2196.

PRISONER—WHEN CONVICTED OF FELONY AND RETURNED TO OHIO PENITENTIARY, OHIO STATE REFORMATORY OR OHIO REFORMATORY FOR WOMEN FOR VIOLATING PAROLE—MILEAGE AND COMPENSATION OF OFFICER—HOW PAID—WHERE PRISONER EXTRADITED FROM ANOTHER STATE ON FELONY CHARGE—PAROLE VIOLATOR—INDICTMENT UPON WHICH PRISONER EXTRADITED NOLLIED—RETURNED TO INSTITUTION FROM WHICH PAROLED—HOW COSTS AND EXPENSES PAID—WHERE PRISONER VIOLATED PAROLE AND GOES INTO ANOTHER STATE—IS "FUGITIVE FROM JUSTICE" AND SUBJECT TO EXTRADITION IF PAROLE REVOKED.

1. *When a prisoner who has been convicted on a felony charge is returned to the Ohio penitentiary or the Ohio state reformatory for women, for violating parole, the sheriff (or other officer named in section* 13606 *G. C.) delivering such prisoner to the warden of the penitentiary or the superintendent of the reformatory, is entitled to receive the mileage and compensation for "necessary expenses" provided for by said section, and said mileage and compensation for necessary expenses are payable out of the state treasury from the fund known as the "prosecution and transportation of convicts" fund.*

2. *In a case where a prisoner has been extradited from another state on a felony charge, and upon his return to Ohio it is discovered that he is a parole violator, and the indictment upon which he was extradited is nollied and he is returned to the penal institution from whence paroled, to complete his sentence, such costs and expenses as are made upon extradition are payable by the county under section* 2491 *G. C. Such costs and expenses as are made after the prisoner is treated as a parole violator may be paid by the state, under the authority of section* 13606 *G. C.*

3. *Where a convicted prisoner who has been placed on parole, violates the terms and conditions thereof and goes into another state, he is a "fugitive from justice" within the provisions of the United States constitution and laws, and as such is subject to extradition if his parole is revoked.*

COLUMBUS, OHIO, June 25, 1921.

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

GENTLEMEN:—Acknowledgment is made of your letter, reading as follows:

"We respectfully request your written opinion upon the following matters:

Section 2174 G. C. provides that a prisoner violating the conditions of his parole or conditional release shall be treated as an escaped prisoner owing service to the state and when arrested shall serve the unexpired period of the maximum term of his imprisonment.

Section 13606 G. C. provides that sheriffs, coroners and constables shall arrest a convict escaping from the penitentiary and forthwith convey him to the penitentiary and deliver him to the warden thereof. They shall be allowed 8 cents per mile going to and returning from such penitentiary and such additional compensation as the warden deems reasonable for the necessary expenses incurred.

Section 13606-1 G. C. defines the duties of certain officers when prisoners violate parole.

Question 1. When the prisoner is returned to the Ohio peni-

tentiary for violating parole out of what treaury or fund is the payment of mileage and compensation to cover expenses mentioned in section 13606 G. C., to be paid?

Question 2. In the event, that a violator of parole is returned to the reformatory at Mansfield or the women's reformatory at Marysville, which institutions are not mentioned in section 13606 G. C., how, and from what funds are the expenses for the return to be paid?

Question 3. In a case where a prisoner has been extradited from another state on a felony charge, and upon his return it is discovered that he is a parole violator and the indictment upon which he had been extradited is nollied and he is returned to the penal institution, from whence he was paroled, to complete his sentence, can any of the costs arising out of the charge under which he was arrested and brought back be paid, and if so, how?

Question 4. Is escape and violation of parole an extraditable offense of itself?"

The following sections are pertinent to your inquiry:

Section 2169 G. C. "The Ohio board of administration shall establish rules and regulations by which a prisoner under sentence other than for treason or murder in the first or second degree, having served a minimum term provided by law for the crime for which he was convicted or a prisoner under sentence for murder in the second degree, having served under such sentence ten full years, may be allowed to go upon parole outside the building and inclosure of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner. The board may designate geographical limits within and without the state, to which a paroled prisoner may be confined or may at any time enlarge or reduce such limits, by unanimous vote."

