

2242.

CONVICTION, FELONY, "ARMED BURGLARY OF A BANK," SECTION 12441 G. C. — "KIDNAPPING FOR THE PURPOSE OF EXTORTION", SECTION 12427 G. C. — PERSONS SO CONVICTED REQUIRED TO BE SENTENCED TO IMPRISONMENT, OHIO PENITENTIARY, THOUGH THEY BE BETWEEN AGES SIXTEEN AND TWENTY-ONE YEARS — WHERE SUCH PERSONS BETWEEN AGES SIXTEEN AND TWENTY-ONE YEARS CONVICTED, "BURGLARY OF AN INHABITED DWELLING HOUSE," SECTION 12437 G. C., REQUIRED SENTENCE IS TO OHIO STATE REFORMATORY, NOT OHIO PENITENTIARY.

SYLLABUS:

1. *Persons convicted of a felony under the provisions of the last paragraph of Section 12441 of the General Code, defining the crime commonly called "Armed Burglary of a Bank", or, under Section 12427, General Code, denouncing the crime of "Kidnapping for the Purpose of Extortion," are required to be sentenced to imprisonment in the Ohio Penitentiary even though such persons be between the ages of sixteen and twenty-one years.*

2. *Persons between the ages of sixteen and twenty-one years of age, convicted of the crime of "Burglary of an Inhabited Dwelling House" under the provisions of Section 12437, General Code, are required to be sent to the Ohio State Reformatory and not the Ohio Penitentiary.*

Columbus, Ohio, May 1, 1940.

Honorable Charles L. Sherwood, Director, Department of Public Welfare, Columbus, Ohio.

Dear Sir:

Receipt is acknowledged of your request for my opinion, reading as follows:

"Are prisoners, irrespective of age, legally confined in the Ohio State Reformatory who have been sentenced under statutes carrying a fixed or definite term of imprisonment, for instance, 'Life' or 'Not less than 20 years', or should they be transferred to the Ohio Penitentiary under the provisions of Section 2210-2, G. C.

Shall male offenders under twenty-one years of age who have been found guilty or have pleaded guilty to the following named crimes be sentenced to the Ohio Penitentiary or to the Ohio State Reformatory?

Section 12427:

'Whoever wilfully and maliciously abducts or kidnaps any person, or wounds or maims said person, for the purpose of extorting from said person so abducted or kidnapped, or from any other person, a reward, ransom, moneys, goods, chattels or other things of value, upon conviction shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment in the penitentiary during life; provided, however, if the person so abducted or kidnapped has been liberated unharmed prior to the commencement of trial, the said person so convicted shall be imprisoned in the penitentiary for not less than twenty years.'

Section 12437:

'Whoever in the night season maliciously and forcibly breaks and enters an inhabited dwelling house with intent to commit a felony, or with intent to steal property of any value, shall be imprisoned in the penitentiary during life; but upon recommendation of mercy by the jury shall be imprisoned in the penitentiary not less than five years nor more than thirty years.

When the accused enters a plea of guilty, the court may hear evidence as to the circumstances of the offense, and in its discretion, sentence the accused to be imprisoned in the penitentiary during life, or for a period of not more than thirty years, nor less than five years'.

Section 12441:

' * * *

'Whoever, by day or night, maliciously enters a bank or other financial institution which receives upon deposit or otherwise for safe-keeping the moneys or public funds, of individuals or corporations and attempts to commit or commits a felony with firearms or other deadly weapons, shall be imprisoned in the penitentiary during life; provided, that if the jury upon the trial of any such indictment as a part of their verdict finds the accused guilty and recommends mercy, the court may sentence the accused to not less than twenty years in the penitentiary.'"

A proper resolution of your question requires a consideration of Sections 2131 and 2132, General Code, which must be read in connection with the sections quoted and referred to in your letter. These sections read:

Section 2131:

“The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory, if they are not-known to have been previously sentenced to a state prison. Male persons between the ages of sixteen and twenty-one years convicted of felony shall be sentenced to the reformatory instead of the penitentiary. Such persons between the ages of twenty-one and thirty years may be sentenced to the reformatory if the court passing sentence deems them amenable to reformatory methods. No person convicted of murder in the first or second degree shall be sentenced or transferred to the reformatory.

