

149.

BOARD OF CLEMENCY—WITHOUT AUTHORITY TO RELEASE PRISONER FROM THE OHIO PENITENTIARY UNTIL HE HAS SERVED MINIMUM SENTENCE IMPOSED BY COURT—MANDATORY DUTIES OF COURT UNDER SECTION 2166, GENERAL CODE.

SYLLABUS:

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.

COLUMBUS, OHIO, March 5, 1927.

HON. C. LUTHER SWAIM, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—I am in receipt of your letter dated February 16, 1927, reading in part as follows:

“A question as to the minimum term of a convict in the Ohio penitentiary has arisen upon which your early opinion is requested. This person was sentenced from this county to the Ohio penitentiary in March, 1925, for a term of not less than four years and not more than twenty years. Notice is now being given by publication for hearing for parole of this prisoner, said hearing to be on or after April 5, 1927.

The penitentiary authorities are evidently acting under the opinion of Hon. C. C. Crabbe, Attorney General, of May 7, 1924, given to Hon. P. E. Thomas, warden of the Ohio penitentiary, Opinions of the Attorney General, 1924, pages 222-225.

* * * * *

Is not that part of G. C. 2160: ‘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released therefrom until he has served the *minimum term provided by law* for the crime of which he has been convicted’ repealed or rendered inoperative by this act of March 15, 1921, in view of the first section, G. C. 2166: ‘All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration, 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?’

Is not this Section 2166, G. C., violated if a prisoner is released under G. C. 2160 and 2169 at the end of his minimum term as fixed by law, when the court has fixed a higher minimum term?

Also, is not part of G. C. 2169: ‘A prisoner * * * having served a *minimum term provided by law* for the crime for which he was convicted may be allowed to go upon parole outside of the building and inclosure of the penitentiary’ repealed or rendered inoperative by this act of March 15, 1921, in view of the first section, G. C. 2166: ‘All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration as authorized by this chapter, but no such terms shall exceed the maximum term provided by law for the felony for which the prisoner was con-

victed, nor be less than the minimum *term fixed by the court for such felony?*

* * * * *

Your deep consideration of this question is requested, and if you should differ with your predecessor in this matter, it is requested that you set aside and reverse his opinion. I may state that the courts generally regard the former opinion as erroneous.

The release of convicts before the end of the minimum terms provided, or fixed, by the courts, is tending to lessen the influence of the courts upon the criminal element, as they are, or it is, beginning to regard the minimum as the only punishment, if they behave themselves in the penitentiary, without regard to the minimum as fixed by the courts.

I realize the crowded condition at the penitentiary, but that condition should be met in other ways than by setting aside the minimum terms provided and fixed by the courts.

I may state that the prisoner in this case, if released, would have to be re-tried on another charge, and re-sentenced, as the public will not stand for the setting aside of the minimum term of the court. All of which means extra work and expense for the state."

Section 86 of the General Code recreates the Ohio Board of Clemency and provides for the appointment of its members, the qualifications and term of appointment, etc.

Section 91, General Code, provides :

"The Ohio board of clemency shall have all the powers and enter upon the performance of all the duties conferred by law upon the board of pardons."

Section 92, General Code, provides :

"Upon the appointment of the members of the Ohio board of clemency as hereinbefore provided, and their qualification, such board shall supersede and perform all of the duties now conferred by law upon the Ohio board of administration with relation to the release, parole, and probation of persons confined in or under sentence to the penal or reformatory institutions of Ohio; and thereafter the said Ohio board of clemency, shall be vested with and assume and exercise all powers and duties in all matters connected with the release, parole or probation of persons confined in or under sentence to the penal institutions of Ohio now cast by law upon the said Ohio board of administration. The parole officers of the several penal institutions of the state shall be appointed by and subject to the direction and supervision of the managing officers of the institutions herein named."

By virtue of these two sections the Board of Clemency has all the powers and duties conferred by law upon the Board of Pardons and supersedes the Ohio Board of Administration in the release, parole or probation of persons confined in or under sentence to the penal institutions of Ohio.

Section 2160, General Code, (88 O. L. 556) 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, General Code, (107 O. L. 527) provides :

"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 allowed 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, but the concurrence of every member shall be 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."

This section, like Section 2160 of the General Code, is applicable to prisoners serving under a general sentence and provides that those prisoners under general sentence are eligible to parole when they have served the minimum term provided by law for a crime for which they were convicted.

Section 2170, General Code, (89 O. L. 361) provides rules and regulations as to the return of such paroled prisoners.

