in section 13031-16, shall be subject to imprisonment *for not more than one year; * * *.*"

As to *where* the imprisonment in such cases is to be had, it is not expressly stated. However, construing said provision and section 13031-17a together, we think it is reasonably clear that the place of punishment for one guilty of the second, or inferior, degree of the crime is not in any event to be the Ohio penitentiary, and it would therefore follow that the offense is not a felony but a misdemeanor only.

We have, then, this situation as to the term of imprisonment of one who has been found guilty and committed to the Ohio reformatory for women as a "second degree" violator of section 13031-13 G. C.: (1) A statute of general application, to-wit, section 2148-9 G. C., which says that

"In case of commitments for misdemeanor * * * the term of such imprisonment shall not be more than *three years* * * *"

and (2) a statute of special application, to-wit section 13031-17b which says that the guilty person

"shall be subject to imprisonment for *not more than one year* * * *."

The first mentioned statute was passed April 18, 1913, while the last mentioned statute was passed June 17, 1919, and is therefore the latest expression of the legislative will.

Under well settled rules of construction we think it is clear that the maximum term of imprisonment for one committed to the Ohio reformatory for women as a "second degree" violator of section 13031-13 G. C. is *one* year and not *three* years. In other words we hold that the legislature intended that section 13031-17b should constitute an exception to the general rule for misdemeanor commitments stated by section 2148-9 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1698.

ROADS AND HIGHWAYS—WHERE ROAD IMPROVEMENT UNDERTAKEN UNDER AUTHORITY OF SECTIONS 6906 ET SEQ. G. C.—PETITION FILED BY PROPERTY OWNERS, ETC.—PARTICULAR CASE—WHETHER PETITION CONTAINS NUMBER OF SIGNERS MENTIONED IN SECTIONS 6907 TO 6909 G. C. HAS BECOME IMMATERIAL.

Under authority of sections 6906 et seq., G. C., a road improvement project has been undertaken, and a petition filed by property owners which was found by the county commissioners to contain the requisite number of signatures as mentioned in sections 6907 to 6909 G. C. This finding was followed by the passage of a resolution of necessity by unanimous vote of the three commissioners (see sections 6907 and 6910 G. C.), and in said resolution of necessity the commissioners set forth the plan to be followed in apportioning cost (section 6919 G. C.) Thereafter, notice was published for the filing of surveys, estimates, etc., and fixing time for hearing (section 6912 G. C.) After date fixed for hearing, a final resolution was passed by unanimous

vote of the three commissioners, determining to proceed (section 6917 G. C.) and in this resolution the commissioners repeated their statement as to method of apportioning cost mentioned in resolution of necessity. No reference was made either in the resolution of necessity or in the resolution determining to proceed, of the filing of the petition, or of the matters stated in the petition.

HELD, that under the circumstances stated, the question whether the petition contains the number of signers mentioned in sections 6907 to 6909 G. C. has become immaterial.

COLUMBUS, OHIO, December 10, 1920.

HON. JOSEPH W. BAGBY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Your letter of recent date has been received, reading as follows:

"The county commissioners of Brown county, Ohio, desire to have your opinion and advice as to the following:

A petition was presented to them asking for the construction of a road under section 6907 and subsequent sections of the General Code, 107 O. L. beginning on page 95; the petition avers that it was signed by at least fifty-one (51) per cent. of the adjacent land owners to be assessed on account of the cost and expense of the improvement, such assessment to be made as provided in paragraph 4 of section 6919, the assessment to affect the real estate within one mile of either side of the improvement; all questions of compensation and damages have been determined and the proceeding has reached a point where the county surveyor has filed a schedule of estimated assessments. Objections to the assessments have been filed by a number of the land owners whose lands are affected and these objectors also contend and make, or undertake to make, the question that fifty-one (51) per cent. of those whose lands are affected did not sign the petition.

First: Section 6917 provides, after claims for compensation and damages have been disposed of, that the commissioners must still be satisfied 'that the public convenience and welfare require that such improvement be made and that the cost and expense thereof will not be excessive in view of the public utility thereof.'

Section 6909 directs the manner of 'determining whether the required number of persons have signed the petition asking for said improvement, necessary to give the county commissioners jurisdiction thereof.'

After making the finding required by section 6909 and after making the findings required by section 6917, have the county commissioners power or authority to entertain the question now sought to be raised and again hear the evidence to determine whether or not fifty-one per cent (51%) in fact signed the petition.

