

and to these lands, and to advise you not to purchase the same unless proceedings are taken by the said G. F. Thomas, as trustee in trust for the Bank of Peebles, to clear his title to these lands as against this objection.

I am herewith returning to you said abstract of title, warranty deed, encumbrance estimate and Controlling Board's certificate.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1045.

PRISONER—HOW EFFECTED BY REPEAL OF SECTIONS 2174 AND 2175, GENERAL CODE.

SYLLABUS:

1. *The Ohio Board of Clemency has authority to grant paroles, conditional releases or absolute releases to prisoners who violated their paroles or conditional releases and were declared delinquent and returned to the Ohio Penitentiary and are now serving the unexpired period of the maximum term of their sentence in accordance with the provisions of Section 2174 prior to its repeal.*

2. *Prisoners who are serving the unexpired period of the maximum term of their sentence, by virtue of the provisions of Section 2174 of the General Code, and have a second sentence to serve at the termination of the service of their first sentence, may be granted a release by the Ohio Board of Clemency from the service of the unexpired term of the maximum term of their first sentence, by virtue of the repeal of Section 2174 of the General Code.*

3. *Prisoners who were at large on parole or conditional release and who committed a new crime and were resentenced to the Ohio Penitentiary prior to the repeal of Section 2175, General Code, must serve their second sentence at the termination of their first or former sentence.*

4. *Prisoners whose paroles were revoked and who are serving the unexpired period of the maximum term of their sentence, are not eligible to parole until they are recommended as worthy of such consideration by the warden and chaplain of the penitentiary, and such recommendation has been published for three consecutive weeks in two newspapers of opposite politics in the county from which such prisoner was sentenced.*

COLUMBUS, OHIO, October 17, 1929.

HON. H. H. GRISWOLD, *Director, Department of Public Welfare, Columbus, Ohio.*

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

“House Bill 362, passed by the last General Assembly, becomes effective July 24, 1929, and repeals Sections 2174 and 2175 of the General Code. Several questions arise in the administration of the law following this repeal on which we desire your official opinion:

(1) In the case of a prisoner who has heretofore been paroled, has violated his parole and has been brought back to serve the maximum sentence provided by law, does the repeal of Section 2174 enable the Board of Clemency to grant parole before the expiration of such maximum term

after this repeal becomes effective? In case his violation consists of conviction of another crime, does the repeal of Section 2175 enable the Board of Clemency to grant parole from the first sentence before the expiration of the maximum term?

(2) A prisoner is paroled and violates the condition of his parole before H. B. 362 becomes effective, but he is not apprehended and brought back until after this bill becomes effective. In such case do the provisions of Section 2175 of the General Code apply and require that he serve the maximum sentence or may he be released by the Board of Clemency before the expiration of such sentence?

(3) In the case cited in paragraph 2, if the violation of parole consists in the commission of a crime of which the prisoner is convicted and for which he is sentenced, does the sentence for such second crime run concurrently with the unexpired portion of his maximum or with such term as he may serve before release by the Board of Clemency, if the Board of Clemency has authority to release before the maximum?"

Sections 2174 and 2175 of the General Code were repealed by the 88th General Assembly by House Bill No. 362, which act became effective July 24, 1929.

Section 2174 of the General Code provided as follows:

"A prisoner violating the conditions of his parole or conditional release, having been entered in the proceedings of the board of managers and declared to be delinquent shall thereafter be treated as an escaped prisoner owing service to the state, and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment. The time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of time served."

Section 2175 of the General Code provided as follows:

"A prisoner at large upon parole or conditional release committing a new crime, and resented to the penitentiary, shall serve a second sentence, to begin at the termination of his service under the first or former sentence, or the annulment thereof."

These sections were only applicable to prisoners sentenced to the Ohio penitentiary. See Opinions of the Attorney General, 1927, p. 1431.

The general rule of interpretation of statutes is that when an act of the legislature is repealed without a saving clause, it is considered, except as to transactions past and closed, as though it never existed. This rule is largely superseded by Section 26 of the General Code, which provides as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

House Bill No. 362, which repealed a large number of obsolete, unconstitutional

and unnecessary sections of the General Code, also contained Section 13767-5 of the General Code, which provided as follows:

"This act shall not be construed to affect any rights which might exist under and by virtue of the sections hereby repealed at the date this act goes into effect."