In 1921, 109 Ohio Laws, 64, the legislature enacted the so-called "Indeterminate Sentence Law," which now appears as Section 2166, and provides :

"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, 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. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced and, for the purposes of this chapter he shall be held to be serving one continuous term of imprisonment. If through oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter and receive the benefits thereof, as if he had *not* been sentenced in the manner required by this section." (The word "not" appears in the act.)

Sections 2160 and 2166 of the General Code appeared in the Revised Statutes as Sections 7388-6 and 7388-8.

Section 7388-6 of the Revised Statutes gave discretionary authority to the courts to enter an indeterminate sentence and empowered the board of managers to determine the length of imprisonment. See *In the Matter of Clayton* 13 O. D. 546. Both

sections appear in 81 Ohio Laws, 72, as part of an act, passed on March 24, 1884, which is entitled:

“Relating to the imprisonment of convicts in the Ohio penitentiary and the employment, government and release of such convicts by the board of managers.”

Section 5 of said act reads as follows:

“Every sentence to the institution of a person hereafter convicted of a felony * * * shall be, if the court having said case thinks it right and proper to do so, a *general* sentence of imprisonment in the penitentiary. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board of managers * * * and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which the prisoner was convicted.”

The above section was amended by an act passed on April 14, 1884, contained in 81 Ohio Laws, 186, to read:

“Every sentence to the *penitentiary* of a person hereafter convicted of a felony * * * may be, if the court having said case thinks it right and proper, a general sentence of imprisonment in the penitentiary * * * .”
(Italics the writer’s.)

Said section was again amended in 87 Ohio Laws, 164, with a provision applicable to prisoners sentenced for two or more separate offenses.

As stated in the opinion of Judge Allread, in the case of *Francis vs. State*, 4 Ohio App. 465, at page 466:

“Section 7388-6, Revised Statutes, gave discretionary authority to the court to enter an indeterminate sentence. This statute, however, appears to have been repealed by the General Code. It is true that Sections 2160 and 13697, General Code, recognized general sentences, but these sections are consistent with an intention to provide for proceedings in cases of general sentence previously entered. The absence of a provision authorizing a court to sentence an offender for an indefinite period is consistent only with an intention to repeal that provision of Section 7388-6, Revised Statutes, and to leave in force the definite-sentence statute. See *The State vs. Toney*, 81 Ohio St., 130.”

In 103 Ohio Laws, 29, appears:

“An act to provide for indeterminate penitentiary sentences and to repeal Section 2166, General Code.”

Said act provides as follows:

“Courts imposing sentences to the Ohio penitentiary for felonies * * * shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio Board of Administration. * * * But no such terms shall exceed the maximum, nor be less than the minimum term fixed by law for the felony of which the prisoner was convicted * * * .”

This section was again amended in 109 Ohio Laws, 64, to read as it now does in Section 2166, *supra* :

"Courts imposing sentences to the Ohio penitentiary for felonies * * * 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 * * * but no such terms shall * * * be less than the minimum term fixed by the court for such felony." (Italics the writer's.)

Section 2166 makes it mandatory that courts imposing sentences to the Ohio penitentiary for felonies, excepting certain crimes therein enumerated, shall make them general, but shall fix, within the limits prescribed by law, a minimum period of duration of such sentences. It was the intent of the legislature to place in the hands of the courts power to fix the minimum term of imprisonment. This section provides that all terms of imprisonment of persons in the Ohio penitentiary may be terminated by the proper board but no such terms shall be less than the minimum term fixed by the court for such felony.

All courts of this state under Section 2166 now impose indeterminate sentences, and fix, within the limits prescribed by law, a minimum period of duration of such sentences.

It is presumed that the legislature has knowledge of existing statutes and the state of the law relating to the subjects with which they deal. All consistent statutes which can stand together, although enacted at different dates, relating to the same subject, and hence called statutes in *pari materia* are treated prospectively and construed together as though they constituted one act. They are all to be compared, harmonized, if possible, and if not susceptible of a construction which will make all their provisions harmonize, they are made to operate together so far as possible, consistently with the evident intent of the latest enactments. This is true whether the acts relating to the same subject were passed at different dates separated by long or short intervals or at the same session or on the same day.

Where the latest statute is complete in itself, and intended to prescribe the only rule to be observed, it will not be modified by the displaced legislation, i. e. the other statutes to be construed in *pari materia*. The repugnancy being ascertained, the later act or provision in date or position has full force, and repeals whatever in the precedent law is inconsistent with it. Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. The intention to repeal, however, will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance. One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose.

In amended Senate Bill No. 8, 109 Ohio Laws, 74, there are two sections:

Section 1: (This is Section 2166, General Code.)

Section 2: "That said original Section 2166, General Code, and all laws or parts of laws inconsistent with this act be, and the same are hereby repealed."

