

In this connection it may be well to invite your attention to the case of *Board of Elections vs. Henry* in the Court of Appeals, Franklin County, Ohio, 25 Ohio Appellate ----, wherein it is held in the eighth branch of the syllabus, as follows:

"Ballots on which voters wrote H.'s name in pencil, but did not add cross mark, held properly counted for H."

This case was presented to the Supreme Court upon motion to certify which was overruled November 2, 1927, 158 N. E. 94.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1518.

FINE AND IMPRISONMENT—THIRD OFFENSE UNDER LIQUOR—
COURT OF COMMON PLEAS WITHOUT AUTHORITY TO REMIT
FINE OR SUSPEND SENTENCE.

SYLLABUS:

1. *By the terms of Sections 6212-17 and 13706, General Code, a Court of Common Pleas is without authority to remit a fine or part thereof or suspend a sentence or part thereof imposed under Section 6212-17, General Code.*
2. *By the terms of Section 6212-17, General Code, a Court of Common Pleas, upon conviction of an accused of a third, or of a subsequent offense, under Sections 6212-13 to 6212-20, General Code, must impose a fine and imprisonment as provided in said Section 6212-17, General Code.*

COLUMBUS, OHIO, January 4, 1928.

HON. CARL Z. GARLAND, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—This will acknowledge your letter dated January 2, 1927 (1928) which reads:

"We are having some difficulty in determining the rights of the Common Pleas Court in sentences for a third offense under the liquor laws of Ohio. We are asking for an opinion from your department on the following circumstances.

An indictment has been returned in this county charging the defendant with a third offense for the sale of liquor, he having been charged with sale and convicted on two other occasions. Can the Common Pleas Court suspend any part of the sentence? Is it compulsory on the part of the Common Pleas Court to sentence the defendant to a fine and also impose the penitentiary sentence, or can either be given and not include the other?"

The answer to your questions is found in Sections 13706 and 6212-17, General Code, which in so far as pertinent, provide:

Sec. 13706. "In prosecutions for crime, except as mentioned in Section 6212-17 of the General Code, and as hereinafter provided, where the defendant has pleaded or been found guilty and it appears to the satisfaction of

the court or magistrate that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall be immediately sentenced, such court or magistrate may suspend the imposition of the sentence and place the defendant on probation in the manner provided by law, and upon such terms and conditions as such court or magistrate shall determine."

Sec. 6212-17. "Except as herein provided, any person who violates the provisions of this act (G. C. Sec. 6212-13 to 6212-20), * * * for a third and each subsequent offense, he shall be fined not less than five hundred dollars nor more than two thousand dollars *and* be imprisoned in the state penitentiary not less than one year nor more than five years. * * * *No fine or part thereof imposed hereunder shall be remitted nor shall any sentence imposed hereunder be suspended in whole or in part thereof.*" (Italics the writer's.)

Your attention is directed to the case of *Madjorous vs. State of Ohio*, 113 O. S. 427, the syllabus of which reads:

"The prohibition against remission of fines and suspension of sentence provided in Section 6212-17, General Code, is a valid exercise of legislative power, and does not invalidate the operative provisions of that section."

Answering your first question specifically it is my opinion that a Court of Common Pleas, by the terms of Sections 6212-17 and 13706, General Code, upon the conviction of an accused of a crime or offense under Sections 6212-13 to 6212-20, General Code, is without authority to remit a fine or part thereof or suspend a sentence or part thereof imposed under Section 6212-17, General Code.

Section 6212-17, supra, is plain and unambiguous in providing that "for a third and each subsequent offense, he (the accused) shall be fined not less than five hundred nor more than two thousand dollars *and* be imprisoned in the state penitentiary not less than one year nor more than five years." In other words, for a third and each subsequent offense the penalty provided is a fine plus imprisonment.

Answering your second question specifically it is my opinion that by the terms of Section 6212-17, General Code, upon conviction of an accused of a third, or of a subsequent offense under Sections 6212-13 to 6212-20, General Code, a Court of Common Pleas must impose a fine and imprisonment as provided in said Section 6212-17, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1519.

INDIGENT PERSON—RESIDENT OF CITY—PAYMENT FOR SURGICAL OPERATION DISCUSSED.

SYLLABUS:

1. *When an indigent person has a legal settlement and residence in a city of this state, the county commissioners of the county in which such city is located are not authorized to contract for a necessary surgical operation on such person, or pay for the*