Second: It is perhaps the same question put in a different way, thus: If the findings of the commissioners, under section 6909 and 6917, be not appealed from and error be not prosecuted would such findings be conclusive or would a court grant an injunction against the proceedings or the collection of the assessments, if in fact it were shown that fifty-one per cent (51%) had not signed the petition?

Third: Would the fact that the commissioners voted unanimously throughout the proceeding sustain their record, assuming that the petition was defective? General Code Section 6911."

In response to requests for detailed information in connection with your inquiry,

you have furnished copies of petition of property owners and of the several resolutions of your board of commissioners, which proceedings as shown by said copies, may be briefly described as follows:

(a) The petition, which bears an endorsement of filing on May 5, 1919, opens with a recital that it contains the signatures of fifty-one per cent of the land or lot owners residents of said county who would be specially taxed or assessed for the improvement, concluding with a request that the compensation, damages, costs and expenses of said improvement be

> "apportioned and paid as provided in the subdivision numbered 4 in section 6919 of the General Code of Ohio, and upon the one mile assessment plan described in said subdivision."

(b) The resolution adopted May 5, 1919, upon unanimous vote, Journal 12, page 151, contains a recital of the filing of the petition signed by at least fifty-one per cent of the land or lot owners and a finding by the board that said petition is duly signed by at least fifty-one per cent of the land or lot owners residents of the county of Brown, who would be specially taxed or assessed for the improvement of said road. The resolution concludes with a resolving clause that the board meet on May 10, 1919, to view the road and determine whether the public welfare and convenience require that the improvement be made.

(c) The resolution adopted May 19, 1919, upon unanimous vote, Journal 12, page 154, consists of a declaration that it is necessary for the public convenience and welfare that proceedings be had and taken for constructing, improving and repairing the road described in the petition. A description of the road is given as is also a designation of the grade and the general nature of the improvement. A statement then follows to the effect that the method used for paying compensation, damages, costs and expenses shall be five per cent to be paid out of the county treasury

> "and the remaining ninety-five per cent to be assessed and collected from the owners of real estate within one mile of either side of said improvement according to the benefits accruing to such real estate as may be determined, as provided in plan four, section 6919 G. C."

The resolution concludes with an order to the county surveyor to make plats, surveys, profiles, cross-sections, estimates and specifications, and that upon the completion and filing thereof, the county auditor shall cause a notice to be published of the time and place of hearing objections to the improvement and claims for compensation and damages.

(d) The resolution of July 26, 1919, Journal 12, page 168, also adopted on unanimous vote, contains a preliminary recital that the matter came on for further hearing on claims for compensation and damage; that none has been filed; that the board is still satisfied that the public convenience and welfare require that such improvement be made, and that the cost and expense will not be excessive in view of the public utility thereof, and concludes with a resolution adopting plans, profiles, cross-sections and specifications as prepared by the county surveyor and ordering the surveyor to proceed with and report to the commissioners an assessment upon the basis of ninety-five per cent of the estimated cost against real estate situated within one mile of either side of the improvement according to the benefit to said real estate.

It is proper to state here that while the initial resolution of May 5, 1919, contains a reference to the petition of the property owners, yet no such reference is

made in either of the subsequent resolutions of May 19, 1919, and July 26, 1919. It may be mentioned also that it appears from your letter of November 12, 1919, that "the notice referred to in section 6912 G. C. was given fixing time and place for hearing objections." This notice is the one ordered by the commissioners in their resolution of May 19, 1919, to be given by the county auditor.

It is also noted in your last mentioned letter that the commissioners made no change in the route or termini of the improvement as set out in the property owners' petition.

The statutes under which the above-mentioned proceedings were had is a series known as sections 6906 to 6954 G. C. Section 6906 is introductory in its nature and provides generally that the commissioners shall have power "as hereinafter provided" to construct a public road, etc.

Section 6907 reads:

> "When a petition is presented to the board of commissioners of any county asking for the construction, reconstruction, improvement or repair of any public road or part thereof, as hereinafter provided for, signed by at least fifty-one per cent of the land or lot owners, residents of such county, who are to be specially taxed or assessed for said improvement as hereinafter provided, the county commissioners shall, within thirty days after such petition is presented, go upon the line of said proposed improvement and, after viewing the same, determine whether the public convenience and welfare require that such improvement be made. The petition shall state the method of paying the compensation, damages, costs and expenses of the improvement desired by the petitioners, who may request that the same be apportioned and paid in any one of the methods provided by section 6919 of the General Code.

