

for a definite term, a prisoner so serving in the Ohio Penitentiary is eligible for parole when he shall have served the minimum term provided by the statute defining the crime of which such prisoner was convicted."

In view of the foregoing and answering your second inquiry specifically, it is my opinion that a person who is sentenced to the Ohio Penitentiary for not less than twenty years nor more than twenty-five years for the crime of robbery is not eligible for a parole until he shall have served within the penitentiary the minimum term of imprisonment fixed by the trial court, viz., twenty years. A prisoner so sentenced in 1923 would not be entitled to time off for good behavior even though he has no demerits at this time.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1361.

PARK—CITY NOT HAVING PARK COMMISSION MAY PURCHASE LAND
OUTSIDE CITY LIMITS FOR PARK PURPOSES.

SYLLABUS:

A city not having a park commission is authorized to purchase land outside of the city limits and not contiguous thereto for park purposes, if the acquisition of such land is reasonably necessary for the purpose.

COLUMBUS, OHIO, December 14, 1927.

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

GENTLEMEN:—This is to acknowledge receipt of your communication of recent date requesting an opinion on the question stated by you, as follows:

"May a city not having a park commission purchase land outside of the city limits and not contiguous thereto for park purposes?"

Section 3615, General Code, provides that each municipal corporation shall be a body politic and corporate and among other things provides that such municipal corporation may "acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any municipal purpose authorized by law."

Section 3631, General Code, provides that each municipal corporation shall have power:

"To hold and improve public grounds, parks, park entrances, free recreation centers and boulevards, and to protect and preserve them. To acquire by purchase, lease, or lease with privilege of purchase, gift, devise condemnation or otherwise and to hold real estate or any interest therein and other property for the use of the corporation and to sell or lease it, or to donate the same by deed in fee simple to the State of Ohio as a site for the erection of an armory."

So far as pertinent to the question at hand, Section 3939, General Code, 112 O. L. 379, provides:

"Each municipal corporation in addition to other powers conferred by law shall have power :

(1) To acquire by purchase or condemnation real estate with or without buildings thereon, and easements or interests therein, for any lawful purpose.

* * * * *

(14) To provide land for and improve parks, boulevards and public playgrounds.

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The powers granted by the above noted statutory provisions with respect to the acquisition by a municipal corporation of land for park and other purposes might be so construed as to limit such power to the acquisition of land within the corporate limits of a municipal corporation for such purposes.

In 43 Corpus Juris, p. 1327, it is said :

"As a rule a municipal corporation has no power to purchase or hold land for a park, highway, or other municipal purpose beyond its territorial limits, unless the power has been specially conferred upon it by the legislature; and such power is not conferred by a general grant of power to purchase, hold, and convey such property, real and personal, as may be necessary for its public uses and purposes. The legislature may, however, confer such power, either in express terms or by necessary implication."

See also to the same effect *City of Cleveland vs. Painter*, 6 O. N. P. (n. s.) 129, 131.

However, it is necessary to note in this connection certain pertinent provisions of Sections 3677 and 3678, General Code. So far as pertinent, Section 3677, General Code, provides :

"Municipal corporations shall have special power to appropriate, enter upon and hold real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter.

* * * * *

(2) For parks, park entrances, boulevards, market places, and children's playgrounds.

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Section 3678, General Code, contains the following provisions :

"In the appropriation of property for any of the purposes named in the preceding section, the corporation may, when reasonably necessary, acquire property outside the limits of the corporation."

I am inclined to the view that this provision of Section 3678, General Code, when read in connection with those of Section 3677 and other provisions of the General Code above noted, by implication confers authority upon the municipal corporation to purchase property outside the limits of the corporation for park purposes when it is reasonably necessary so to do. It is true that there is no statutory provision in any of the sections of the General Code relating to the appropriation by a municipal corporation of private property for municipal purposes, which expressly limits the right and power of the municipal corporation in appropriating such private property

