

1074.

APPROVAL, BONDS OF WEST LOVELAND SCHOOL DISTRICT, CLERMONT COUNTY, OHIO—\$4,500.00.

COLUMBUS, OHIO, September 28, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1075.

APPROVAL, BONDS OF THE VILLAGE OF ROCKY RIVER, CUYAHOGA COUNTY, OHIO—\$59,500.00.

COLUMBUS, OHIO, September 28, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

1076.

APPROVAL, BONDS OF THE VILLAGE OF FOREST, HARDIN COUNTY, OHIO, \$4,000.00.

COLUMBUS, OHIO, September 28, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1077.

MINIMUM SENTENCE—SECTION 710-172, GENERAL CODE, FIXES NO MINIMUM—SPECIFIC SENTENCE INTERPRETED—ELIGIBILITY FOR PAROLE.

SYLLABUS:

1. *Section 710-172, General Code, fixes no "minimum term provided by law" for which one convicted therefor may be imprisoned in the Ohio Penitentiary.*

2. A judgment of a court imposed upon one convicted of a violation of Section 710-172, General Code, which reads: "It is therefore considered and adjudged by the court that the defendant be imprisoned and confined in the Ohio Penitentiary at Columbus, Ohio, for not more than thirty years, and to be kept at hard labor but without solitary confinement and to pay the costs of this prosecution in the amount of \$-----, for which execution is awarded," fixes no minimum period of duration of sentence. A prisoner so sentenced is eligible for parole at any time after his commitment to the Ohio Penitentiary, provided such prisoner is recommended as worthy of such consideration by the warden and chaplain of the penitentiary and notice thereof is published in accordance with Section 2171, General Code.

COLUMBUS, OHIO, September 28, 1927.

HON. GEORGE H. BLECKER, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated September 16, 1927, which reads as follows:

"Please render opinion of the following: Re: Minimum term and sentence under Section 710-172 of the General Code.

General Code Section 710-172 for a term of sentence provides 'imprisoned in the penitentiary for not more than thirty years.' In pursuance of this provision of the statute, the court pronounced the following sentence:

'It is therefore considered and adjudged by the court that the defendant be imprisoned and confined in the Ohio Penitentiary at Columbus, Ohio, for not more than thirty years, and to be kept at hard labor but without solitary confinement and to pay the costs of this prosecution in the amount of \$-----, for which execution is awarded.'

Attention is further called to the following from Section 2160, General Code:

'A prisoner under general sentence to the penitentiary shall not be released therefrom until he has served the minimum term provided by law for the crime of which he was convicted; and he shall not be kept in the penitentiary beyond the maximum term provided by law for such offense.'

Also the following, Section 2166, General Code:

'Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general, but they shall fix, within the limits prescribed by law, a minimum period of duration of such sentences.'

This office is now solicitous about its recommendation and validity of such sentences under said statute and similar ones and feels that they should have the ruling of your department on the following questions: First, What, if any, is the minimum term under said statute 710-172 of the General Code? Second: In the sentence suggested what, if any, is the minimum term?"

Section 710-172, General Code, to which you refer, provides:

"Whoever being an officer, employe, agent or director of a bank, embezzles, abstracts, or wilfully misapplies any of the money, funds, credit or property of such bank whether owned by it or held in trust, or wilfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment or decree, or makes a false entry in a book, report or statement of such bank, or makes a false statement or certificate as to a trust

deposit, fund or contract, for or under which such bank is acting as trustee, or fictitiously borrows or solicits, obtains or receives money for the bank not in good faith, intended to become and be the property of the bank, with intent to defraud or injure the bank or another person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, or publishes a false statement or report relating to the financial condition of the bank with intent to defraud or injure it or another person or corporation, *shall be fined not more than ten thousand dollars, or imprisoned in the penitentiary not more than thirty years, or both.*" (Italics the writer's.)

By the terms of this section the trial court, upon conviction, may sentence a defendant to pay a fine of not more than ten thousand dollars, or to be imprisoned in the penitentiary not more than thirty years, or both.

Section 12372, General Code, provides :

"Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors."

The offense denounced by Section 710-172, *supra*, is a felony, inasmuch as it may be punished by imprisonment in the penitentiary.

In considering the question that you present your attention is directed to the four major divisions of the General Code entitled "Political," "Civil," "Remedial" and "Penal," respectively. Part Fourth entitled "Penal" is subdivided under Title I, "Felonies and Misdemeanors" and Title II "Criminal Procedure" and originally all statutes pertaining to such subjects were contained therein. In recent years the legislature enacted a number of penal sections which now appear in divisions other than Part Fourth. Section 710-172, *supra*, belongs to this class and appears in Part First entitled "Political" under the chapter headed "Superintendent of Banks."

This section, as do Sections 12433, 12434 of the General Code, and others states the "maximum term provided by law" for such offense but is silent with respect to the "minimum term provided by law." In other words the legislature has fixed a maximum number of years that a court may impose upon one convicted therefor but has left the minimum term to be fixed within the discretion of the trial court. It may be said that when the legislature enacted Section 710-172, *supra*, it failed to provide "a minimum term provided by law" for such offense.

