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PENITENTIARY—STATE REFORMATORY—PRISONER UNDER SENTENCE FOR FELONY—THEREAFTER REMOVED FROM INSTITUTION—TRIED FOR ANOTHER FELONY—FOUND GUILTY AND SENTENCED—MUST SERVE FIRST SENTENCE BEFORE COMMENCEMENT TO SERVE SENTENCE UNDER CONVICTION OF SECOND OFFENSE.

## SYLLABUS:

A convict in the penitentiary or state reformatory under sentence for a felony, who thereafter is removed from such institution to stand trial for another felony, for which he is found guilty and is sentenced, must serve his first sentence before he commences serving the sentence under the conviction of the second offense.

Columbus, Ohio, October 17, 1945

Hon. Frazier Reams, Director  
Department of Public Welfare  
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“Former General Code Section 2175 (81 v. 76) provided—

‘A prisoner at large upon parole or conditional release committing a new crime, and resentenced, to the Penitentiary, shall serve a second sentence, to begin at the termination of his service under the first or former sentence, or the annulment thereof.’

This section was repealed effective July 26, 1929 (113 v. 685.) As the result of the repeal of Section 2175, G. C., and also in accordance with an opinion of the Attorney General, No. 5745, rendered under date of June 26, 1936, a prisoner convicted and sentenced on a felony commitment while at large on parole or escape is entered on the new sentence and serves that sentence before completing the previous sentence. In Opinion No. 5745, the Attorney General held—

'I find no provision which would authorize either the Board of Parole, or the head of a penal institution, or the Department of Public Welfare to stay the execution of a sentence imposed upon a parolee, who, while on a parole, has been convicted and sentenced for another offense. In other words, the execution of a sentence imposed upon a prisoner convicted of a penal offense is not a matter lying within the discretion of either the Department of Public Welfare or its agents, or the Board of Parole.'

Sections 13438-5 and 13438-8, G. C. (113 O. L. v. 171-172, eff. July 21, 1929) refer to the removal of a convict from the Penitentiary or State Reformatory for sentence or trial on an offense committed in the institution, and to a prisoner against whom an indictment or information for felony is pending. Section 13438-8, G. C. provides—

'If such convict is acquitted, he shall be forthwith returned by the sheriff to the penitentiary to serve out the remainder of his sentence, but if he is sentenced to imprisonment in the penitentiary, he shall be returned thereto by the sheriff *and the term of his imprisonment shall begin at the expiration of the term for which he was in prison at the time of his removal.* If he is sentenced to death, such sentence shall be executed as if he were not under sentence of imprisonment in the penitentiary.'

Query I. Is this provision to be considered as an exception to the general rule that a prisoner shall serve the latest sentence before completing a previous and unexpired sentence?

As an example of the apparent inconsistencies of the provisions of Section 13438-8, G. C., we cite the following: On April 26, 1944, one M.A.P. was admitted to the Ohio Penitentiary on sentence from Summit County on a charge of armed robbery, 2 counts, and one count for shooting with intent to wound, 3 consecutive sentences, 21 to 70 years. On May 9, 1944, this man was taken from the Penitentiary to *Stark County*, under the provisions of Sections 13438-5 to 13438-8, G. C., to answer to an indictment for murder. On June 21, 1944, the man was returned to the Penitentiary with a sentence from Stark County, murder—first degree, life. The officials of the Penitentiary acting under the provisions of Section 13438-8, G.C., re-entered the prisoner on

his former Summit County sentence, armed robbery and shooting with intent to wound—21 to 70 years. If this handling of the case is correct, the prisoner's entry on his life sentence must be deferred for at least 10 years from April 26, 1944, as he would not be subject to parole or final release on the Summit County sentence until he had served 10 full years.

The offense on which M.A.P. was sentenced from *Summit County* armed robbery and shooting with intent to wound, was committed on October 29, 1942 in Akron, but he was not arrested on this charge until November 12, 1943; indicted February 14, 1944, and sentenced in April 1944.

The Stark County murder was committed April 6, 1943 at an inn outside of Canton. It was not until the prisoner was in custody on this charge, November 1943, that he was identified as the perpetrator of the Summit County offense. The man was tried in December 1943 on the Stark County murder charge, the jury disagreed, and he was released by Stark County on December 15, 1943 to Summit County, where he was indicted, tried and found guilty of armed robbery and shooting with intent to wound, and sentenced to the Ohio Penitentiary, admitted April 26, 1944. On May 9, 1944, he was taken from the Penitentiary to Stark County for another trial on the murder charge; convicted by the jury of first degree, with mercy, and sentenced on June 19, 1944 to life imprisonment.

Query II: If Section 13438-8, G. C., which provides that the term of imprisonment 'shall begin at the expiration of the term for which he was in prison at the time of his removal' must be held to apply to prisoners referred to in Sections 13438-5, 13438-6, and 13438-7, does that section also apply to a prisoner who is convicted for a felony committed while confined in the Reformatory or Penitentiary (Section 13438-4)?

