

2741.

1. "CONVICTION" — "ARMED ROBBERY" OR "ARMED BURGLARY" OF A BANK — KIDNAPPING, WOUNDING OR MAIMING FOR PURPOSE OF EXTORTION — IF PERSON KIDNAPPED IS LIBERATED UNHARMED PRIOR TO COMMENCEMENT OF TRIAL — TYPE OF SENTENCE COURT REQUIRED TO IMPOSE — WHEN PRISONER ENTITLED TO TIME OFF FOR GOOD BEHAVIOR — SECTIONS 12427, 2163, G. C.
2. PAROLE — SECTION 2210-1 G. C. — PRISONERS SENTENCED FOR DEFINITE OR GENERAL TERM.
3. RELEASE — SECTIONS 12427, 2209-16 G. C.
4. PRISONER CONVICTED OF BURGLARY, INHABITED DWELLING IN NIGHT SEASON, LIFE SENTENCE, OHIO PENITENTIARY, NOT SUBJECT TO RELEASE, UNLESS GOVERNOR ISSUES PARDON OR COMMUTES SENTENCE.

SYLLABUS:

1. *Where a defendant is convicted either of the crime commonly called "armed robbery" or "armed burglary" of a bank (Sec. 12441, G. C.) and the jury recommends mercy, or where a person is convicted of the crime of kidnapping or wounding or maiming, for the purpose of extortion (Sec. 12427, G. C.) and the person so kidnapped is liberated unharmed prior to the commencement of trial, the court is required to impose a sentence to imprisonment in the penitentiary for not less than twenty years and may sentence the defendant to the penitentiary for such number of years as it deems neces-*

sary and proper, neither of such sections expressly or otherwise fixing a maximum sentence to be imposed under such circumstances.

2. *A person convicted and sentenced under either Section 12441 or Section 12427, supra, under the circumstances set forth in the preceding branch of the syllabus, is entitled to time off for good behavior as provided in Section 2163, General Code.*

3. *The provisions of Section 2210-1, General Code, to the effect that a prisoner serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree, or a prisoner sentenced for a maximum term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years, apply to prisoners sentenced for a definite term as well as those sentenced for a general term and such prisoners become eligible for parole at the expiration of ten full years of imprisonment.*

4. *A prisoner convicted and sentenced under either Section 12441 or Section 12427, supra, under circumstances set forth in the first branch of this syllabus, is entitled to a final release at the expiration of the sentence to imprisonment imposed by the court; when he shall have performed all the terms and conditions of his parole if paroled (Section 2209-16, G. C.); if not paroled, when he shall have "served his entire term without violation of the rules and discipline, except such as the Board of Managers has excused," that is, the number of years fixed by the trial court less time off for good behavior, as prescribed by Section 2163, General Code (former Section 2161 G. C.).*

5. *A prisoner convicted of burglary of an inhabited dwelling in the night season, as provided in Section 12437, General Code, and sentenced to the penitentiary for life, is not subject to final release unless he be pardoned or have his sentence commuted by the Governor.*

Columbus, Ohio, September 10, 1940.

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

Dear Sir:

This office has your request for the opinion of the Attorney General, which reads as follows:

"Sections 12441 and 12427 of the General Code read as follows:

' *** Whoever, by day or night, maliciously enters a bank or other 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.'

Section 12427 (117 v. 485) Penalty for Kidnapping for Purposes of Extortion.

'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.'

May we have your opinion on the following questions:

- I. What is the maximum of the penalty, 'not less than twenty years', assessed by these sections?
- II. When may such a prisoner be granted a final release?
- III. May the sentencing court fix a maximum longer than twenty years on a 'not less than twenty years' statutory penalty?
- IV. Does the sentencing court have the authority to fix a minimum less than, or in excess of twenty years?
- V. If twenty years is the minimum penalty, when shall a prisoner sentenced to the penitentiary under this provision of the section, become eligible to consideration for parole?
- VI. As Section 2210-1 G. C. (118 v. 82) provides for the diminution of sentence to ten full years in sentences carrying a minimum term longer than fifteen years, does Section 2163 G. C. referring to diminution on *definite* sentences other than life, have any application in sentences of 'not less than twenty years' under the above quoted sections.

Section 12437 G. C. (101 v. 128) Burglary of an Inhabited Dwelling in the Night Season, reads as follows:

'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 impris-

oned 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.'

