

date the Director of the Census at Washington released the population figures for Ohio by counties.

Said opinion further pointed out that section 3498, General Code, which provides that thirty days after the proclamation of population by the Secretary of State cities shall become villages or *vice versa*, has no application to counties. I am informed that the Secretary of State sent out on December 30, 1930, to all county auditors a copy of the 1930 census figures by counties. However, this has no legal effect in determining the date of the completion of the 1930 census so as to affect salaries payable from the county treasuries.

Since the appellate judge concerned in this opinion was appointed on December 3, 1930, and took office on December 6, 1930, which was some time after August 22, 1930, I am of the opinion that his salary should be based on the 1930 census figures of the counties in his appellate district.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3021.

COMMUTATION OF LIFE SENTENCE—FIXED BY GOVERNOR TO EXPIRE AT THE END OF TERM OF YEARS CERTAIN—PRISONER NOT ENTITLED TO FURTHER DIMINUTION FOR GOOD BEHAVIOR.

SYLLABUS:

Where the expiration of a sentence in the commutation of a life sentence is fixed by the governor to be "at the end of eleven years from beginning of sentence," the provisions of section 2163, General Code, are not applicable to the commuted sentence, and the prisoner is not entitled to any diminution for good behavior.

COLUMBUS, OHIO, March 5, 1931.

HON. JOHN MCSWEENEY, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, which reads as follows:

"Section 2163 G. C. (O. L. 88 v. 556) provides that a person confined in the penitentiary for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, shall be entitled to a certain diminution of his sentence.

We respectfully request your opinion as to whether or not a prisoner sentenced for life and whose sentence has been commuted is entitled to a further diminution of sentence under this section.

Specifically, one J. S. was on May 23, 1920, sentenced to the Ohio Penitentiary for life on a charge of Murder, First Degree—Mercy. On January 12, 1931, the Governor granted him a 'commutation at end of eleven years.' This prisoner's sentence will not expire under this commutation until May 22, 1931, provided there is no further diminution allowed him."

Your inquiry raises the question of whether or not time allowance for good

behavior, as provided for in section 2163, General Code, is applicable to a prisoner whose life sentence has been commuted to a term of years. The commutation of a sentence has been declared by many authorities to be a substitution of a lower for a higher grade of punishment. It has also been held that after commutation the sentence has the same legal effect as though the sentence had originally been for the commuted term.

A decision of our Supreme Court and opinions of my predecessor are in accord with the law as hereinbefore stated. In the case of *Ex Parte Victor*, 31 O. S. 206, the third paragraph of the syllabus reads as follows:

“Commutation is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit’s benefit.”

The court, at page 209 of this case, stated the legal effect of a commuted sentence to be as follows:

“As soon as the commutation is made, the new penalty becomes the one fixed by law, and the original penalty can not be restored.”

In the Opinions of the Attorney General, 1928, page 815, the second and third paragraphs of the syllabus provide:

“2. In its legal acceptance, a commutation is a change of punishment from a higher to a lower degree, in the scale of crimes and penalties fixed by the law. As soon as the commutation is made, the new penalty becomes the one fixed by law, and the original penalty cannot be restored.

3. Where a commutation or partial pardon has been granted by the Governor to a prisoner convicted of a felony so as to render such prisoner eligible for parole by the Ohio Board of Clemency, upon serving the minimum term provided in such commutation or partial pardon, such person may be paroled by such board the same as though the commuted sentence was originally imposed.”

Your attention is also called to the discussion as to commutation of a sentence in the Opinions of the Attorney General, 1927, page 2605. In the case of *State ex rel. Murphy vs. Wolfer*, 127 Minn. 102, a life sentence was commuted to a term of thirty years. After the commutation of sentence the prisoner claimed that he was entitled to a diminution of the commuted sentence by reason of a “good time” statute similar to section 2163, General Code. The court held as follows:

“A prisoner sentenced to the state prison for life whose sentence is commuted to one for a term of years, is entitled to diminution of that sentence by reason of good conduct, commencing on the day of his arrival in prison, and not from the time of commutation of his sentence.”

The court, in its discussion, at page 103, said that after commutation “the commuted sentence is the only one in existence and the only one to be considered.” To the same effect is the case of *In re Hall*, 34 Neb. 206, at page 209.

Whether or not the principles of law therein stated are applicable to your inquiry depends on the construction to be placed on the order of commutation made by the governor, since the right to diminution of the commuted sentence

depends on the terms of the commutation. Courts have held that where it is apparent that the authority granting the commutation intended that no allowance for good behavior should be made, such intention will be given effect. This rule of law was applied in the case of *Meyers vs. Jackson*, 245 Mich. 692, where the terms of the commutation read as follows:

“So that the same will expire fifteen years from date of sentence.”

The court held that a prisoner whose life sentence was commuted by the governor to expire fifteen years from date of sentence is not entitled to any reduction of sentence for good behavior under 1 Compiled Laws, 1915, section 1732, in force when he was sentenced, since the date of expiration is fixed by executive order, and the statute has no application. Thus it seems to me that the governor, in granting commutation of a sentence in which the order read “to be released from confinement at the end of eleven years from beginning of sentence,” meant that the prisoner was not to be allowed time off the commuted sentence for good conduct and that the prisoner was to be released only at the end of eleven years of imprisonment. The language of the commutation, in my mind, is plain and unambiguous and there is no necessity for making any construction other than that of the natural meaning of the words “at the end of eleven years from beginning of sentence.” The governor, if he intended otherwise, would not have used such language and would, no doubt, have left out the words “end” and “from beginning of sentence” if he intended that the prisoner was to have the benefits of section 2163, General Code. It is apparent from the order of commutation, that the prisoner was to serve eleven full years from the beginning of his sentence and not otherwise.

In conclusion, it is therefore my opinion that where the expiration of a sentence in the commutation of a life sentence is fixed by the governor to be “at the end of eleven years from beginning of sentence,” the provisions of section 2163, General Code, are not applicable to the commuted sentence, and the prisoner is not entitled to any diminution for good behavior.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3022.

APPROVAL, SUPPLEMENTAL FINAL RESOLUTION FOR ROAD IMPROVEMENT IN LUCAS COUNTY, OHIO.

COLUMBUS, OHIO, March 5, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

3023.

TOWNSHIP BOARD OF EDUCATION—VACANCY IN MEMBERSHIP—HOW FILLED—WHAT NECESSARY TO MAKE SELECTION VALID.

SYLLABUS:

Opinion of Attorney General, 1924, Vol. 1, p. 137, approved.