And it is therefore clear that the legislature when they amended Section 2166, intended that all laws or parts of laws inconsistent therewith should be repealed.

1. Answering your questions specifically, as to your first question, it is my opinion that that part of Section 2160, *supra*, "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" has not been repealed or rendered inoperative by the provisions of Section 2166, *supra*.

Section 2160 provides that a prisoner under a *general*, or as now denominated an *indeterminate*, sentence shall not be released until he has served the minimum term provided by law for the crime of which he was convicted. If a court fix the minimum to be served by such a prisoner, as directed in Section 2166, the "minimum term provided by law" is the minimum fixed by court.

In your letter you refer to an opinion of the Attorney General, found in the Opinions of the Attorney General for 1924, page 222, the syllabus of which reads as follows:

"A sentence of 'not less than seven years' when such term is the maximum provided by law, is a general sentence as provided by Section 2163.

A prisoner under a general sentence is eligible to parole when he has served the minimum term provided by statute.

A sentence for not less than seven years which is the same as the maximum provided by law, is not for such a definite term as named in Section 2163, General Code."

That opinion covered a situation which arose through oversight or otherwise whereby a prisoner was sentenced to the Ohio penitentiary for a definite term, thus bringing into operation that part of Section 2166, *supra*, reading as follows:

"If through oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter and receive the benefits thereof, as if he had not been sentenced in the manner required by this section."

In the case that you mention in your letter, the court imposing sentence complied with the provisions of Section 2166, *supra*, and fixed within the limits prescribed by law a minimum period of duration of sentence. Section 2166 was in force and effect at the time the court so imposed sentence. Therefore, in the case mentioned in your letter the term of imprisonment of said defendant may not be terminated by the Ohio Board of Clemency until said defendant has served the minimum term fixed by the court, to wit: four years, less whatever diminution of sentence for good behavior as provided in Section 2163, General Code. In fact, the holding in the opinion above referred to is the same as the holding in this opinion, the following language being used at page 224:

"By Section 2166, *supra*, it is made mandatory that the court, when imposing sentences, except for certain crimes, fix a minimum period of duration of sentence as fixed within the limits prescribed by law.

While it is conceded that if a person is sentenced for not less than a certain term and another law fixes the maximum term which is co-incident with the minimum term fixed by the court, such a term is definite, yet it is not made so by the sentence of the court, but by virtue of another law. It is evident that the legislature meant to place in the hands of the court the power to fix the minimum term of imprisonment. This is shown by the use of the words in Section 2166, 'all terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration, as authorized by this chapter, but no such term 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.'"

2. In view of what is said above, the answer to your second question must be in the affirmative, and I am of the opinion that the Board of Clemency is without authority to release a prisoner sentenced for an indeterminate sentence before the expiration of the minimum period of duration "of such sentence fixed by the trial court."

3. The answers to your first and second questions answer your third question.

In conclusion it is my opinion that :

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.

Respectfully,
EDWARD C. TURNER.
Attorney General.

150.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND IN HANOVER TOWNSHIP COLUMBIANA COUNTY, OHIO, GUILFORD LAKE PARK.

COLUMBUS, OHIO, March 5, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I have examined the encumbrance estimate and abstract of title purporting to cover Tract No. 16, Guilford Lake Park, consisting of 48.26 acres, more or less, owned by Emerson H. Votaw and Ida B. Votaw, R. D. No. 4, Lisbon, Ohio. Tract No. 16 consists of two parcels, the first containing 6.32 acres, more or less, situate in the southeast quarter of Section 1, Hanover township, Columbiana county, Ohio, and the second containing 41.92 acres situate in the northeast quarter of Section 12.

The abstract as submitted covers only the 6.32 acre tract, no abstract being submitted as to the second parcel consisting of 41.92 acres. It was prepared by McMillan & Kelso, Abstracters, Lisbon, Ohio, under date of May 19, 1926, and recertified under date of December 24,——. The abstract as submitted pertains to the following premises, to wit: 6.32 acres situated in the southeast quarter of Section 1, Hanover township, Columbiana county, Ohio, and being more particularly described as follows:

"Parcel No. 1. Beginning on the southerly line of said Section No. 1, at a point where the center line of the north and south road running through said section intersects said south line of said Section No. 1; thence N. 0° 06' E. along said center line of said road 921.23 feet to a stake; thence S. 86° 45' E. 126.60 feet to a stone; thence S. 8° 41', E. 353.35 feet to an iron stake; thence S. 24° 37', E. 187.40 feet to a stake; thence S. 32° 54', E. 178.80 feet to a stake; thence S. 51° 52', E. 363.00 feet to an iron stake; thence S. 84° 29', E. 348.00 feet to a stone in the south line of said Section No. 1; thence N. 89°