Section 2132:

“Courts imposing sentences to the Ohio state reformatory shall make them general, and not fixed or limited in their duration. The term of imprisonment of prisoners shall be terminated by the Ohio board of administration, as authorized by this chapter, but the term of such imprisonment shall not exceed the maximum term, nor be less than the minimum term provided by law for such felony.”

Section 2210-2, General Code, to which you refer, provides as follows:

“If through oversight or otherwise, a prisoner is sentenced to the Ohio penitentiary or the Ohio state reformatory who is not legally eligible for admission thereto, the warden or superintendent of said institution shall receive said prisoner and shall forthwith recommend to the department of public welfare, the transfer of said prisoner to the proper institution. Prisoners so transferred shall be entitled to the same legal rights and privileges as to the term of sentence, diminution of sentence and parole, as if originally sentenced and committed to the institution to which they have been transferred.”

1. Your inquiry with reference to Section 12441, General Code, will be first answered for the reason that this question has been specifically passed upon by the Supreme Court. In the case of *Ex Parte Fleming*, 123 O. S. 16, 173 N. E. 441 (1930), it was held as stated in the second branch of the syllabus that:

“*Habeas corpus* does not lie to effect the discharge of one under the age of twenty-one years who has received a definite sentence to the penitentiary under the provisions of such new act (Section 12441, General Code) for the offense of entering a bank with intent to commit or committing a felony with firearms or other deadly weapons, even though a general law passed prior to such new act provides for general sentences of male persons between the ages

of sixteen and twenty-one years, convicted of felony, to the reformatory instead of the penitentiary."

In the Fleming case, the petitioner for a writ of habeas corpus had been convicted under Section 12441, General Code, "of entering a bank to commit a felony with firearms or other deadly weapons". He was sentenced to imprisonment in the Ohio Penitentiary "for a period of duration not less than twenty years." It was the applicant's contention that, since he had been "sentenced for the felony in question while he was still between sixteen and twenty-one years of age, Sections 2131 and 2132, General Code, require(d) his sentence to be a general one to the Ohio state reformatory instead of the penitentiary."

The rationale of the court's holding is set forth at page 19 et seq. of the opinion of Judge Robert H. Day, concurred in by the entire court, which reads in part:

"These two sections of the General Code, 2131 and 2132, have been upon the statute books of Ohio for many years, the last amendment thereto being found in 103 Ohio Laws, 885, and becoming effective August 11, 1913. Both of the sections are laws of a general nature, and, as above indicated, long antedate the provision of the General Code relative to entering a bank by night or day and attempting to commit a felony with firearms, or other deadly weapons therein, passed by the Legislature in 1929. Prior to that date the Criminal Code of Ohio provided against robberies, forgeries, larceny, burglary, and other offenses which might be committed against a bank or other financial institution, as mentioned in the amendment of Section 12441, *supra*. The Legislature has power to define crimes and offenses and fix the penalties therefor.

We reach the conclusion that this amendment to Section 12441, General Code, was doubtless enacted to prevent the all too common commission of offenses of the character indicated against institutions named in the amended Section 12441, that *the Legislature for that purpose made special provision for the sentence to the penitentiary of those found guilty of violating such section, it being in the nature of a special penalty against that class of offenders guilty of the depredations named in that section, and that the general law applicable to offenders between sixteen and twenty-one years of age, as set forth in Sections 2131 and 2132, does not apply.*

'Where the general provisions of a statute are found to be in conflict with the express provisions of a later act relating to a particular subject, the latter will govern, although the words of the earlier general act, standing alone, would be broad enough to include the subject to which the more particular provisions re-

late.' Thomas, Sheriff, v. Evans, 73 Ohio St., 140, 76 N. E., 862.

Authorities might be multiplied in support of this proposition, but we deem it unnecessary. That the Legislature had power to pass this new law for the purpose of preventing robberies and hold-ups upon banks and like institutions receiving money on deposit, we deem too well established to require the citation of authority.

* * *

Entertaining the view that the Legislature has made special provision by the amendment to Section 12441, General Code, for a penitentiary sentence of those convicted of entering 'a bank or other financial institution which receives upon deposit or otherwise for safekeeping the moneys or public funds, of individuals or corporations, and attempts to commit or commits a felony with firearms or other deadly weapons,' and that the general law with reference to male offenders from sixteen to twenty-one years of age receiving general sentences to the Ohio reformatory, as provided in Section 2131 and 2132, General Code, does not apply it therefore becomes our duty, on this record, to deny the writ."
(Emphasis ours.)

