

3238.

DISAPPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS  
DUTIES AS RESIDENT DISTRICT DEPUTY DIRECTOR—H. H.  
FETZGER.

COLUMBUS, OHIO, May 20, 1931.

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

DEAR SIR:—You have submitted a bond purporting to cover the faithful performance of the duties of H. H. Fetzger, as Resident District Deputy Director assigned to Ashland County. Said bond is being returned without my approval for the reason that the power of attorney submitted by J. W. Gardner, who signed the bond on behalf of the surety, The United States Fidelity & Guaranty Company authorizes him to sign "bonds and undertakings given or required in any judicial action or proceeding" etc., and in my opinion, does not authorize the execution of the bond under consideration.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

3239.

GOVERNOR—AUTHORITY TO PARDON, COMMUTE THE SENTENCE  
OF, OR PAROLE A FELON AFTER CONVICTION AND SENTENCE,  
BUT BEFORE INCARCERATION IN PENAL INSTITUTION, DIS-  
CUSSED.

SYLLABUS:

1. *The Governor has the power to pardon a person convicted of a crime, either before sentence or before incarceration in a penal institution.*
2. *The Governor can exercise his power of commutation at any time after a person has been convicted and sentenced for committing a crime.*

COLUMBUS, OHIO, May 21, 1931.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—This is to acknowledge your letter of recent date, which reads as follows:

"A circumstance has arisen which causes me to ask you the following question:

Has the Governor of Ohio authority to pardon, commute or parole the sentence of a person convicted of a felony but who has not entered upon a term in a penal institution though sentence has been pronounced?"

Article III, section 11 of the Constitution of Ohio, reads as follows:

"He shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases

of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the general assembly, at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor."

The people, by virtue of article III, section 11 of the Constitution of Ohio, have conferred on the Governor the power to grant pardons, reprieves or to commute sentences. The question involved in your inquiry is when can the Governor exercise this power of pardon or commutation. At the common law the crown could exercise its pardoning powers at any time regardless of whether or not the crime had been already committed or whether or not a trial and a conviction had been obtained. This abuse of the pardoning power by the crown led the makers of the constitutions of the various states to enact in their constitutions provisions that the pardoning power could only be exercised after conviction. This restriction is also embodied in our constitution. See article III, section 11. Provisions restricting the Governor from exercising his power to pardon until after conviction have been construed as prohibiting the exercise of that power until the accused has been found guilty either by a court or jury.

The next thing to determine is what is meant by the word "conviction." 20 R. C. L. 539 gives the following as the legal meaning of "conviction":

"A conviction then within the meaning of these constitutional provisions is a stage of the proceedings which precedes the judgment or the sentence of the court, which later serves merely as the basis of an appeal or execution, and not to enlarge the verdict or aid in the determination of the guilt of the accused. That being so, sentence by the court is not essential to the completion of a 'conviction,' and is not a necessary precedent to the exercise of the pardoning power."

It has been held by many courts that the power to commute a sentence is a part of the pardoning power and that it may be exercised under that grant of power. Whatever has been said as to the power of the Governor to pardon a crime after conviction but before sentence or incarceration in a penal institution would therefore equally apply to a commutation of a sentence, inasmuch as it is considered a part of the pardoning power. There is no necessity, however, in this state, of considering the power to commute a sentence as being a part of the power to pardon, since the people have deemed it wiser to expressly state in the constitution of this state that the Governor has the power to pardon and to commute a sentence after conviction.

Whether or not the Governor can parole a person after conviction but before sentence or incarceration is a question that has not been adjudicated in this state. 20 R. C. L. 577 states that:

"A number of the state constitutions give the governor specific power to grant paroles, but even in the absence of such specific grant of power it is generally held that under constitutional or statutory provisions conferring the pardoning power upon the governor, he may grant paroles."

This rule that the power to parole is a part of the pardoning power is followed by a majority of the courts in the United States although there is a minority which holds otherwise. A parole has been defined and distinguished from other forms of release in 20 R. C. L. 578 as follows:

"A power to pardon is something more than a power to parole or a power to release from servitude. A parole does not pardon the prisoner; he still remains in legal custody. A parole is not the vacation of the sentence imposed, nor is it a commutation of the punishment. It suspends the execution of the penalty, and temporarily releases the convict from imprisonment on conditions which he is at liberty to accept or reject."

