequently a fine is not a debt and unless there is some specific statutory provision which inures to the benefit of the relator, the statutes relative to insolvent debtors do not apply.

\* \* \*

In view of the fact that the relator must rely for relief upon the application of Section 11150, General Code, it is necessary to consider the same in detail. The insolvency statutes had their beginning in 29 Ohio Laws 329, but at the time of their enactment they did not apply to persons who were imprisoned for a fine, penalty or costs in criminal proceedings. This feature was first incorporated in the amendment of February 1, 1853, as found in 51 Ohio Laws, 323. \* \* \*"

Then follows a discussion of the legislative history of Section 11150, supra. The opinion continues:

"The construction claimed by the relator renders the language of Section 11150, General Code, meaningless, wherein it is provided 'unless the judgment in the case requires imprisonment until the fine, penalty, or costs be paid.' This exception of the very act under which the relator seeks to be discharged would have no effect, and in statutory construction all parts of a statute must be given meaning if the same can be done under the rules of legal construction. The trial court may, under Section 13717, General Code, order that the person sentenced remain imprisoned until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that such person shall receive a credit upon his fine and costs at the rate of one dollar and a half per day for each day's imprisonment, in which event the accused serving such a sentence may legally be discharged by the provisions of such section (13717), or pardoned or paroled; but he is not entitled, by the very exception of Section 11150 to the benefit of the discharge under such section (11150). However, in the event the magistrate should fine a person convicted without ordering him to be imprisoned until such fine and costs are paid, the accused might still, under Section 13718, General Code, be taken into custody, upon execution, and confined in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged as provided in Section 13718, in which latter contingency, after serving sixty days, the accused would be entitled to the benefit of the insolvency act and might secure his discharge under Section 11150, General Code, the judgment not requiring his imprisonment until the fine, penalty or costs are paid. Hence, not being within the exception, Section 11150 applies and the accused might be discharged thereunder. \* \* \*

If the words of Section 11150, General Code, 'unless the judgment in the case requires imprisonment till the fine, penalty or costs be paid' are to be eliminated from the statute in question, it is the duty of the Legislature to do so rather than for this court to reach that end by construction.

Being of opinion that the judgment in the present case provided for the imprisonment of the relator until the fine and costs were paid or he be otherwise legally discharged, such judgment denies to him the benefit of Section 11150, General Code, and his legal discharge may be effected only by pardon, parole or credit upon his fine and costs at the rate of one dollar and a half per day as provided in Section 13717. It follows, therefore, that the relief prayed for must be denied and the judgment of the Court of Appeals reversed, and final judgment rendered for plaintiff in error and the petition in mandamus dismissed at the costs of the relator."

In view of the case of *Boyer vs. State ex rel. Halyburton*, supra, it is my opinion that a person, who is imprisoned under process for fine, penalty or costs, in a criminal proceeding, if sentenced to remain imprisoned until such fine, penalty or costs are paid, or secured to be paid, or he is otherwise legally discharged, is not entitled to the benefit of the discharge provided by Section 11150, General Code. Such prisoner may only be released by pardon, parole, paying or securing the payment of such fine, penalty and costs or by allowing a credit upon the fine and costs at the rate of one dollar and a half per day for each day's imprisonment. However, in the event the magistrate should impose a fine and costs without ordering such person to be imprisoned until such fine and costs are paid, and the accused be taken into custody upon execution, as provided by Section 13718, General Code, to be confined in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, in such case the prisoner, after serving sixty days, would be entitled to the benefit of the insolvency act and might secure his discharge as provided by Section 11150, General Code, inasmuch as the judgment of the magistrate did not require his imprisonment until the fine, penalty or costs be paid.

In considering your second inquiry, your attention is directed to Section 11146, General Code, which provides:

"The probate court in each county shall appoint a commissioner of insolvents, who shall give bond to the state in a sum fixed by the court, not less than one thousand dollars, with sureties to be approved by it, conditioned for the faithful discharge of his duties, and hold his office for three years, unless sooner removed by the court."

By the provisions of this section it is mandatory that the probate court appoint a commissioner of insolvents whose term of office shall be three years, unless sooner removed by the court. The appointment of such a commissioner by the Probate Court is an act which the law specially enjoins as a duty resulting from such office and mandamus would lie to compel such court so to act.

As provided by Section 11180, General Code,

"When the office of commissioner of insolvents is vacant, or in case of the death, absence, or inability of such commissioner, the duties of commissioner temporarily shall be discharged by a master commissioner, but as soon as there is a commissioner to act, all unfinished business must be turned over to him."

In Opinion No. 1088, dated September 30, 1927, addressed to the Prosecuting Attorney of Summit County, this office held:

"1. By the terms of Section 11146, General Code, it is mandatory that each probate court of the several counties of the state appoint a commissioner of insolvents.

2. A probate court may designate a deputy clerk or an employe of his office to act as commissioner of insolvents, providing such deputy or employe possesses the necessary qualifications to hold such office and provided the probate court determines that it is possible for such appointee physically to perform the duties of both positions."

In view of the foregoing, and answering your second question specifically, I am of the opinion that, by the terms of Section 11146, General Code, it is mandatory that

each probate court of the several counties of the state appoint a commissioner of insolvents. By the terms of Section 11180, General Code, when the office of commissioner of insolvents is vacant, the duties of commissioner temporarily shall be discharged by a master commissioner.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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2381.

MUNICIPALITY—WATER REVENUE—SURPLUS FUNDS MAY BE APPLIED TO CONSTRUCTION OF PORTION OF MUNICIPAL OFFICE BUILDING OCCUPIED BY WATERWORKS.

*SYLLABUS:*

*A municipality may, by proper legislation, use surplus water revenues for the purpose of constructing that portion of a city office building to be dedicated and used for water works office purposes.*

COLUMBUS, OHIO, July 23, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—I am in receipt of your inquiry, as follows:

“In the case of *Cincinnati vs. Foettinger*, 105 O. S. 145, it was decided that the use of water works funds was limited to the purposes specified in Section 3959, General Code.

The syllabus of Opinion No. 3866, to be found at page 1109 of Opinions for 1922, reads:

‘Under the provisions of Sections 3958 and 3713, G. C., the water works department of a municipality may enter into an agreement with the city, to pay rental for office space occupied by said department in a public building under the control of the city.’

*Question:* May water works funds be used to pay a portion of the cost of constructing a city office building to house all departments, including the water works office?’

Sections 3958 and 3959, General Code, read as follows:

Section 3958. “For the purpose of paying the expenses of conducting and managing the water works, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes.”

Section 3959. “After paying the expenses of conducting and managing the water works, any surplus therefrom may be applied to the repairs,