See also the case of *In re Flora*, and *State ex rel. Flora v. Allman*, Director of Public Welfare, 12 O. O. 495, 27 Abs. 555 (C. of A., Madison County; 1938), which followed the Fleming case, the first branch of the headnotes reading (27 Abs. 355):

"A bank robber, even though he be between 16 and 21 at the time he is sentenced, must be sentenced to the penitentiary, and the provision of §12441 G. C., that the court "may sentence the accused to not less than 20 years in the penitentiary' has application only to the length of time and not to the place of confinement and apparently does not provide for an indeterminate sentence."

II. Considering next your request with reference to Section 12437, General Code, the Court of Appeals of Summit County, in the cases of *State v. Catalfo* and *State v. Merlo*, 59 O. App. 99; 12 O. O. 399 (1938), distinguished the facts in these cases from the facts in the Fleming case, *supra*, and limited the application of the law laid down in the Fleming case. The syllabus in the Catalfo case reads as follows:

"1. Section 12432, General Code, as Section 6818, Revised Statutes, was in force on April 23, 1902, and provided that those convicted of violating that section should be imprisoned in the *penitentiary* not less than one year nor more than fifteen years. On April 23, 1902, Section 2131, General Code, was amended

in substantially its present form as Section 7388-24, Revised Statutes, and provided that a special class—to wit, male persons 'between the ages of sixteen and twenty-one' years convicted of felony should be sentenced to the *reformatory* instead of the penitentiary. *Held*, that by the enactment of Section 2131, General Code, the provisions of that section relating to sentence of the class therein mentioned, were controlling as an exception of said class from the operation of Section 12432, General Code, as to place of imprisonment.

2. Thereafter, on September 7, 1921, Section 12432, General Code, was repealed and reenacted, the only change, however, made therein being in the *term* of imprisonment, which was increased to not less than ten years nor more than thirty-five years. *Held*, that such repeal and reenactment did not change or affect the exception as to *place* of imprisonment, created by the enactment of Section 2131, General Code."

Apparently the Catalfo and Merlo cases were argued and submitted at the same time. Whether or not this be true, the two appeals were decided in the same opinion. And since the opinion of the court in the Merlo case is more decisive here and follows and is in conformity with the holding in the Catalfo case, only excerpts from the opinion relating to Merlo will be quoted. At page 97 et seq., the court said as follows:

"As to the *Tony Merlo case*: He was found guilty of robbery (violation of Section 12432, General Code), and, although he was only 19 years of age, was sentenced to the penitentiary for an indeterminate period of not less than 10 years nor more than 25 years.

Section 12432, General Code, as Section 6818, Revised Statutes, was in force on April 23, 1902, when Section 7388-24, Revised Statutes, was amended, which section was substantially in the present form of Section 2131, General Code. Previous to that date, it was provided that persons convicted of the crime of robbery should be imprisoned in the penitentiary not more than 15 years nor less than 1 year, and, as has been said, in 1902 it was provided by what is now Section 2131, General Code, that male persons between the ages of 16 and 21 who were convicted of robbery should be sentenced to the reformatory; * * *

It is claimed, however, that inasmuch as Section 12432, General Code, was repealed and reenacted on September 7, 1921, when Section 2131, General Code, was in force, *** Section 12432, General Code, should be considered as if enacted in 1921, and that, as it provided that whoever violated that section should be sentenced to the penitentiary, its provisions should govern although Section 2131, General Code, was then in force and required violators of that section between the ages of 16 and 21 to be sentenced to the reformatory.

Examination discloses that by such repeal and reenactment of Section 12432, General Code, the only change made therein was to change the minimum term from one year to ten years, and the maximum term from fifteen years to twenty-five years, and that otherwise the language of the section is the same as it was before such repeal and reenactment.