For example, one O.M. while confined in the Ohio State Reformatory on a charge of forcible rape, 3 to 20 years, on March 28, 1945 cut the throat of a fellow prisoner resulting in the prisoner's death a half hour later. O.M. was turned over to the Richland County Court under Section 13438-4, and on June 12, 1945, he was convicted and sentenced to the Ohio State Reformatory for manslaughter, 1 to 20 years. If Section 13438-8 applies to prisoners referred to in Section 13438-4, this man should have been returned to the Ohio State Reformatory to serve the remainder of his reformatory sentence before being entered on the Penitentiary manslaughter sentence.

We shall greatly appreciate your opinion on these questions at as early a date as possible."

Your recital of facts resolves into two questions, namely:

1. If a prisoner confined in the Ohio State Penitentiary, under a sentence of from twenty-one to seventy years, thereafter is removed from the penitentiary, stands trial and is thereafter convicted of murder, must the prisoner serve his first sentence before his time begins to run on the murder sentence?

2. If a person confined to the Ohio State Reformatory under a sentence of from three to twenty years, murders one of his fellow prisoners and thereafter is convicted of manslaughter, must he serve the first sentence of from three to twenty years before he can commence serving his sentence for manslaughter.

Your first question is answered by the plain provisions of Sections 13438-5 and 13438-8 of the General Code, which read respectively as follows:

Section 13438-5:

"A convict in the penitentiary or state reformatory, who escaped, or forfeited his recognizance before receiving sentence for a felony, or against whom an indictment or information for felony is pending, may be removed to the county in which such conviction was had or such indictment or information was pending, for sentence or trial, upon the warrant of the court of such county. This section shall not extend to the removal of a convict for life, except the sentence to be imposed or the indictment or information pending against him is for murder in the first degree."

Section 13438-8:

"If such convict is acquitted, he shall be forthwith returned by the sheriff to the penitentiary to serve out the remainder of his sentence, but if he is sentenced to imprisonment in the penitentiary, he shall be returned thereto by the sheriff and the term of his imprisonment shall begin at the expiration of the term for which he was in prison at the time of his removal. If he is sentenced to death, such sentence shall be executed as if he were not under sentence of imprisonment in the penitentiary."

You will note that the last section specifically sets forth that the term of his imprisonment shall begin at the expiration of the term for which he was imprisoned at the time of his removal.

Since your second question deals with a convict who while in the State Reformatory was indicted and convicted of manslaughter, it would appear that the same statutes apply thereto. Section 13438-4 should not be allowed to confuse you in this matter since said section does not qualify section 13438-5 but simply sets forth a peculiar procedure where the offense is committed within the penal institution, that is to say, it permits the prisoner to be retained in the institution where he committed the offense, subject to the order of the Court of Common Pleas in the county wherein such institution is located.

It will be observed that Section 13438-5, General Code, reads :

“A convict in the penitentiary or state reformatory \* \* \* against whom an indictment or information for a felony is pending, may be removed \* \* \*.”

Sections 13438-4, 13438-5 and 13438-8 in their present form were all passed by the Legislature at the same time on the same subject (113 O. L. 171), are in *pari materia* and must be construed together so as to make a complete design. On this point, Crawford on Statutory Construction, pages 433, 435, says :

“The rule which thus allows the court to resort to statutes in *pari materia* finds its justification *in the assumption that statutes relating to the same subject matter were enacted in accord with the same legislative policy; that together they constitute a harmonious or uniform system of law; and that, therefore, in order to maintain this harmony, every statute treating the same subject matter should be considered. As a result, statutes in pari materia should not only be considered but also construed to be in harmony with each other that each may be fully effective.* They are to be *construed* together as if they constituted one act. Moreover, this rule is especially applicable where the several statutes are not only in *pari materia* but have been enacted on the same day, or during the same legislative session.” (Emphasis added.)

The sections quoted and referred to herein are not new in the Ohio Criminal Code. They have their origin back in the Revised Statutes when Section 13438-5 was known as Revised Statute, Section 7234 and Section 13438-8 was known as Revised Statute, Section 7238.

The Supreme Court of Ohio in the case of Henderson v. James, Warden, 52 O. S., 242, in a case involving the question of whether or not

two sentences passed at different times by different courts would run concurrently where the man in each instance was sentenced and imprisoned under a different name, said in interpreting sections 7234 and 7238 of the Revised Statutes :

“These two sections clearly show the Legislative intent, that convicts shall serve out one sentence for each offense for which they are convicted and sentenced.”

An examination of the opinion of the Attorney General, referred to in your letter, discloses that the question dealt with therein concerned a prisoner who while being absent from a penal or reformatory institution on parole was convicted and sentenced for another crime. Therefore, since the cases under consideration herein do not involve parolees, said opinion has no application.

Therefore, in specific answer to your inquiry, it is my opinion that in each of the cases presented, the prisoner must serve the remainder of his sentence growing out of his first conviction before he commences serving the sentence under the conviction of the second offense.

Respectfully,

HUGH S. JENKINS

Attorney General