Section 6908 has reference to the matter of ascertaining the number of signers. Section 6909 reads in part:

> "In determining whether the required number of persons have signed the petition asking for said improvement, necessary to give the county commissioners jurisdiction thereof, the following persons shall not be counted either for or against the improvement: * * * * * * * * * *"

(Here follow provisions as to counting of signers)

Section 6910 reads:

> "The county commissioners may, without the presentation of a petition, take the necessary steps to construct, reconstruct, improve or repair a public road or part thereof, as hereinbefore provided, upon the passage of a resolution by unanimous vote declaring the necessity therefor. The cost and expense thereof may be paid in any one of the methods provided in section 6919 of the General Code, as may be determined by the county commissioners in said resolution."

Provisions then follow (sections 6911 to 6917) as to the procedure to be adhered to by the commissioners, including order to county surveyor for making of surveys, plans, estimates, etc.; publication of notice that the improvement is to be made, that copies of the surveys, plans, estimates, etc., are on file; and that on a day certain

objections to the improvement and claims for compensation, etc., will be heard (by amendment of section 6912, 108 O. L. 500, this publication is dispensed with in cases of reconstruction and repair where no lands or property are taken); adjustment of claims for damages, if any; and a final determination by the commissioners (section 6917) after hearing and determining claims for compensation and damages whether they are still satisfied that the public convenience and welfare require the making of the improvement. Methods are then set out in 6919 for division of cost of improvement as between county, township and property owner. The last paragraph of said section 6919 reads:

> "When the board of county commissioners acts by unanimous vote and without the filing of a petition, the commissioners shall set forth in their resolution declaring the necessity for the improvement, the method of apportioning and paying the compensation, damages, costs and expenses of the improvement, which may be any one of the methods above provided."

Immediately preceding the paragraph just quoted, is subdivision 4 of said section 6919, describing the method of apportioning cost referred to in the petition of the property owners in the present instance and adopted by the commissioners, which subdivision reads:

> "4. All or any part thereof shall be assessed against the real estate abutting upon said improvement, or against the real estate situated within one-half mile of either side thereof, or against the real estate situated within one mile of either side thereof, or against the real estate situated within two miles of either side thereof, according to the benefits accruing to such real estate and the balance thereof, if any, shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all the taxable property in the county or from any funds in the county treasury available therefor."

The foregoing brief review of pertinent statutes indicates that the only effect of the filing of a petition by property owners is to give the commissioners authority to act by a majority vote as compared with a required unanimous vote when no petition is filed. In this connection, it is worthy of note that preceding the passage of the Cass law in 1915 (106 O. L. 574) there was in effect a series of statutes known as sections 6956-1 to 6956-16 (101 O. L. 247) authorizing a plan of road improvement by county commissioners. Said last named series of sections to some extent formed the groundwork of the Cass act so far as that act related to improvement by county commissioners. In said series of sections 6956-1 et seq. provision was made for the filing of a petition by a majority of the owners of real estate; and there was in said series of sections no authority conferred for undertaking an improvement other than upon the filing of such petition. It is likely that the expression in existing section 6909 relative to the number of signers "necessary to give the county commissioners jurisdiction" was adapted into the Cass law from said repealed series of sections 6956-1 et seq. and said expression is still retained in section 6909. However, it is not believed that the presence of said expression should be accepted as stamping the filing of a petition with the character of a jurisdictional step where in fact the several steps of the commissioners are taken by unanimous action; for in the first place, as already noted, there was not, prior to the passage of the Cass Act, any provision for dispensing with a petition; and in the second place, section 6912 G. C. provides for a notice by publication to all interested property owners, except in cases of reconstruction or repair, and of course, such property

owners may appear before the commissioners and make protest against the undertaking of the improvement.

Again, as has been seen by reference to the last paragraph of section 6919, the adoption by the commissioners of one of the four plans named in said section does not depend upon the filing of a petition; the commissioners on their own motion if they act unanimously, may adopt one of said four plans. Likewise, in section 6911 there is mention of majority action by the commissioners where a petition is filed, and unanimous action where a petition is not filed, in the matter of determining the route and termini of the road and the kind and extent of said improvement.