The sections of the General Code which define the several felonies with few exceptions provide a minimum as well as a maximum term of imprisonment which a court may impose on one convicted therefor. I find no section of the General Code which fixes generally the minimum period of imprisonment to be served by a person committed to the Ohio Penitentiary. The only general section in this regard is Section 12370, General Code, which provides :

"In the interpretation of part fourth the word 'Imprisoned,' where the context does not otherwise require, means imprisoned in the county jail if the maximum term prescribed for the offense is one year, and imprisoned in the penitentiary if the maximum term prescribed for the offense is longer than one year."

It will be noted, however, that the operation of Section 12370, *supra*, by the language thereof, is limited to the term "imprisoned" as found in "Part Fourth" and it is doubtful if it has any application to the meaning of the term "imprisoned" as found in Section 710-172, *supra*. See *Walton vs. State*, 3 Ohio App. 97, 101. Furthermore

this section has reference to the "place where" imprisonment is to be had rather than for "how long" such imprisonment shall be.

By the terms of Section 2166, General Code:

"Courts imposing sentences to the Ohio Penitentiary for felonies, except treason and murder in the first degree, shall make them general, but they shall fix, within the limits prescribed by law, a minimum period of duration of such sentences. All terms of imprisonment of persons in the Ohio Penitentiary may be terminated by the Ohio Board of Administration (now the Ohio Board of Clemency), as authorized by this chapter, but no such terms shall exceed the maximum term provided by law for the felony of which the prisoner was convicted, nor be less than the minimum term fixed by the court for such felony."

This section has been construed in several recent opinions of this department, viz., Opinions No. 149 and 221, respectively, dated March 5, 1927, and March 22, 1927, Opinions, Attorney General for 1927. The syllabus of Opinion No. 149 reads as follows:

"1. Under the provisions of Section 2166, General Code, it is mandatory that the trial court when imposing sentences, except for treason and murder in the first degree, fix a minimum period of duration of sentence within the limits prescribed by the statute fixing the penalty for such crime.

2. The Board of Clemency is without authority to release a prisoner under sentence to the Ohio Penitentiary until he shall have served the minimum period of duration of such sentence fixed by the court under the provisions of Section 2166, General Code."

In Opinion No. 221, it was held:

"1. The Ohio Board of Clemency is without authority to allow a prisoner to go upon parole outside the building and inclosure of the penitentiary unless and until such prisoner shall have served within the penitentiary, the minimum term of imprisonment fixed by the trial court for the felony of which the prisoner was convicted.

2. Where, therefore, the trial court fails to fix the minimum period of duration of the sentence imposed, as required by Section 2166, General Code, or where the trial court through oversight or otherwise imposes a sentence 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 question specifically, it is my opinion that:

1. Section 710-172, General Code, fixes no "minimum term provided by law" for which one convicted therefor may be imprisoned in the Ohio Penitentiary.

2. A judgment of a court imposed upon one convicted of a violation of Section 710-172, General Code, which reads:

"It is therefore considered and adjudged by the court that the defendant be imprisoned and confined in the Ohio Penitentiary at Columbus, Ohio, for not more than thirty years, and to be kept at hard labor but without solitary

confinement and to pay the costs of this prosecution in the amount of \$-----, for which execution is awarded.”

fixes no minimum period of duration of sentence. A prisoner so sentenced is eligible for parole at any time after his commitment to the Ohio Penitentiary provided such prisoner is recommended as worthy of such consideration by the warden and chaplain of the penitentiary and notice thereof published in accordance with Section 2171, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1078.

APPROPRIATION FOR HIGHWAY DEPARTMENT—HOUSE BILL NO. 206,
87TH GENERAL ASSEMBLY, DISCUSSED—MONEY FOR ABOLISHING
GRADE CROSSINGS—PAYMENT OF SALARY OF OFFICER OR EM-
PLOYE OF DEPARTMENT OF HIGHWAYS.

SYLLABUS:

1. *The funds to be raised under House Bill No. 206, 87th General Assembly, during the fiscal period ending December 31, 1927, were legally appropriated to the Department of Highways and Public Works, Division of Highways, by House Bill No. 502, 87th General Assembly, and may be expended by that department in accordance with the provisions of and for the purposes specified in House Bill No. 206.*

2. *By the terms of Section 5541-8, General Code, all revenue derived under House Bill No. 206, 87th General Assembly, after the establishment and maintenance of the rotary fund of \$25,000.00 provided for in Section 5541-7, General Code, including the monies, not exceeding one million dollars, determined by the State Highway Director to be used for the purpose of abolishing grade crossings, must be apportioned and used in the several counties of the state in accordance with the provisions of said Section 5541-8, supra, viz., forty per cent must be used in the various counties of the state in proportion to the number of motor vehicles registered in such counties, the remaining sixty per cent to be apportioned and used in the several counties of the state according to such equitable plan or method of apportionment as shall be from time to time adopted and prescribed by the Director of Highways and Public Works.*

3. *Section 22, Article II, of the Constitution of Ohio, applies to appropriations made by the General Assembly of funds derived under House Bill No. 206, passed by the 87th General Assembly.*

4. *Except where it is specifically directed by statute that the salary of any officer or employe of the Department of Highways and Public Works, or that any other expense, be paid from a fund other than the state highway construction fund, any legitimate expenditure incident to paying the state's share of constructing or reconstructing of state highways or abolishing railway grade crossings is a proper charge against the state highway construction fund to the extent that monies to the credit of such fund are sufficient.*

COLUMBUS, OHIO, September 29, 1927.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date reading as follows: