

ates to prevent the transfer of revenues from the waterworks fund to the general fund.”

As above stated, it appears that a law expressly providing what shall be done with interest earned upon money borrowed in anticipation of the collection of funds to be raised by taxation, is a limitation upon that power of taxation and is, therefore, applicable to all taxing subdivisions. Accordingly, any ordinance of a charter city seeking to nullify such provisions would be void and inoperative.

In view of the foregoing, I am of the opinion that :

1. The provision of Section 5625-10, General Code, that interest earned on money in a special bond fund shall be paid into the sinking fund or the bond retirement fund of the subdivision, is a limitation upon the power to tax and is, accordingly, applicable to charter municipalities as well as to other taxing subdivisions of the state.

2. A charter city may not legally appropriate depository interest earned on bond funds for the purpose of supplementing such bond funds and authorize the expenditure of such depository interest for the purposes of such bond funds.

Respectfully,

GILBERT BETTMAN,
Attorney General.

418.

APPROVAL, ARTICLES OF INCORPORATION OF THE IMPERIAL CASUALTY COMPANY OF COLUMBUS.

COLUMBUS, OHIO, May 20, 1929.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am returning to you herewith the articles of incorporation of The Imperial Casualty Company of Columbus, with my approval endorsed thereon.

Respectfully,

GILBERT BETTMAN,
Attorney General.

419.

WORKHOUSE PRISONERS—VIOLATORS OF CRABBE ACT—MANAGING OFFICER'S POWER TO RELEASE AND PAROLE—SECTION 6212-17, GENERAL CODE, CONSTRUED.

SYLLABUS:

The words "remit" and "suspend" as used in Section 6212-17, General Code, refer only to courts, and therefore Section 6212-17, does not affect the authority under Sections 4133, et seq., given to an officer authorized by statute to manage a workhouse, to release or parole prisoners confined therein for failure to pay fines and costs imposed for a violation of the Crabbe Act.

COLUMBUS, OHIO, May 22, 1929.

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

GENTLEMEN :—I am in receipt of your letter of April 27, 1929, which is as follows :

“Sections 4133 et seq. provide for the discharge and parole of persons confined in workhouses by authorities in charge of such workhouses.

Question: Do the provisions of Section 6212-17, G. C., prevent the discharge or parole of workhouse prisoners by workhouse authorities, when such prisoners have been sentenced for violation of the Crabbe Act?”

Section 4133 of the General Code provides as follows :

“An officer vested by statute with authority to manage a workhouse, may discharge, for good and sufficient cause, a person committed thereto. A record of all such discharges shall be kept and reported to the council, in the annual report of the officer, with a brief statement of the reasons therefor.”

Section 4134, General Code, provides as follows :

“Such officer also may establish rules and regulations under which, and specify the conditions on which, a prisoner may be allowed to go upon parole outside of the buildings and enclosures. While on parole such person shall remain in the legal custody and under the control of the officer, and subject at any time to be taken back within the enclosure of the institution. Full power to enforce the rules, regulations and conditions, and to retake and reimprison any convict so upon parole, is hereby conferred upon such officer, whose written order shall be sufficient warrant for all officers named therein to authorize them to return to actual custody any conditionally released or paroled prisoner. All such officers shall execute such order the same as ordinary criminal process.”

Section 6212-17 of the General Code, provides in part as follows :

“Except as herein provided, any person who violates the provisions of this act (G. C., Sections 6212-13 to 6212-20), for a first offense * * * . No fine or part thereof imposed hereunder shall be remitted nor shall any sentence imposed hereunder be suspended in whole or in part thereof.”

In an opinion rendered by the Attorney General on April 3, 1925, published in the opinions of the Attorney General for 1925, page 186, the then Attorney General held that under Section 12382, General Code, the county commissioners may release prisoners as provided therein even though such indigent prisoners were confined for fines and costs imposed for a violation of the Crabbe Act. The then Attorney General in the foregoing opinion says :

“Section 6212-17, General Code, was intended as a curb upon courts which were abusing their powers by releasing persons upon whom sentence had been passed, under the mistaken impression that they had an inherent right to do so.

You will note that this section uses the words ‘remit’ and ‘suspend,’ and in that connection can refer only to courts, as commissioners have no power whatever to suspend or remit sentences; and Section 12382, General Code,

merely makes provision for release of indigent prisoners for a time in order that they may earn money to pay their fines, and the next section provides that such prisoners shall again be confined if they fail to pay."

This opinion was rendered prior to the time that Section 12382 of the General Code was enacted in its present form, it now providing that Section 6212-17, *supra*, shall not prevent the commissioners from releasing indigent prisoners as provided by Section 12382, General Code, so that the reasoning in this opinion is applicable here.