* * *

In *In re Harry Allen*, 91 Ohio St., 315, 110 N. E., 535, paragraph 1 of the syllabus, it was determined that:

'1. Where there is reenacted in an amendatory act provisions of the original statute in the same or substantially the same language and the original statute is repealed in compliance with Section 16, Article II of the Constitution, such provisions will not be considered as repealed and again reenacted, but will be regarded as having been continuous and undisturbed by the amendatory act.'

That pronouncement is in accordance with the general rule, and, applying that rule, we are of the opinion that the provision for sentence to the penitentiary contained in Section 12432, General Code, should be considered not as a new enactment by the Legislature on September 7, 1921, * * * .

The facts relative to said amendment differ very materially from the facts considered by the Supreme Court in reference to the amendment of Section 12441, General Code, which was involved in the case of *Ex parte Fleming*, 123 Ohio St., 16, 173 N. E. 441. Before it was amended, that section made it an offense to enter certain named buildings (among which was a bank) and attempt to commit a felony, but provided a penalty for its violation of only one or two years in the penitentiary. As reenacted, that paragraph was just the same except that bank buildings were omitted from the list of buildings.

But that was not the only change made in the reenactment of that section, a separate paragraph was added to it, and it related solely to banks, and created a new and distinct offense—to wit, entering a bank or other financial institution which receives private or public funds for safekeeping, and committing or attempting to commit a felony with firearms or *other deadly weapons*, and providing a penalty of life imprisonment unless mercy be recommended by the jury.

* * *

No such situation is presented by the amendment we are considering. We are clearly of the opinion that the Legislature, by the amendment involved in the instant *Merlo* case, did not intend in any way to affect the provisions of Section 2131, General Code, and this is apparent when we consider the circumstances and history of this legislation.

For at least seventy-five years the law required violators of the robbery statute to be sentenced to the penitentiary—that being

the principal penal institution of the state; recognition was given to the fact that it was an unwise public policy to confine youthful culprits with hardened criminals, although such youthful culprits had committed felonies, and accordingly the reformatory was established for the very purpose of changing that condition; and the legislature, instead of amending all of the statutes that provided for sentence to the penitentiary, passed what is now Section 2131, General Code, * * *.

That was a statute applying to a special class, and it is evident that the Legislature intended that the general provisions in the criminal statutes relating to sentences to the penitentiary should be considered as containing an exception as to violators between the ages of 16 and 21, as provided in Section 2131, General Code, * * *

Until the Legislature indicates an intention to change the public policy thus established, it is the duty of courts to carry out and make effective that public policy, and we are of the opinion that the change made in the robbery statute by the amendment and reenactment of the same in 1921 does not indicate an intention on the part of the Legislature to change such public policy."

(Emphasis ours.)

The law as declared by the Supreme Court in the Fleming case, and as limited in its application in the Merlo case, makes easy the answer to your question having to do with Section 12437, General Code. Since the amendment of Sections 2131 and 2132, General Code, in the act of April 23, 1902 (95 v. 251), Section 12437, General Code, has been amended five times. See 95 v. 561; 96 v. 14; 98 v. 3; 100 v. 5; and 101 v. 128, passed April 18, 1910. A careful examination of the several acts in question, however, reveals that in so far as Section 12437, *supra*, is concerned, neither the crime of burglary of an inhabited dwelling, nor the penalty therefor was essentially changed. In any event, no *new* crime was created, authorizing the court to impose any different or additional penalty. The holding and reasoning of the court in the Catalfo and Merlo cases are therefore here pertinent, and the conclusion is irresistible that a person between the ages of sixteen and twenty-one years convicted of burglary of an inhabited dwelling, under the provisions of Section 12437, General Code, may only be sentenced to the Ohio State Reformatory as prescribed by Section 2131, General Code.

III. Coming now to your question with reference to Section 12427, General Code, which defines the crime of kidnapping or abduction of a person for the purpose of extortion, it is my opinion that the rules of law and principles annunciated in the Fleming case, *supra*, govern. The only amend-

ments to Section 12427 enacted after the passage of Section 2131 in its present form (103 v. 864, 865; Aug. 11, 1913) are contained in the acts respectively passed on September 14, 1933 (115 v. Pt. 2, 74) and April 29, 1937 (117 v. 485).