to cases where the municipal authorities are not able to agree with the owner with respect to the purchase of such property, as is provided in the case of other corporations appropriating property under the right of eminent domain (Section 11039, General Code). In no case, however, can it be necessary for a municipal corporation, any more than any other corporation, to appropriate property under its right of eminent domain, where such municipal corporation is able to purchase the property desired on terms agreed upon by and between it and such owner; and it is inconceivable that the legislature, in the enactment of the above quoted provisions of Sections 3677 and 3678, intended to confer upon municipal corporations the power of condemning land outside of the limits of the municipal corporation for park purposes, and at the same time deny to such municipal corporation the right and power to purchase such land for this purpose. There is nothing in the provisions of Section 3678, General Code, authorizing a municipal corporation to acquire lands outside of the limits of such municipal corporation for park and other purposes, which limits the municipal corporation to the acquisition of the lands contiguous to the municipal corporation. So far, therefore, as the provisions of said Section 3678 are concerned, I am of the opinion that a city may purchase land for park purposes outside of the city limits whether contiguous thereto or not, when the purchase of such land is reasonably necessary for said purposes. This conclusion is supported by the case of *City of Cleveland vs. Painter*, *supra*, where it was held that a municipal corporation was authorized to acquire land outside of the city limits for park purposes by direct purchase as well as by appropriation.

It only remains to consider whether this power of a municipal corporation to purchase lands outside of the limits of a municipal corporation for park purposes has in cities been cut down or limited by the provisions of Section 4060, General Code. This section, referring to powers of the board of park commissioners in cities, reads as follows:

“The board may establish or extend parks, parkways, boulevards and connecting viaducts and subways, public comfort stations and children's playgrounds and public baths located in such parks, within such city or the territory contiguous to such city, and acquire or appropriate, in the manner provided by law, the necessary real estate for such purposes, and in the same manner, to appropriate for parkway or boulevard purposes, any street, avenue or public way of such city.”

This section is a part of an act passed in 1908 (99 O. L., p. 440), providing authority for the appointment by the mayor of a board of park commissioners after approval by the electors of the city voting upon the question whether there should be such board of park commissioners; and the act, which has been carried into the General Code as Sections 4053 to 4065, General Code, both inclusive, provides further for the powers of such board of park commissioners with respect to the establishment and control of city park entrances, boulevards, playgrounds, public baths and comfort stations.

In consideration of this question it is well to note that power was first given to municipal corporations to appropriate lands outside of the limits of a municipal corporation for park purposes in 1888 (85 O. L. 175). Since the grant of this power upon the consideration above noted, and as held in the case of *City of Cleveland vs. Painter*, heretofore cited, municipal corporations, including cities, have had the right to purchase lands outside of the limits of the corporation for park purposes, whether such lands be contiguous to the limits of such municipal corporation or not, when reasonably necessary to do so. In this situation I am unable to see in the provisions of said Section 4060, General Code, any intention on the part of the legislature to limit the

power of cities not having a board of park commissioners to purchase either contiguous or non-contiguous lands outside of the city limits for park purposes.

In view of the fact that the establishment of a board of park commissioners in any city is a matter that is wholly optional with the electors of such city, and of the other considerations hereinabove noted touching the proper construction of Section 4060, General Code, I am of the opinion, by way of answer to the specific question submitted, that a city not having a board of park commissioners may purchase lands outside of the city limits and not contiguous thereto for park purposes, when the acquisition of such land is reasonably necessary for said purpose.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1362.

COUNTY COMMISSIONERS—AUTHORITY AS TO CONSTRUCTING AND REPAIRING TOWNSHIP DITCHES—SECTION 6603, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. *The county commissioners are vested with sole authority in regard to the constructing, cleaning and repair of township ditches, except that the township trustees have authority under the provisions of Section 6603, General Code, to improve a township ditch or drain within the limitations contained in said section.*
2. *When a petition is filed under the provisions of Section 6603, General Code, it is the mandatory duty of the township trustees to proceed under said section.*

COLUMBUS, OHIO, December 14, 1927.

HON. JOHN H. HOUSTON, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

“The Code of Ohio seems very ambiguous as to specifying upon what officials devolve the construction and repair of ditches, drains and water courses under Section 6601, General Code of Ohio, et seq.

Specifically, should the trustees in any case lay out and keep in repair any ditches, whatsoever, or should this duty be placed upon the board of county commissioners? If the trustees may supervise any ditch construction and repair, is such duty mandatory upon them, or merely permissive?

Upon the passage of the above quoted sections, were all ditches heretofore constructed, automatically placed within the jurisdiction of the commissioners, or did such ditches as were heretofore under the township trustees and known as township ditches remain under the jurisdiction of the trustees of the township?”

Previous to 1919, township trustees had power to construct public ditches and had other duties to perform in reference thereto, but the ditch laws were codified in 1919 and this act took away from said trustees and all township officials practically all duties concerning ditches. The Act of 1919 was unsatisfactory and the legislature