Section 2170 G. C. "All prisoners on parole shall remain in the legal custody and under control of the board of managers and subject to be taken back within the enclosure of the penitentiary. Such board may make and enforce such rules and regulations with respect to the retaking and reimprisonment of convicts under parole. Its written order certified by its secretary shall be sufficient warrant for all officers named therein to return to actual custody a conditionally released or paroled prisoner; and such officers shall execute such orders as in cases of ordinary criminal process."

Section 2174 G. C. "A prisoner violating the conditions of his parole or conditional release, having been entered in the proceedings of the board of managers and declared to be delinquent, shall thereafter be treated as an escaped prisoner owing service to the state, and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment. The time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of time served."

Section 13606 G. C. "Sheriffs, coroners and constables shall ar-

rest a convict escaping from the penitentiary, and forthwith convey him to the penitentiary and deliver him to the warden thereof. They shall be allowed eight cents per mile going to and returning from such penitentiary, and such additional compensation as the warden deems reasonable for the necessary expense incurred."

Section 13606-1 G. C. "That when a prisoner is paroled or probated from the Ohio penitentiary or the Ohio state reformatory, and violates any of the conditions of his parole or release, it is hereby the duty of any sheriff, deputy sheriff, chief of police, policeman or police officer, upon his knowing or being advised that such paroled convict is in his bailiwick and has violated the conditions of his parole or release, to forthwith arrest such person, and, if a prisoner from the penitentiary, report same to the Ohio board of administration, at Columbus, and if from the Ohio state reformatory, to the superintendent of the same, and for so doing no warrant or other authority shall be necessary."

(1) While section 13606 G. C. does not specifically mention the treasury out of which the mileage and "necessary expense" monies payable thereunder are to come, a reasonable construction is that such monies are payable by the state out of the state treasury. This by reason of the fact that the prisoner on parole is, in contemplation of law, in the legal custody and under the control of the state (see section 2169 G. C.), just as if he were behind the walls of the penitentiary. Being in the state's custody, it is fair to suppose that the legislature, in enacting section 13606 G. C., intended that the costs and expenses incurred by the local authorities named therein in assisting the state to assert its custody should be paid by the state.

Another circumstance strengthening the view that such cost and expense is payable by the state out of the state treasury, we learn by inquiry at the office of the auditor of state. It is this: that such has been the construction given section 13606 G. C. by the auditor of state for many years, with apparent acquiescence on the part of the legislature. It is a well recognized legal principle that in construing a statute, the contemporaneous and practical construction given that statute by the officers whose special duty it is to execute the same, is entitled to much weight. 36 Cyc. 1140.

We are further informed by the auditor of state that the particular fund in practice drawn upon for the payment of the items under consideration, is the so-called "prosecution and transportation of convicts" fund. This is the fund mentioned in the appropriation bills under the heading "Prosecution and Transportation of Convicts. * * * F 9 General plant. Fees, costs, mileage and other expenses provided by statute." See 108 O. L. Part I, p. 788. No reason occurs to us why payment of the mileage and expenses mentioned in section 13606 G. C. may not properly be paid out of said fund.

(2) You point out in your second question that section 13606 G. C. makes no mention of the institutions known as the Ohio State Reformatory nor of the Ohio Reformatory for Women. The reason for this is, of course, plain; section 13606 G. C. was originally enacted in the year 1835 (33 O. L. 18), before either the Ohio State Reformatory or the Ohio Reformatory for Women was in existence. In this respect we have a situation like that passed upon by the Attorney-General in Opinion No. 427, addressed to the auditor of state, and rendered July 5, 1917 (Opinions of the Attorney-General for 1917, Vol. II, p. 1160). There the question was whether sections 13722 G. C. et seq. could be construed as authorizing the payment by the state of the costs of con-

viction and the costs of transportation in cases of felony where women are sentenced and committed to the Ohio Reformatory for Women. In said sections (13722 G. C. et seq.) there was no mention of either the Ohio Reformatory for Women or the Ohio State Reformatory, the amendments thereof found in 108 O. L. Part II, p. 1219 not yet having come into existence. Notwithstanding such omission, it was held that the state was liable for costs in the cases of persons sentenced to either institution upon a felony charge. At page 1162, speaking of sections 13722 G. C. et seq., the opinion says:

> "This act provided for the payment of costs by the state 'in all cases of conviction of any person of any crime, punishment whereof is imprisonment in the penitentiary.' It will be noted here that the object of the statute was to pay the costs of convicting any person convicted of any crime the punishment whereof is imprisonment in the penitentiary, and as to the provision for the payment of costs, the legislature had uppermost in mind the crime of which the person was convicted rather than the institution to which such person was being sent. It was provided that the warden of the penitentiary should certify to cost bills, but at that time no other institution was taking care of prisoners convicted of felonies. If there had been such institutions at that time there is no doubt but that the superintendents of such institutions would have had similar duties imposed upon them. Some years after this act was passed, the Ohio State Reformatory was established and it has always been held that the above sections, providing for payment of costs, included cases where the defendant was sentenced to the Ohio State Reformatory as well as to the penitentiary. This holding, I think, was correct since the prisoners sentenced to the reformatories for felonies were convicted of a crime 'the punishment whereof is imprisonment in the penitentiary' within the meaning of the act of March 4, 1844."

It will also be noticed that section 13606-1 G. C., authorizing police officers to arrest parole violators without warrant makes specific mention of the Ohio State Reformatory, but not of the Ohio Reformatory for Women. Such omission is doubtless due to the fact that said section became effective August 7, 1913 (103 O. L. 404), while the Ohio Reformatory for Women was not proclaimed by the governor (section 2148-5 G. C.) to be ready for the reception of women convicted of felony until August 16, 1916. At any rate, the section clearly shows a legislative intention to provide for the arrest and return of felons violating parole, and names all the state institutions then in existence which had to do with the custody of felons.

In view of the foregoing facts, it seems not unreasonable to hold that the word "penitentiary" found in section 13606 G. C. should be taken to include the other state institutions now provided for the reception of felons, namely the Ohio State Reformatory and the Ohio Reformatory for Women, and that when a sheriff, coroner or constable returns to such last named institutions a felon parole violator, mileage and necessary expense money should be paid such officer by the state out of the fund mentioned in answer to your first question.

(3) The statement of your third question makes it clear that in the case put, the prisoner is not returned to the jurisdiction of Ohio *as a parole violator*, but as an *extradited felon*. This circumstance we think important. Assuming (but not deciding) that section 13606 G. C. authorizes the payment of mileage and "necessary expenses" in connection with the arrest of a parole

violator outside of Ohio, we are unable to see how this section could apply to expenses made *prior* to the time when the prisoner was regarded as a parole violator.

Section 2491 G. C. says:

> "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 commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just."

Under this section the necessary expenses of extradition are payable by the county, and they are so payable regardless of whether the charge on which extradition was had, is proved, disproved or nollied. If, however, the extradited person is subsequently convicted of a felony, sentenced to the penitentiary or to a reformatory, and the execution issued pursuant to section 13723 G. C. is returned "no goods," the statutes provide for the reimbursement of the county by the state of the costs of prosecution including the sum paid by the county commissioners pursuant to section 2491 G. C. See 13722 G. C. et seq.

Your question "can any of the costs arising out of the charge under which he was arrested and brought back be paid" is therefore answered by saying that such costs as are made upon extradition are payable by the county under section 2491 G. C. The indictment having later been nollied, there would be no conviction and no "sentence for a felony" upon which to base a cost bill for payment by the state.

However, you state that upon the prisoner's return to Ohio, it is discovered that he is a parole violator and that in that capacity he is returned to the "penal institution from whence he was paroled." We have no doubt that such costs and expenses as were made after the prisoner was treated as a parole violator may be paid by the state, under the authority of section 13606 G. C. and out of the fund spoken of in answer to your first question..

(4) Your fourth question is this: "Is escape and violation of parole an extraditable offense of itself?"

In conference with a representative of your bureau it is learned that what you particularly have in mind is the situation where a prisoner while on parole and while in the state of Ohio, commits an offense against the laws of Ohio, and flees from the state to escape arrest.

That extradition may be had, based on the offense committed in Ohio by the paroled prisoner, is, of course, clear; but it seems you desire also to know whether such person may be extradited merely because he has violated his parole.

There is no statute of Ohio which makes the mere violation of the terms and conditions of a parole an offense. From this fact it might not unnaturally be supposed that extradition could not lie, there being no "offense" to base it on.

