Note from the Attorney General's Office:

1933 Op. Att'y Gen. No. 33-0969 was overruled by
2012 Op. Att'y Gen. No. 2012-042.

969.

FELONY—MAY NOT BE PROSECUTED BY MEANS OF AN INFORMATION INSTEAD OF AN INDICTMENT.

SYLLABUS:

A felony in Ohio can not be prosecuted by means of an information instead of an indictment.

COLUMBUS, OHIO, June 19, 1933.

HON. JOHN W. BOLIN, *Prosecuting Attorney, Athens, Ohio.*

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

> Section 13422-4 defines jurisdiction of Probate Court in criminal matters and Section 13425-1 Prosecution by Information. Do these two Sections provide for the prosecution of felony cases by information?
>
> Is there any means whereby the Prosecuting Attorney can file on information either in Probate Court or Common Pleas Court and prosecute on information alone without resorting to calling a Grand Jury and formally indicting in crimes which constitute felony?
>
> The purpose of asking your opinion is for the reason that in many cases, parties under arrest are willing and ready to enter a plea of guilty and start upon their time in one of the penal institutions of the State and the evidence of the State is conclusive and as the calling of Grand Juries is expensive and the retention of prisoners in the County Jail awaiting Grand Juries is also expensive, I am just wondering if there is not some provision for the information being filed either in Probate Court or Common Pleas Court in felony cases."

It is not necessary to discuss the first question raised in your letter, in view of the fact that the legislature in the enactment of the new probate code saw fit to relieve the probate court of its criminal jurisdiction by repealing section 13422-4 and sections 13425-1 to 13425-22, inclusive, of the General Code. 114 O .L. 475 (section 10512-23, General Code). See sections 6212-39 and 13435-14, General Code, before and after said sections were amended in 114 O. L. 479. See also section 13422-1, General Code, as amended in 114 O. L. 479.

Your second inquiry is whether a prosecution for a felony can be commenced by means of an information of an indictment. Section 10 of article I of the Constitution of Ohio is pertinent to the question and reads in part as follows:

> "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, *no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.*" (Italics the writer's.)

Offenses in Ohio are divided into two classes—felonies and misdemeanors. Felonies are those offenses which may be punished by death or by imprisonment in the penitentiary. All other offenses which are not punishable by death or by imprisonment in the penitentiary are misdemeanors. Section 12372, General Code. It is well settled in this state, both by judicial pronouncement and practice, that all felonies must be prosecuted by indictment, as required by the constitutional mandate contained in section 10 of article I of the Constitution of Ohio. In *Lane* vs. *State,* 39 O. S. 312, at page 313, it is stated that:

> "Felonies must be prosecuted by indictment (Const. art. I § 10)."

See also *Stewart, et al.,* vs. *State of Ohio,* 41 O. App. 351, 21 O. Jur. 681. There is no judicial pronouncement by the Supreme Court of Ohio as to what constitutes an infamous crime within the meaning of that phrase as contained in section 10 of article I of the Constitution. An infamous crime is defined in 16 C. J., page 60, as "one which works infamy in the person who commits it". According to the modern view, the question of whether a crime is an infamous one or not is determined by the nature of the punishment. The rule is stated in 16 C. J., page 60, as follows:

> " * * * the question is determined by the nature of the punishment, and not by the character of the crime, and that any crime is infamous that is punishable by death or imprisonment, with or without hard labor, in a state prison. The decision turns not upon the punishment actually inflicted, but upon the punishment which the court is authorized to impose."

An offense which is punishable by imprisonment in a penitentiary is considered by many authorities as an infamous crime. 24 A. L. R. 1004. Although, as previously stated herein, there is no judicial pronouncement on the question by the Supreme Court of Ohio, nevertheless there are indications that the Supreme Court of Ohio would be inclined to hold that an offense punishable by imprisonment in a penitentiary is an infamous crime. That conclusion finds support in the case of *Stockum* vs. *State,* 106 O. S. 249, wherein it was held that a conviction for the violation of section 1654, General Code (misdemeanor), was not a conviction for an infamous crime. Clark, J., at page 253, said that:

> "It is urged that imprisonment 'at hard labor' makes the crime 'infamous;' that the rule has been changed; that new tests of 'infamous' have been laid down; that hard labor is an 'infamous punishment,' and this court is asked to reverse not only its own line of consistent adjudication upon the proposition, but to disregard the adjudications of the supreme court of the United States.
>
> The state of Ohio has created its system of criminal procedure, covering questions of crime and imprisonment, and has provided its own definitions and procedure.
>
> *It has divided offenses into classes of felonies and misdemeanors. It has not defined any offenses as 'infamous.' Reasoning by analogy, felonies might be regarded as infamous crimes inasmuch as conviction of a felony involves the loss of civil rights.* (Section 12390, General Code.) If the reasoning is sound, the offense for which Stockum was convicted is not infamous." (Italics the writer's.)