This saving clause has no application to your inquiry because it saves only the "rights" that existed before the repeal became effective, and the state has no vested rights in the service of a prisoner in a penal institution. The question does arise, however, whether or not under the terms of Section 26, General Code, supra, the serving of a sentence by a prisoner until he is finally released therefrom is a pending criminal prosecution or proceeding. I am of the view that it is not a pending prosecution or proceeding, and the provisions of Section 26 of the General Code are not applicable to the cases in question. A criminal proceeding is no longer pending when a person is confined in the penitentiary. The prosecution or proceeding is ended when he is committed to the penitentiary.

In the case of *State vs. Lawrence*, 74 O. S., at page 43, the court, in discussing the case of *In re Kline*, 70 O. S. 29, in which a defendant was seeking to be released by reason of the repeal of the "Habitual Criminal Act", which act was repealed while he was serving a sentence imposed for violation of said act, says:

"The repeal under consideration in the *Kline* case was of the act familiarly known as the 'Habitual Criminal Act.' Previous to the repeal of said act, and while the same was yet in full force and effect, *Kline* had been indicted, convicted, sentenced and imprisoned thereunder, and at the time of the repeal of said act, his prosecution was fully ended. There was therefore no question before the court in that case as to the effect of such repeal would or could have on a pending prosecution, or a *cause* of prosecution existing at the time of said repeal; and Section 79, Revised Statutes, was neither involved nor considered in the determination of that case."

Section 79 of the Revised Statutes, referred to in this quotation, is now Section 26 of the General Code.

The repeal of Sections 2174 and 2175 of the General Code in effect makes eligible to parole prisoners who, prior to its repeal, could not be paroled. However, the repeal of these sections does not contravene the provisions of the Constitution of the State of Ohio against retroactive legislation, nor does it interfere in any way with the judicial functions of the courts.

In the case of *State ex rel Attorney General vs. Peters*, 43 O. S. 550, the court, in passing upon the constitutionality of the "Parole Act", said as follows:

"This legislation applies to convicts who became such before as well as after the passage of the act. It can not seriously be contended that this is an interference with the judicial functions of the court, but is rather the exercise of that guardianship and power of discipline, which is vested in the state, to be exercised through the legislative department, for the safe-keeping, proper punishment and welfare of the prisoner. Neither is it an interference with the exclusive power vested in the governor to grant reprieves, commutations and pardons. While on parole the convict remains 'in the custody and under the control of the board, and subject at any time to be taken back within the inclosure of said institution, and with

power to enforce such rules and regulations, and to retake, and to reimprison any convict so upon parole.' This is not a pardon."

The court in this opinion further says:

"It may be claimed that this act, so far as it affects past sentences, is retroactive, and therefore unconstitutional. This can not be, as by this provision the legislature is only prevented from interfering with the vested rights of individuals.

It does not hinder the state from divesting itself of any right of claim of its own. The only party who could object is the prisoner, and he can not where it is clearly for his benefit. If the provisions of the law are not *ex post facto* in their nature, he can not complain."

The legislature has the power to fix by law the kind and manner of punishment and to provide such disciplinary regulations not in conflict with the fundamental law as it deems best. The Board of Clemency is a creature of the legislature and has only such powers as the legislature gives to it. The legislature can limit or extend the power of the board and in doing so does not interfere with any vested rights, for the right of parole does not confer a vested right on the prisoner and the state can divest itself of any of its rights with respect to the service of a prisoner in a penal institution. By the provisions of Sections 2174 and 2175 of the General Code, the legislature limited the power of the Board of Clemency to grant paroles to prisoners who violated the conditions of their parole and were returned to the Ohio penitentiary. The legislature, by the repeal of these sections, removed this limitation on the power of the Board of Clemency and thereby gave it full power to parole prisoners as it has under the statutes that still remain in full force and effect.