A more liberal view of the matter appears, however, to have been taken by the courts. In the case of Hughes vs. Pflanz, Jailer, 71 C. C. A. 234, 138 Fed. 980, the facts were these: One Hughes was convicted in Indiana of an offense, and sentenced to, and confined in, the Indiana Reformatory. Later, he was paroled by the board of managers of that institution, the parole agreement requiring him to "remain in the legal custody and under the control of said

board of managers." Hughes violated the conditions of his parole, and went to Kentucky and was in that state when the board of managers declared him delinquent and ordered his arrest and return to the reformatory. He resisted extradition on the ground that (71 C. C. A. 236):

> "he is not a person charged with crime, within the meaning of the federal constitution and statute relating to extradition from one state to another; that the term 'charged with crime,' used in the constitution and statute, means a charge by *indictment or affidavit* made before a magistrate, and that the charge must be a pending charge, on which the relator could be tried when returned to the demanding state, and not a judgment of conviction, upon which he would be returned to the administrative authorities * * *."

After citing article IV, section 2 of the Constitution of the United States, and the law of congress passed in 1789 (now section 5278 of the Revised Statutes of the United States), providing for the carrying out of the constitutional provision, the court (page 237) says:

> "The term 'charged with crime,' as used in the constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provision of the constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice.
>
> The relator was convicted of the crime of larceny in Indiana, and sentenced, and the term of sentence has not yet expired. That charge of larceny continues to be a charge against him until the sentence has been performed, and he therefore stands 'charged with crime,' within the meaning of that term as used in the federal constitution. The question has not often been raised, but in the only instances called to our attention where it has been the foregoing views have been adopted. In re Hope, 10 N. Y. Supp. 28; Drinkall vs. Spielgel, Sheriff, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486."

The same liberal view is taken in the more recent case of Ex parte Williams, 10 Okl. Cr. 344, 136 P. 597, 51 L. R. A. (n. s.) 668. The second headnote to said case says:

> "A convicted prisoner, who has a parole, and who goes into another state, is a fugitive from justice within the provisions of the United

States constitution and laws, and as such is subject to extradition if his parole is revoked."

Your fourth question is therefore answered in the affirmative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2197.

ROADS AND HIGHWAYS—WHEN COUNTY COMMISSIONERS ARE AUTHORIZED TO EXPEND PROCEEDS OF LEVY UNDER SECTION 6926 G. C. FOR ORDINARY REPAIRS UPON SECTIONS OF INTER-COUNTY HIGHWAY OR MAIN MARKET ROAD WITHIN LIMITS OF CITY.

County commissioners are authorized to expend the proceeds of levy under section 6926 G. C. for ordinary repairs upon such sections of an inter-county highway or main market road as lie within the limits of a city, provided that the prior consent of the city be first obtained as provided by section 6949 G. C.; and they may make like expenditure upon such sections of an inter-county highway or main market road lying outside a municipality as have not become subject to maintenance by the state. By reason of section 1203 G. C. the consent of the state highway commissioner to the improvement should first be obtained. Opinions Attorney-General 1920, Vol. I, p. 497; and Vol. II, p. 911, referred to.

COLUMBUS, OHIO, June 25, 1921.

HON. EUGENE T. LIPPINCOTT, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—You have recently written to this department as follows:

"A part of section 6859-3 of the General Code of Ohio reads as follows:

'ROUTE NO. VII, to be known as the western route, commencing at Toledo, thence in a southerly direction passing through the municipalities of Perrysburg, Bowling Green, Findlay, Bluffton, Lima, Wapakoneta, Sidney, Piqua, Troy, Dayton, West Carrollton, Miamisburg, Franklin, Middletown, Hamilton, Cincinnati.'

The people of Allen county, Ohio, in November, 1920, voted, what we call, a two (2) mill levy. The following is the wording of the ballot:

'ALLEN COUNTY, OHIO,
INCREASE OF TAX LEVY.

YES

For an additional levy of taxes for the purpose of constructing, reconstructing, maintaining and repairing county roads not exceeding two (2) mills for not to exceed five (5) years.

NO

For an additional levy of taxes for the purpose of constructing, reconstructing, maintaining and repairing county roads not exceeding two (2) mills for not to exceed five (5) years.'

Question No. 1. The county commissioners of this county desire