VII. When a person convicted under the provisions of this section is sentenced to the penitentiary for life shall he at any time become subject to final release other than upon commutation or pardon?"

Your questions will not be considered in the order asked for the reason that certain of the questions may be conveniently grouped together; and since the reasoning and the decision of the court in *Ex Parte Fleming*, 123 O. S. 16, 173 N. E. 441 (1930), contains in a large measure the answers to your questions, this case will first be quoted at length.

The syllabus of the *Fleming* case is as follows:

"1. The state, in its inherent sovereign power to define crimes and fix penalties, may, acting through the legislature, create a new offense applicable to all within the class named and of general operation throughout the state, authorizing the trial court to pass a *definite sentence* upon one convicted thereunder to the penitentiary for life, or, if the jury as a part of their verdict recommend mercy, for not less than twenty years.

2. 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, G. C.) 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." (Emphasis ours.)

The facts in this case were that *Fleming*, who was between the ages of sixteen and twenty-one years of age was convicted of the crime commonly called "armed burglary" or "armed robbery" of a bank, under Section 12441, General Code, quoted in part in your letter. The jury recommended mercy and the court adjudged that *Fleming* "be imprisoned in the Penitentiary of this State and kept at hard labor (no part of the time to be kept in solitary confinement), and until legally discharged. And that said imprisonment (should) be for a period of duration *not less than twenty-five years.*" The action was in habeas corpus, *Fleming* contending that "being 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."

In the opinion concurred in by the entire court, Judge Robert H. Day said as follows at page 19, et seq.:

"So much of Section 2131, General Code, as is applicable reads as follows: 'Male persons between the ages of sixteen and twenty-one years convicted of felony shall be sentenced to the reformatory instead of the penitentiary.'

Section 2132 provides: '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.'

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. * * *

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

'Where the general provisions of a statute and those of a later one on the same subject are incompatible, the provisions of the latter statute must be read as an exception to the provisions of the earlier statute.' City of Cincinnati v. Holmes, Admr., 56 Ohio St., 104, 46 N. E., 514."

I, III. Coming now to your first question, it is at once obvious that there is no express provision in either Section 12441 or 12427, General Code, fixing a maximum sentence to be imposed upon such persons convicted under either of such sections. In Section 12441, General Code, it is provided in words which require no interpretation or construction, that upon a recommendation of mercy "the court may sentence the accused *to not less than twenty years in the penitentiary.*" That is, the court in such a case must impose a sentence to imprisonment of at least twenty years duration and may impose a longer term, if within its discretion, the court deems a longer term necessary and proper. Likewise, in the statute relating to kidnapping, quoted in your letter (Sec. 12427, G. C.), the Legislature has provided in mandatory language that, if the conditions prescribed in the proviso are present, the "person so convicted *shall* be imprisoned in the penitentiary for not less than twenty years."

There is nothing in either section limiting the power and jurisdiction of the court to impose a sentence to imprisonment for a longer term of years than twenty; and it seems to me that I would be compelled so to rule, even were I not guided and controlled by the holding and opinion in the Fleming case. As you shall have noted the trial court in the Fleming case sentenced the defendant to serve "for a period of duration not less than twenty-five years," and the Supreme Court held this to be a valid sentence for the *definite* term specified — obviously five years longer than the minimum fixed in the statute.

In specific answer to your first question, therefore, it is my opinion that where a defendant is convicted of the crime commonly called "armed robbery" or "armed burglary" of a bank (Sec. 12441, G. C.) and the jury recommends mercy, or where a person is convicted of the crime of kidnapping or wounding or maiming, for the purpose of extortion (Sec. 12427, G. C.) and the person so kidnapped is liberated unharmed prior to the commencement of trial, the court is required to impose a sentence to imprisonment in the penitentiary for not less than twenty years and may sentence the defendant to the penitentiary for such a number of years as it deems necessary and proper, neither of such sections expressly or otherwise fixing a maximum sentence to be imposed under such circumstances.

The above discussion and the conclusion reached answers your third question.

II, IV, V and VI. Your second, fourth, fifth and sixth questions are more or less related and it will serve materially to reduce the length of this opinion if the law applicable thereto be discussed at one time.