Section 2160 of the General Code provides as follows:

"The board of managers shall provide for the conditional or absolute release of prisoners under a general sentence of imprisonment and their arrest and return to custody within the penitentiary. A prisoner shall not be released, conditionally or absolutely, unless, in the judgment of the managers, there are reasonable grounds to believe that his release is not incompatible with the welfare of society. A petition or application for the release of a prisoner shall not be entertained by the board. 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."

Section 2169 of the General Code provides as follows:

"The Ohio Board of Administration shall establish rules and regulations by which a prisoner under sentence other than for treason or murder in the first or second degree, having served a minimum term provided by law for the crime for which he was convicted or a prisoner under sentence for murder in the second degree, having served under such sentence ten full years, may be allotted to go upon parole outside the building and inclosure of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, necessary for the parole of a prisoner.

The board may designate geographical limits within and without the state, to which a paroled prisoner may be confined or may at any time enlarge or reduce such limits, by unanimous vote."

You will observe that Section 2160 refers to the Board of Managers and Section 2169 refers to the Ohio Board of Administration. However, by virtue of Sections 91 and 92 of the General Code, the Ohio Board of Clemency has all the powers and duties conferred by law upon the Board of Managers and supercedes the Ohio Board of Administration in the release, parole or probation of persons confined or under sentence to the penal institutions of Ohio. See Opinions of Attorney General, 1927, Vol. 1, p. 249.

By virtue of Sections 2160 and 2169, General Code, the Ohio Board of Clemency has authority to grant paroles, conditional or absolute releases to all prisoners under sentence to the Ohio penitentiary other than those serving sentences for offenses specifically excepted by statute. The Ohio Board of Clemency, however, 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. Opinions of Attorney General, 1927, Vol. 1, p. 248.

In view of the conclusions reached, the Ohio Board of Clemency has authority to grant paroles, conditional releases or absolute release to prisoners who violated their parole or conditional release and were declared delinquent and returned to the Ohio penitentiary and are now serving the unexpired period of the maximum term in accordance with the provisions of Section 2174, prior to its repeal.

You will observe that under the provisions of Section 2175, General Code, prior to its repeal, a prisoner at large upon parole or conditional release committing a new crime and resentenced to the penitentiary was required to serve the second sentence to begin at the termination of his service under his first or former sentence or annulment of it. While this section provided that he should serve his second sentence after the termination of his first, it did not provide that he should serve the maximum term of his first sentence before commencing to serve his second sentence. Such prisoner serves the unexpired period of the maximum term of his first sentence, not by virtue of the provisions of Section 2175, but by virtue of the provisions of Section 2174, General Code.

Since I have concluded that prisoners who are serving the unexpired period of the maximum term of their sentence by virtue of the provisions of Section 2174, General Code, may now be paroled or released by the Ohio Board of Clemency by reason of the repeal of that section, therefore prisoners who are serving the unexpired period of the maximum term of their sentence by virtue of the provisions of Section 2174 of the General Code, and who have a second sentence to serve at the expiration of the first or former sentence, may be granted a release by the Ohio Board of Clemency from the service of the unexpired period of the maximum term of their first sentence.

Prisoners who were at large on parole or conditional release and were resentenced to the Ohio Penitentiary after committing a new crime, were received at the Ohio Penitentiary after being declared delinquent as escaped convicts owing service to the state, and they were given their old numbers and began serving the unexpired period of the maximum term of their imprisonment. The second sentence was not to begin until the expiration of the unexpired period of the first sentence. The court imposing the second sentence intended that the second sentence should not be served until the expiration of the first sentence. In other words, the court intended that the provisions of Section 2175 of the General Code, should be complied with, therefore the judgment of the court with reference to the second sentence has not been put into execution unless the period of the service of the first

sentence has been terminated. The repeal of Section 2175 of the General Code can not affect the judgment of the court.

In the case of *In re Kline*, 70 O. S. 27, the court in the course of its opinion says:

"The legislature cannot intervene and vacate the judgment of the courts either directly or indirectly by repeal of a statute under which the judgment was rendered because that would be an exercise of judicial and not legislative power."

I am of the opinion, therefore, that a prisoner who was at large on parole or conditional release, and who committed a new crime and was re-sentenced to the Ohio Penitentiary prior to the repeal of Section 2175, General Code, must serve his second sentence at the termination of his first or former sentence.