Blosser, J., in the case of *Stewart* vs. *State, supra,* said, at page 352, that:

> " * * a felony, is regarded as an infamous crime under the laws of Ohio."

In view of the authorities cited and quoted herein, it is safe to say that a felony is an infamous crime within the meaning of that phrase as used in section 10 of article I of the Constitution of Ohio.

By virtue of the provisions of section 10 of article I, indictment by a grand jury is necessary in order to prosecute a person accused of committing a felony, since it is expressly provided therein that no person shall be held to answer for a felony (infamous crime) except on indictment by a grand jury. Accordingly, it is only offenses which are not classed or deemed felonies that need not be prosecuted by indictment.

It was not intended by the enactment of section 13437-34, which reads:

> "In prosecutions for misdemeanor in the court of common pleas, indictment by the grand jury shall not be necessary, but such prosecution may be upon information filed and verified by the prosecuting attorney of the county, or by affidavit when such method is by statute especially provided. The provisions of law as to form and sufficiency, amendments, objections and exceptions to indictments and as to the service thereof shall apply to such informations."

to dispense in felony cases with the requirement of section 10 of article I that offenses that are felonies must be prosecuted by indictment. It is obvious on a reading of section 13437-34 that a prosecuting attorney has no authority to put a party to trial for a felony on the filing of an information. To warrant the institution of a criminal proceeding by the filing of an information, the offense must be one which is classed as a misdemeanor, inasmuch as section 13437-34 expressly provides that a prosecution for a misdemeanor in a court of common pleas may be commenced by an information instead of an indictment. In other words, the commencement of a criminal prosecution in a court of common pleas by the means of an information is available to a prosecuting attorney only when the offense charged is a misdemeanor. That a felony can not be prosecuted by means of an information filed by a prosecuting attorney was definitely determined in the case of *Stewart, et al.,* vs. *State, supra,* wherein it was held:

> "1. Unlawfully manufacturing intoxicating liquor is felony, classed as infamous crime, which can only be charged by indictment found by grand jury (Section 6212-17, General Code; Article I, Section 10, Constitution).
>
> 2. Whatever Constitution and laws of state prescribe in criminal prosecutions is essential to court's jurisdiction, and can neither be omitted nor waived.
>
> 3. Judgments of conviction for unlawfully manufacturing intoxicating liquor held nullities, where accused were tried solely on informations prepared and filed by prosecuting attorney (Section 6212-17, General Code; Article I, Section 10, Constitution)."

See also 31 C. J., page 565.

At the common law, all felonies were required to be prosecuted by indictment, while misdemeanors could be prosecuted either by indictment or information. Warden, J., in the case of *Gates and Goodno* vs. *State,* 3 O. S. 294, at page 297, said that:

> "Informations lie (in England) for misdemeanors only; they would not support a conviction for treason or felony."

See also 31 C. J., page 565. The enactment of section 13437-34 is merely declaratory of the common law practice of instituting prosecutions for misdemeanors by information. The rule of the common law in respect to the commencement of criminal prosecutions prevails in Ohio today by constitutional provision and statutory enactment. Thus, by virtue of the provisions of section 10 of article I of the Constitution of Ohio, prosecutions for felonies can be only by indictment, while prosecutions for misdemeanors can be either by indictment (section 13436-18, General Code) or by information (section 13437-34, General Code).

Specifically answering your letter, I am of the opinion that a felony in Ohio can not be prosecuted by means of an information instead of an indictment.

Respectfully,
JOHN W. BRICKER,
Attorney General.

970.

BUILDING AND LOAN COMPANY—MAY NOT LEGALLY ACT AS TOWNSHIP DEPOSITORY—UPON INSOLVENCY SUCH FUNDS IMPRESSED WITH TRUST AND CONSTITUTE PREFERRED CLAIM—IDENTIFICATION OF FUNDS.

SYLLABUS:

1. *Under sections* 3320 *et seq. of the General Code, a building and loan company may not legally act as a township depository.*
2. *Where township funds are deposited in a building and loan company, the officers of such company having knowledge that the funds are township funds, upon the subsequent insolvency of the building and loan company, such funds are impressed with a trust and entitled to allowance as a preferred claim upon liquidation, provided they can be traced or identified.*
3. *Such identification is complete when the minimum sum on hand in the general deposits of the building and loan company between the date of the trust deposit and the date of closing for liquidation is equal to or in excess of the amount of the trust deposit.*

COLUMBUS, OHIO, June 19, 1933.

HON. F. MERCER PUGH, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—You have requested my opinion as to whether or not a certain deposit by township trustees in a building and loan company, now in process of liquidation, constitutes a preferred claim against the assets of the building and loan company The deposit in question was made by the trustees of Swancreek