"The county auditor may discharge from imprisonment any person confined in the county jail for the non-payment of a fine or amercement due the county, except fines for contempt of court or an officer of the law, when it is made clearly to appear to him that the fine or amercement cannot be collected by such imprisonment."

While this section gives the county auditor authority to discharge prisoners from the county jail for fines *due the county,* it gives no authority to discharge prisoners for fines due the state and this is the only authority granted the auditor in such matters. The fine under the Crabbe act is not divisible, so that a court, when half of such fine is paid, cannot say whether it is the state's half or the county's half, nor does the defendant have the right to say which half he is paying.

When money is received on a fine, section 6212-19, General Code, specifically orders one-half of it paid to the county and one-half to the state, and leaves no discretion to a court or any one else in the matter, and therefore a condition would never arise where section 2576, General Code, would be operative in Crabbe act cases.

In answer to your question, therefore, it is my opinion that an auditor cannot discharge a prisoner confined in the county jail for non-payment of a Crabbe act fine.

Respectfully,
C. C. CRABBE,
Attorney General.

2482.

TAXES AND TAXATION—AUTHORITY OF TAX COMMISSION TO REQUIRE REPORTS AND PAYMENT OF FEES FROM CORPORATIONS —"DEMPSEY ACT" (HOUSE BILL 338) CONSTRUED.

SYLLABUS:

1. *Section 6 of House Bill* 338, *enacted by the* 86th *general assembly, known as the Dempsey act, confers upon the tax commission of Ohio the authority to require the report and payment of fees and taxes due from foreign and domestic corporations within the five year period next preceding the determination of the amounts due from such corporations by the tax commission.*

2. *In the event such corporations have filed the reports required by law prior to the enactment of said act, but have not paid the fees and taxes due, and desire to pay said fees and taxes, and receive the certificate provided by section* 5511, *General Code, as amended,* 109 *O. L.,* 94, *section* 26, *General Code of Ohio, applies since the filing of the report is sufficient to constitute the matter a proceeding within the meaning of said section.*

COLUMBUS, OHIO, May 13, 1925.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date received, as follows:

"Assuming that the Dempsey act, rewriting the corporation franchise tax law, became effective at midnight on Friday, April 18, the question now presents itself as to the powers of the commission to receive reports from

domestic corporations under the former law now repealed, and to certify the same to the auditor of state for assessment. Specifically we desire to ask your answer to the following:

"Does section 26 or any other section of the General Code operate as a saving clause so as to preserve the powers of the commission to insist upon compliance with the repealed sections?

"In case of a corporation which has already reported but is in default for payment of fee, may the commission require payment under the sections which have been repealed, of such fee for 1924, or for years previous thereto, as a condition precedent to the issuance of the certificate required in section 5511, as amended 109 O. L., 94?

"In case of a corporation in default of both report and payment of fee, may the commission require such report and payment under the repealed sections as a condition precedent to the issuance of the certificate just referred to above?"

Section 26 of the General Code provides:

"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."

Section 5511, General Code (109 O. L., 94), provides:

"Any corporation whose articles of incorporation or certificate of authority, to do business in this state, has been cancelled by the secretary of state, as provided in section one hundred and twenty (G. C. section 5509) of this act, upon the filing, within two years after such cancellation, with the secretary of state, of a certificate from the commission that it has complied with all the requirements of this act and paid all taxes, fees or penalties due from it, and upon the payment to the secretary of state of an additional penalty of one-tenth of one per cent upon the amount of its authorized stock, such penalty not to exceed one hundred dollars nor be less than ten dollars in any case, shall be entitled again to exercise its rights, privileges and franchises in this state, and the secretary of state shall cancel the entry made by him under the provisions of section one hundred and twenty (G. C. section 5509) of this act, and shall issue his certificate entitling such corporation to exercise its rights, privileges and franchises."

Answering your second question, the filing of the report is sufficient, in our opinion, to constitute the matter a proceeding within the meaning of section 26, General Code. In the recent case of *Industrial Commission* vs. *Vail*, 110 O. S., 304, it was held that the filing of an application for compensation with the industrial commission, prior to the effective date of the amendment of section 1465-90, became "a proceeding within the provisions of section 26, General Code which ripens into an action upon an appeal from a denial of such claim by the industrial commission, and the amendment is not applicable in the trial of such action." The case of Friend vs. Levy, 76 O. S., 26, is not in point, for there, as the court stated (p. 51), a contrary intention was expressed. Neither is this the character of case to be found in Alexander vs. Spencer, treasurer, 13 C. C. (n. s.) 475, affirmed in 83 O. S., 492.

In the present act it is apparent that the legislature had no intention of absolv-

ing any corporation from a tax which had already accrued. That proposition is more fully discussed in the answer to your next inquiry.

In answering your inquiry, we are assuming the facts stated therein, to-wit, that a report has been filed, and, under the law, the right to collect the tax had accrued prior to the repeal and had become a lien upon the property of the corporation, continuing until the fees, taxes and penalties were paid (section 5506, G. C.) To hold otherwise would deny to the commission the right to reinstate corporations whose articles had been canceled, even though the lien of the tax was preserved against the property of the corporation, and both sections 5506 and 5511 were not repealed by house bill 338, referred to in your letter.

Your third question is answered by the provisions of section 6 of said act and it is not necessary that the commission rely upon the provisions of section 26, General Code, for its authority to act. Section 6 amended section 5461 to read as follows:

> "When any public utility or corporation fails to make any report to the tax commission required by law or makes such report and fails to report or reports erroneously any information essential to the determination of any amount, value, proportion or other fact to be determined by the tax commission pursuant to law which is necessary for the fixing of any fee, tax, or assessment, the tax commission shall proceed to determine such amount, value, proportion, or other fact as nearly as practicable and shall certify the same as required by law. Such power and duty of the tax commission shall extend to and only to the five years next preceding the year in which such inquiry is made. Upon determination and certification by the tax commission herein authorized a tax fee, or assessment shall be charged for collection from such public utility or corporation at the rate provided by law for the year or years when such tax, fee, or assessment was omitted, or erroneously charged so that the total tax, fee, or assessment paid and to be paid for such year or years shall be in the full amount chargeable to such public utility or corporation by law. Such charge shall be without prejudice to the collection of any penalty authorized by law."

It is apparent that this section gives the commission the authority to require the report and payment of such taxes and fees within the five year period next preceding.

We assume that the foregoing discussion has answered your first inquiry.

Respectfully,
C. C. CRABBE,
Attorney General.