As heretofore stated, there is a split of authority as to whether or not the Governor, under his power to grant a pardon, may parole a prisoner. An examination of the leading authorities for and against the rule stated, discloses no case in which a parole has been granted before a prisoner has been incarcerated.

In the case of *Fuller vs. State*, 26 So. 126 (Ala.), wherein the majority viewpoint is expressed, the prisoner was already confined in the penitentiary when the Governor granted him a parole. The court, in considering the case, spoke of the parole as being a conditional pardon. In addition to that, the court construed a statute in Alabama which gave the Governor the right to discharge a convict in custody and to suspend sentence, the same to be either on conditions or without granting a parole.

The legislature of Ohio did not consider a parole to be the same thing as a conditional pardon, as is evident by the enactment of section 92, which empowers the Board of Clemency to release, parole or place on probation persons confined in penal institutions, and by section 99, which provides that the governor may grant a conditional pardon or make a conditional commutation of sentence.

The case of *State vs. Superior Court*, 246 Pac. 1033 (Ariz.), held that the Governor could not parole a convict and that a convict could not be paroled until he served the minimum term of his sentence.

Our Supreme Court, in the case of *Weaver vs. State*, 120 O. S. 44, at page 46, made the following statement:

"If it should develop that a person is wrongfully convicted, he is not without remedy, for the executive department of the government, upon proper showing, has full power to grant a pardon, parole, commutation of sentence, or such executive clemency as is authorized by law and justified by the facts in the case."

That case involved the question of whether or not the court of common pleas had jurisdiction in a criminal case after conviction to entertain a motion for new trial upon the ground of newly discovered evidence, which motion was filed at a term subsequent to the one in which a verdict was rendered. Although the statement made by the court, at page 46, is obiter dictum, nevertheless it is of some weight as to the question of whether or not the Governor may parole a prisoner.

Assuming that the Governor can parole a prisoner, the next question is whether or not the Governor can parole a person after conviction but before sentence or incarceration. An examination of the various statutes relating to the parole of prisoners in penal institutions discloses that a prisoner is not eligible

for parole until he has served the minimum term of his sentence and upon recommendation of designated penal officials. See sections 2132, 2148-9, 2160, 2166, 2141, 2148-10 and 2171, General Code. Under these statutes paroles may be granted only to those prisoners who have served the minimum term of their imprisonment. This being so, it appears to me that even if the Governor, by virtue of the Weaver case, *supra*, had the power to parole a prisoner, it could only be exercised when the prisoner had been incarcerated in a penal institution and after he had served at least the minimum term of imprisonment provided by law.

It is therefore my opinion that:

1. The Governor has the power to pardon a person convicted of a crime, either before sentence or before incarceration in a penal institution.

2. The Governor can exercise his power of commutation at any time after a person has been convicted and sentenced for committing a crime.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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3240.

APPROVAL, NOTES OF McARTHUR-HUNTSVILLE VILLAGE SCHOOL DISTRICT, LOGAN COUNTY, OHIO—\$5,500.00.

COLUMBUS, OHIO, May 20, 1931.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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3241.

FIREMEN'S PENSION FUND OF TOLEDO—COMPOSED PARTLY OF MONIES RECEIVED FROM REPEALED LAW WHICH IMPOSED TAX ON FOREIGN INSURANCE COMPANIES—RULE PROVIDING FOR USE OF SUCH FUND FOR FUNERAL EXPENSES OF FIREMEN, VALID.

*SYLLABUS:*

*The firemen's pension fund of the City of Toledo, composed, in part, of collections made from the tax on foreign insurance companies, may be used for the purpose of paying funeral expenses of members of the fire department in pursuance of a proper rule to that effect adopted by the board of trustees of the firemen's pension fund.*

COLUMBUS, OHIO, May 21, 1931.

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

GENTLEMEN:—Acknowledgment is made of your recent communication requesting my opinion upon a question submitted to you by one of your examiners. The letter from your examiner reads in part, as follows:

“The Firemen's Pension Trustees of Toledo have investments in an amount of \$58,650.00, most of the income for which investments was re-