There are two sections in the General Code providing for the diminution of sentences to imprisonment for good behavior here pertinent, viz., Section 2163, contained in the chapter entitled "Ohio Penitentiary" and Section 2210 in the chapter headed "provisions Applying To Penal Institutions." In addition Section 2210-1, General Code, mentioned in your inquiry, must be considered. Sections 2163 and 2210 of the General Code, respectively, provide in part as follows:

Sec. 2163:

"A person confined in the penitentiary, or hereafter sentenced thereto for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, will be entitled to the following diminution of his sentence.

* * *

(f) A prisoner sentenced for a term of six or more years, shall be allowed a deduction of eleven days from each of the months of his full sentence. * * *"

Sec. 2210:

"A person confined in a state penal institution and *not eligible to parole before the expiration of a minimum sentence or term of imprisonment, or hereafter sentenced thereto under a general sentence*, who has faithfully observed the rules of said institution, shall be entitled to the following diminution of his minimum sentence:

* * *

(f) A prisoner sentenced for a minimum term of six or more years, shall be allowed a deduction of eleven days from each of the months of his minimum sentence.

* * *

At the expiration of the minimum sentence diminished as herein provided, each prisoner shall be eligible for parole as provided by law." (Emphasis ours.)

You will observe that Section 2163, supra, relates to prisoners sentenced to the penitentiary for a definite term, while Section 2210 has to do with persons confined in a state penal institution and not eligible to parole before the expiration of his minimum sentence, or sentenced under a *general sentence*.

This difference is emphasized by the last sentence of Section 2210, General Code, providing that at "the expiration of the *minimum* sentence diminished as herein provided, each prisoner *shall be eligible for parole as provided by law.*"

The leading case in Ohio with reference to the application and effect of Section 2210, supra, is the case of *Ex Parte Tischler*, 127 O. S. 404, 188 N. E. 730 (1933), in which the first branch of the syllabus reads:

"1. Under Section 2210, General Code, credits allowed for good behavior reduce the time within which a prisoner is eligible for parole, and are not to be deducted from minimum sentence so as to reduce the term of imprisonment."

In the opinion by Judge Allen it was said as follows at pages 409, et seq.:

" * * * Section 2210, General Code, as given above, does not provide for a deduction of credits allowed for good behavior from an indeterminate sentence. It specifically provides at the end of the section that each prisoner shall be eligible for parole. In the first part of the section, the fact that this enactment only reduces time within which the prisoner is eligible for parole is emphasized by the phrase, 'A person confined in a state penal institution and not eligible to parole.' This section, 2210, is sharply differentiated from Section 2163, General Code, which does establish an absolute diminution of sentence for good behavior in reference to definite sentences."

With reference to the provisions of Section 2163, General Code, the Supreme Court had already held in the case of *Reeves v. Thomas, Warden*, 122 O. S. 22 (1930), that:

"Where a trial judge, authorized to fix, within the limits prescribed by law, a minimum period of duration of imprisonment in the penitentiary for a felony, has imposed a sentence 'for a period of seven years,' and the maximum sentence provided by law for such offense, to-wit, grand larceny, is seven years, *such sentence becomes a definite one, and the person so sentenced is entitled to the benefits of the diminution of sentence for good behavior as provided in Section 2163, General Code.*" (Emphasis ours.)

The sentence in the *Reeves* case was imposed in 1925 when the *Norwood Act* (109 v. 74), which authorized and required that trial courts, when imposing sentences of imprisonment in the Ohio penitentiary, to fix the minimum term to be served, was still in effect. After recognizing this fact at page 25 of his opinion, Judge Robert H. Day said as follows at page 27:

“Both Sections 2163 and 2166, General Code, were upon the statute books during all the time covered by the facts of this case, and should, if possible, receive such construction as will make the same consistent. The plain letter of Section 2163 grants to a person confined in the penitentiary, *whose sentence is definite, the diminution periods set forth in the statute. The effect of the sentence of the trial court, even though imposed under Section 2166, General Code, was to make a definite sentence, and therefore the same came within the provisions of Section 2163, and Reeves is entitled, as one having a definite sentence, to the benefit of such section. * * **”
(Emphasis ours.)