As enacted in the act of September 14, 1933, Section 12427 reads as follows:

“Whoever willfully and maliciously abducts or kidnaps another over the age of twelve years, or wounds or maims him, for the purpose of extorting from him or from anyone related to him by blood, marriage or adoption, moneys, goods, chattels or other things of value, shall be imprisoned in the penitentiary not less than *five* years nor more than thirty years; and whoever willfully and maliciously abducts or kidnaps another under the age of twelve years, or wounds or maims him, for the purpose of extorting from him or from anyone related to him by blood, marriage or adoption; money, goods, chattels or other things of value, shall be imprisoned in the penitentiary for life; but upon recommendation of mercy by the jury shall be imprisoned in the penitentiary not less than ten years nor more than thirty years.

And when the accused enters a plea of guilty, the court may hear evidence as to circumstances of the offense, and, in its discretion, sentence the accused to be imprisoned in the penitentiary during life, or for a period of not more than thirty years, nor less than ten years.”

The act of September 14, 1933, amended this section as passed in the act of May 10, 1910 (101 v. 263), the only change being that the word “five”, above emphasized, was submitted for the word “three”.

In the act of April 29, 1937, Section 12427 was amended to read as follows, the asterisks and italics indicating the changes:

“Whoever willfully and maliciously abducts or kidnaps, *** *any person*, or wounds or maims *** *said person*, for the purpose of extorting from *** *said person so abducted or kidnapped, or from any other person, a reward, ransom, money, goods, chattels or other things of value, upon conviction* shall be *** *punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment in the penitentiary during life; provided, however, if the person so abducted or kidnapped has been liberated unharmed prior to the commencement of trial, the said person so convicted shall be imprisoned in the penitentiary for not less than twenty years.*”

It seems clear that in the last amendment the provisions of Section

12427 are so radically different from those of the former sections as to bring the section as it now reads within the principles announced in the Fleming case, and that the Catalfo and Merlo cases have no application. You will note that under former Section 12427 a distinction was made between the abducting or kidnapping of persons over twelve years of age and those under twelve years. Under the new law there is no such distinction. Under the former law the prohibited acts must have been done for the purpose of extorting from the injured person "or from any one related to him by blood, marriage or adoption", while under the new law it is made a crime to abduct or kidnap *any* person, "for the purpose of extorting from said person so abducted or kidnapped, or from any other person a reward", etc. Moreover, the crime defined in the section as last amended is made a capital offense. It seems to me, therefore, that the crime denounced by Section 12427 and the punishment therefor are so radically different from the crime and punishment defined and ordained in old Section 12427, that it necessarily follows that Sections 2131 and 2132, General Code, have no application. That is to say, the reasoning of the opinion in the Fleming case, *supra*, here applies.

IV. It is difficult to determine whether or not the question contained in the second paragraph of your letter as to whether or not prisoners, irrespective of age, are "legally confined in the Ohio State Reformatory who have been sentenced under statutes carrying a fixed or definite term of imprisonment, for instance, 'Life' or 'Not less than 20 years', or should they be transferred to the Ohio Penitentiary under the provisions of Section 2210-2, G. C.?", is a separate question from the three questions heretofore answered relating to sentences under Sections 12427, 12437 or 12441, General Code, or whether such question is preliminary to the specific questions asked in your communication. In either event, I deem it inadvisable to attempt to answer this question categorically in view of the great number of different crimes in this state with various penalties of different degrees of severity. It seems to me that each individual case should be considered as it arises upon the particular facts presented in such case. It is, of course, unnecessary to say that if your department is concerned with any sentences other than those specifically described in your communication, this office will gladly give its opinion with reference thereto.

In view of the foregoing, it is my opinion, and you are accordingly advised, that:

1. Persons convicted of a felony under the provisions of the last paragraph of Section 12441 of the General Code, defining the crime commonly called "Armed Burglary of a Bank", or under Section 12427, General Code, denouncing the "Crime of Kidnapping for the Purpose of Extortion", are required to be sentenced to imprisonment in the Ohio Penitentiary even though such persons be between the ages of sixteen and twenty-one years.

2. Persons between the ages of sixteen and twenty-one years of age, convicted of the crime of "Burglary of an Inhabited Dwelling House" under the provisions of Section 12437, General Code, are required to be sent to the Ohio State Reformatory and not the Ohio Penitentiary.

Respectfully,

THOMAS J. HERBERT,
Attorney General.