In the case of *Kohler vs. State ex rel.*, 24 Ohio App. Reports at page 275, the court commented upon the effect of Section 6212-17, *supra*, with relation to the release of an insolvent prisoner under Sections 11418, *et seq.*, and said as follows:

"It is true that under Section 6212-17 the following clause appears:

'No fine or part thereof imposed hereunder shall be remitted nor shall any sentence imposed hereunder be suspended in whole or in part thereof.'

It cannot be said that the action of the insolvency commissioner is in contravention of this clause, for the reason that the language pertains strictly to the functions of the court, as in the nature of the case it is the court that imposes, remits, or suspends the fine or sentence, and therefore we think this language is confined strictly to the magistrate, and has no applicability to the commissioner of insolvents, which officer in the case at bar concededly acted in accordance with the statutes defining his powers and his duties in the premises."

A motion in the Supreme Court to certify the record in the case of *Kohler vs. State ex rel.*, *supra*, was denied on March 29, 1927. While the decision in this case was in effect overruled by the Supreme Court in the case of *Boyer vs. State ex rel.*, 118 O. S. 582, the effect of Section 6212-17 in relation to the insolvency statute was not considered by the Supreme Court.

I agree with the view that the language of that part of Section 6212-17, *supra*, with reference to the remission and suspension of sentence, pertains strictly to the function of the court and therefore Section 6212-17 does not affect the authority under Sections 4133, *et seq.*, given to an officer authorized by statute to manage a workhouse to release or parole prisoners confined therein for failure to pay fines and costs imposed for a violation of the Crabbe Act.

It may be urged that Section 4133, General Code, vests a pardoning power in those persons authorized to discharge prisoners by virtue of its provisions and that this statute is in violation of the pardoning power conferred on the governor by the Constitution of the State of Ohio, Article III, Section 11. It is true that the discharge of a prisoner by persons in charge of a workhouse for some frivolous or whimsical cause or even for the purpose of relieving congestion of the institution, would be an exercise of the pardoning power and therefore the operation of the statute would be unconstitutional. However, it is a rule of statutory construction that, if possible, statutes are to be so construed as to make them constitutional. So in a case where it appears that further confinement of a prisoner would be inhumane, the power to discharge such prisoner could be exercised by the authorities in charge of the workhouse.

In the case of *Jiha vs. Barry*, 3 O. N. P. Reports (N. S.) 65, at page 72, the court in its opinion said:

"The discharge from the workhouse is not a *legal* right that belongs to any convict, for he has had all his legal rights in his trial; and such discharge is not a matter of *grace*, for that belongs only to the governor. It is

an act of *humanity*, and can be authorized only in cases where a condition has arisen that makes the further confinement of the convict *inhumane*. This, of course, restricts the discharge of workhouse convicts to few and exceptional cases."

Sections 4134 et seq., of the General Code, authorize officers vested by statute with authority to manage a workhouse, to establish rules and regulations under which prisoners may be allowed to go upon parole outside of its buildings and enclosures and they are to remain while on parole in the legal custody and under the control of the officers and subject at any time to be taken back within the enclosures of the institution.

A similar act with reference to the parole of prisoners of the Ohio Penitentiary was declared constitutional by the Supreme Court of Ohio in the case of *State ex rel. Attorney General vs. Peters*, reported in 43 O. S., page 629. The syllabus of this case is as follows:

"An act to amend an act entitled, "an act relating to the imprisonment of convicts in the Ohio Penitentiary, and the employment, government, and release of such convicts by the board of managers," passed March 24, 1884, passed May 4, 1885 (82 Ohio L. 236), authorizes the board of managers to establish rules and regulations under which certain prisoners then or thereafter under sentence, who had served the minimum term provided by law for the crime for which they were convicted, may be allowed to go upon parole outside of the buildings and inclosures, but to remain while on parole in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of the institution, is not an interference with the executive or judicial powers conferred on these departments by the constitution of the state."

In view of the authorities cited, I am of the opinion that Section 6212-17, General Code, does not affect the authority under Sections 4133, et seq., given to an officer authorized by statute to manage a workhouse, to release or parole prisoners confined therein for failure to pay fines and costs imposed for a violation of the Crabbe Act.

Respectfully,

GILBERT BETTMAN,

Attorney General.

420.

COUNTY COMMISSIONERS—JURISDICTION TO IMPROVE DITCH WITHIN A MUNICIPALTY.

SYLLABUS:

Upon the filing of a petition therefor by the mayor or council of a municipal corporation, county commissioners are vested with jurisdiction, under Sections 6442 et seq. of the General Code, to determine the necessity of a ditch improvement and to proceed therewith, if found necessary, notwithstanding the improvement is to be made wholly within the limits of the municipal corporation.