The above distinctions between Sections 2163 and 2210, General Code, were recognized by the Court of Appeals of Madison County, in the case of *Thorpe v. Amrine*, decided April 16, 1940, (now pending on appeal in the Supreme Court) in which Presiding Judge Hornbeck, speaking for the court, said:

“ * * * It appears that any prisoner who is serving a definite sentence for a felony other than for life is entitled as a matter of right to a diminution for good time for a period fixed by Section 2163, G. C. which is applicable to his sentence. If, however, he is serving under a general sentence then he is only entitled as a matter of right to his good time for the purpose of reducing his minimum sentence for the period applicable under Section 2210 G. C. at which time he is eligible for parole, this section, however, having no effect to assure the prisoner any benefit of good time as against the maximum term of his general sentence.”

Section 2210-1, General Code, as amended by the 93rd General Assembly, reads as follows:

“A prisoner serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree, or a prisoner sentenced for a minimum term *or terms, whether consecutive or otherwise*, of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of ten full years' imprisonment. This provision shall apply to prisoners sentenced before or after the taking effect of this act.” (Emphasis mine.)

In view of the fact that this section expressly relates to “a prisoner sentenced for a *minimum* term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years”, it would seem at first blush that it was the intention of the Legislature that such section should apply only to prisoners sentenced for a general term as defined by Sections 2166 and 2166-1, General Code, that is, a term “not fixed or limited” in its duration but one

having a minimum and maximum number of years to be served. However, I do not believe this to be the correct interpretation of the section in question.

In the first place, no authority need be cited to sustain the proposition that laws imposing penalties and forfeitures are to be construed strictly against the state and favorably to the person affected. Secondly, a strict construction of Section 2210-1, so as to exclude prisoners who have been given a definite sentence would clearly do violence to the letter and spirit of the pardon and parole code, a mere reading of which clearly shows that it was the purpose of the law-making body to keep prisoners in actual confinement only so long as might be necessary to restore them to normalcy and make of them useful and law-abiding citizens. As a third reason, for my conclusion I direct attention to the fact that the word "minimum", as defined in Webster's New International Dictionary, means "Being a minimum; lowest or least attainable, possible, ***." In other words, the phrase from Section 2210-1, above quoted, may and should be read as though written "*any* person sentenced for *at least* a term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years", etc. Next, I do not know of, nor have I been able to find, any statute in Ohio imposing a minimum term of "longer than fifteen years" for any crime denounced by our law. And lastly, while the exact questions asked by you are not contained in the opinions of the Attorney General below cited, and while Section 2210-1 has been amended in several particulars since such opinions were rendered, each and all of such opinions tend to support the conclusions herein reached. See Opinions, Attorney General, 1932, No. 4455; 1933, No. 106; 1935, No. 4939; and 1930, No. 3164.

Moreover, upon investigation, I find that the interpretation here advised has been the administrative rule of construction applied by both your department and the Pardon and Parole Commission, or the old Board of Parole under Section 2210-1, as it now reads, or as originally enacted in 1931. As repeatedly held by the Supreme Court of Ohio and other authorities, such a rule of administrative construction may not be lightly tossed aside.

In view of the foregoing, and in specific answer to your questions as numbered, it is my opinion that:

II. A prisoner such as described by you may be granted a final release at the expiration of the sentence to imprisonment imposed by the court, if paroled, when he "shall have performed all the terms and conditions of his

parole", made and ordered by the Pardon and Parole Commission (Sec. 2209-16, G. C.) ; if not paroled, when he shall have "served his entire term without a violation of the rules and discipline except such as the board of managers has excused", which in my judgment means the number of years fixed by the trial court, less time for good behavior as prescribed by Section 2163, supra (Sec. 2161 G. C.) ; or if pardoned by the Governor under the powers granted by Section II, Article III, of the Constitution of Ohio.

IV. The answer to your fourth question requires no elaboration. As above pointed out, the court is required to impose a sentence to imprisonment for at least twenty years, but may impose a sentence for a longer term.

V. Your fifth question is answered by the provisions of Section 2210-1, General Code, as above indicated, namely, "at the expiration of ten full years imprisonment".

VI. Question six, asked by you, has already been answered in the affirmative.

VII. In so far as your seventh question is concerned, I find nothing in the law relating to "final release" other than Sections 2161 and 2209-16, General Code, above referred to in specific answer to the second question asked by you. I, therefore, answer your last question in the negative.

Respectfully,

THOMAS J. HERBERT,
Attorney General.