Your attention is directed at this point to Section 2171, General Code, which provides as follows:

"A prisoner confined in the penitentiary shall not be eligible to parole, and an application for parole shall not be considered by the board of managers, until such prisoner is recommended as worthy of such consideration by the warden and chaplain of the penitentiary. Before consideration by such board, notice of such recommendation shall be published for three consecutive weeks in two newspapers of opposite politics in the county from which such prisoner was sentenced. The expense of such publication shall not exceed one dollar for each paper."

In the Opinions of the Attorney General for 1928, at page 186, my predecessor, in interpreting the provisions of Section 2171, General Code, held, as shown in the first and second branches of the syllabus, as follows:

"The words 'worthy of such consideration' as the same are used in Section 2171, General Code, are to be construed in their natural, plain and ordinary signification. In other words, no prisoner of the Ohio Penitentiary having served within the penitentiary, the minimum term of imprisonment fixed by the trial court for the felony of which such prisoner was convicted, is eligible to parole until such prisoner is recommended as worthy of such consideration by the warden and chaplain of the penitentiary.

The Ohio Board of Clemency is without jurisdiction to consider an application for the parole of a prisoner confined in the Ohio Penitentiary until such prisoner has (1) served within the penitentiary the minimum term of imprisonment fixed by the trial court for the felony of which such prisoner was convicted, and (2) is recommended as worthy of such consideration by the warden and chaplain of the penitentiary, notice of which recommendation shall have been published for three consecutive weeks in two newspapers of opposite politics in the county from which such prisoner was sentenced."

My predecessor also held, as found in Opinions of the Attorney General for 1928, at page 798, that:

"When cases are brought before the Ohio Board of Clemency in their regular order and in accordance with the provisions of Section 2171, General Code, and the Ohio Board of Clemency continues the hearing of such

cases to a definite date, it is unnecessary that such prisoners again be recommended by the warden and chaplain of the Ohio Penitentiary as worthy of consideration for parole and to give notice thereof by publication as provided in said section.

When cases are brought before the Ohio Board of Clemency in their regular order and in accordance with the provisions of Section 2171, General Code, and the Ohio Board of Clemency continues the hearing of such cases for an indefinite period, it is necessary that such prisoners again be recommended as eligible for parole by the warden and chaplain of the Ohio Penitentiary and that notice thereof be given as provided by Section 2171, General Code."

Apparently prisoners whose parole was revoked and who are now serving the unexpired period of the maximum term of their sentence have not been recommended as eligible to parole as provided in Section 2171, of the General Code, since the revocation of their parole, for the reason that they could not have been eligible to parole because of the provisions of Section 2174 of the General Code. Therefore, such prisoners are not eligible to parole until they are recommended as worthy of such consideration by the warden or chaplain of the penitentiary, and such recommendation has been published for three consecutive weeks in two newspapers of opposite politics in the county from which such prisoner was sentenced.

In specific answer to your inquiries, I am of the opinion:

1. The Ohio Board of Clemency has authority to grant paroles, conditional releases or absolute releases to prisoners who violated their paroles or conditional releases and were declared delinquent and returned to the Ohio Penitentiary and are now serving the unexpired period of the maximum term of their sentences in accordance with the provisions of Section 2174 prior to its repeal.

2. Prisoners who are serving their unexpired period of the maximum term of their sentence, by virtue of the provisions of Section 2174 of the General Code, and have a second sentence to serve at the termination of the service of their first sentence, may be granted a release by the Ohio Board of Clemency from the service of the unexpired term of the maximum term of their first sentence, by virtue of the repeal of Section 2174 of the General Code.

3. Prisoners who were at large on parole or conditional release and who committed a new crime and were resentenced to the Ohio Penitentiary prior to the repeal of Section 2175, General Code, must serve their second sentence at the termination of their first or former sentence.

4. Prisoners whose paroles were revoked and who are serving the unexpired period of the maximum term of their sentence, are not eligible to parole until they are recommended as worthy of such consideration by the warden and chaplain of the penitentiary, and such recommendation has been published for three consecutive weeks in two newspapers of opposite politics in the county from which such prisoner was sentenced.

Respectfully,

GILBERT BETTMAN,
Attorney General.