It clearly appears from your statement of facts and the copies of proceedings therewith submitted, that the commissioners in adopting their "resolution of necessity" on May 19, 1919, complied fully with the terms of the last paragraph of section 6919 regarding the setting forth of the method of apportioning cost. After specifying in detail that ninety-five per cent of the cost would be assessed, they gave notice of the pendency of the proceedings as provided by section 6912, thus affording to all interested persons an opportunity to offer objections to the making of the improvement. Assuredly, then, from a practical standpoint, there remains no ground of complaint that the rights of any one have been impaired; for on the one hand, if the petition contained the statutory number of signatures, the commissioners complied with the request of the petitioners as to plan of payment of cost; and on the other hand, if the petition lacked the statutory number of signers, the commissioners not only complied with the wishes of those who did sign, but also gave to such signers and to all others interested full opportunity to object to the improvement after the commissioners had set forth in their records by resolution the exact proportion in which the cost should be borne.

From all the foregoing considerations it follows, and you are accordingly advised, that under the facts as submitted, the filing of the petition is not to be treated as a jurisdictional step to the granting of the improvement, and that the question whether the petition was signed by fifty-one per cent or more of land and lot owners, has become immaterial.

While the conclusion just stated does not have the support of judicial decision in Ohio, so far as has been found, yet it is in line with the rulings of the Indiana courts upon statutes very similar to those mentioned in your inquiry. In the case of City of Indianapolis vs. Mansur, 15 Indiana, 112, the supreme court of Indiana said in the course of the opinion:

> "The common council of the city of Indianapolis passed an ordinance, directing that a certain street should be graded, etc. The contract was let; and during the progress of the work, information was laid before said council, that the appellee, who was the owner of property abutting on said street, had not paid, etc.: a precept was ordered by the said council to collect the assessment on said property. From this action, appellee appealed to the common pleas court, and there pleaded that two-thirds of the property holders, etc., on said street, had not petitioned, etc., as required by the charter. A demurrer to this answer was overruled. The city then replied that more than two-thirds of the members of the council voted for said ordinance. To this reply a demurrer was sustained.
>
> The brief of appellant presents but one question upon both of those rulings, namely: whether, under the circumstances disclosed in this record, the ordinance was valid?
>
> By the appellee it is insisted, that as the proceedings, relative to the improvement, were commenced by a petition from property holders, it is evident that the intention was to conform them to sections 66 and 67 of the

statute, Acts 1857, p. 63. And that although, in point of fact, more than two-thirds of the council voted for the ordinance, yet that would not make that valid which would otherwise have been invalid; and further, that section 68 of the statute, conferring the power upon the council, by a two-thirds vote, to order improvements, is not valid because of its uncertainty.

As to the first branch of the argument, we think that the fact, that two-thirds of the council voted for the ordinance, makes it binding, although the proceedings on the part of the petitioners, upon the point involved, may not have conformed to, and fully met the provisions of the statute; that is, if section 68 is valid." * * *

(Here the court continues the opinion to the effect that section 68 is valid)

This ruling has been followed in later Indiana cases: McEnerney vs. Town of Sullivan, 125 Indiana, 407; 25 N. E. 540; Daly vs. Higman, 43 Indiana App., 356; 87 N. E. 669.

It is not a valid objection to the conclusion above stated that the commissioners may in fact or in theory have been influenced in their findings by a belief that fifty-one per cent of land owners had signed a petition. It is sufficient answer to such an objection that the findings of the commissioners do not have reference to the petition, but to the public utility of the improvement (sections 6907, 6910, 6917);—in short, the question is one of jurisdiction or authority to order the improvement, and that jurisdiction attaches in either of two ways: (a) upon the filing of the property owners' petition, followed by a finding in favor of the public utility of the improvement by at least a majority of the commissioners, or (b) upon a like finding concurred in by the three commissioners whether a petition has been filed or not.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1699.

INHERITANCE TAX LAW—SUCCESSIONS—WHERE BOY AND GIRL TAKEN INTO HOME OF AUNT AND UNCLE AND REMAIN DURING ENTIRE CHILDHOOD—WHEN ENTITLED TO EXEMPTION UNDER CERTAIN STATEMENT OF FACTS.

Where a boy and girl are taken into the home of their aunt and remain with her and her husband during their entire childhood, receiving the equivalent of parental care, support and provision for education from them, and returning the equivalent of filial service, obedience and affection therefor, a relation exists which, if established more than ten years prior to the death of the husband of the aunt, makes such children, though then of age, come within the five hundred dollar exemption class provided by paragraph 3 of section 5334 G. C. (a part of the inheritance tax law), irrespective of the question as to whether or not they sustain toward them the relation of "nephew" and "niece," respectively.

COLUMBUS, OHIO, December 10, 1920.

HON. WALTER B. MOORE, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—You have submitted for opinion the following question:

"W. S. M. and M. M. were husband and wife; W. G. and L. G. were