2284.

CRIMINAL ACT, HABITUAL — STRICTLY CONSTRUED — PENAL IN CHARACTER — SECTIONS 12442, 13744-1, 12619, ETC., G. C. — "BREAKING AND ENTERING IN DAY TIME" — "BURGLARY" — "BURGLARY IN AN INHABITED DWELLING" — "HABITUAL CRIMINAL" — "FELONY" — INTERPRETATION SENTENCES:
"TWO TIMES CONVICTED" — SEPARATE PROSECUTION AND TRIAL — PAROLE — "STEALING MOTOR VEHICLE" — CONVICTED ON TWO COUNTS, AT SAME TIME CONVICTED UNDER THIRD COUNT — STATUS FOR PAROLE—MINIMUM TERM, GOOD BEHAVIOR.

SYLLABUS:

1. *Section* 13744-1, *together with cognate sections of the General Code, commonly called the "Habitual Criminal Act", being highly penal in character, must be strictly construed and the provisions thereof may not be extended in its application to cases which do not, by the strictest construction, come within such provisions.*

2. *The crime of "Breaking and entering in day time" (Section* 12442, *G. C.) is not among the felonies specified in Section* 13744-1, *General Code, providing that if any person be convicted of any of the felonies enumerated in such section after having been two times convicted of any of the felonies therein specified, separately prosecuted and tried therefor, either in this state or elsewhere, he shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense, nor is such crime of "Breaking and entering in day time" included by implication or otherwise within the terms "Burglary" or "Burglary in an inhabited dwelling", or within any other of the felonies specified in said Section* 13744-1.

3. *Where a prisoner confined in the Ohio Penitentiary, who was once convicted of "Breaking and entering in day time" (Section* 12442 *G. C.) and, while on parole, was subsequently convicted of stealing a motor vehicle (Section* 12619, *G. C.), was later convicted of two crimes of breaking and entering on two counts in the same indictment, each charging breaking and entering two separte dwelling houses in the daytime on separate dates, in violation of the provisions of Section* 12442, *supra, and at the same time was convicted under a third count of being an habitual criminal under Section* 13744-1, *General Code, and sentenced to serve a term of five years in the Ohio Penitentiary on the first count, and a term of five years in the same institution on the second count, the "sentence on the second count to commence at the termination of the first count", is eligible for parole in so far as his conviction upon the first count of the indictment is concerned, at the expiration of the minimum term provided by law, viz., at the expiration of one year less time off for good behavior, at which time such prisoner shall commence serving the sentence imposed under the second count of the indictment under which he is eligible for parole at the end of one year imprisonment, less time off for good behavior.*

Columbus, Ohio, May 21, 1940.

Honorable Charles L. Sherwood, Director, Department of Public Welfare, Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

"May we have your opinion on the following subject:

J. W. F. was admitted to the Ohio State Reformatory from Hamilton County on July 3, 1930, Housebreaking—1 to 5 years. Paroled April 15, 1932.

While on parole on this Ohio State Reformatory charge he was sentenced to the Ohio Penitentiary August 11, 1932, from Hamilton County, Auto Stealing—1 to 20 years, paroled August 15, 1935, declared a violator October 1, 1935. Paroled November 15, 1938, and is wanted as a violator on this sentence.

On January 24, 1940, this man was received at the Ohio Penitentiary from Madison County with the following cited sentence: 'Breaking and Entering and Habitual Criminal Act, Section 13744-1 G. C. (two sentences) 10 to 10.

The statutory penalty for Breaking and Entering under Section 12442 G. C. is one to five years.

It is reported that this conviction was had on proof of the man's having committed two separate and distinct crimes at two different times; first, burglary in the day season of the dwelling house of one H. C.; second, burglary in the day season of the dwelling house of one F. D. These two offenses constitute the first and second counts of the indictment which was returned against him in the Madison County Court of Common Pleas.

The court's Journal Entry reads in part as follows:

'It is therefore ordered and adjudged by the court that the said defendant, J. W. F., be sentenced to a term of five years in the Ohio Penitentiary on the first count of said indictment and to a term of five years on the second count of said indictment. *The sentence on the second count to commence at the termination of the first count.*'

The third count in the indictment was under the Habitual Criminal Act. Whether he was adjudged an habitual criminal because of his previous Ohio State Reformatory and Ohio Penitentiary sentences listed above, or on the two indictments on the current sentence is not clear.

The Habitual Criminal Act Section 13744-1 G. C. reads:

'A person convicted in this state of arson, burning property to defraud insurer, robbery, pocket-picking, burglary, burglary of an inhabited dwelling, murder of the second degree, voluntary manslaughter, assault to kill, rob or rape, cutting, stabbing, or shooting to kill or wound, forcible rape or rape of a child under twelve years of age, incest, forgery, grand larceny, stealing motor vehicle, receiving stolen goods of the value of more than $35.00, perjury, kidnapping or child-stealing, who shall have been previously two times convicted of any of the hereinbefore specified felonies separately prosecuted and tried therefor, either in this

state or elsewhere, shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense; provided that any of such convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purpose of this section as one conviction."

QUERY:

Is not the statutory maximum which must be considered as the minimum under the Habitual Criminal Act the penalty for the offense which in this case is five years, rather than the penalty assessed by the court on the basis of two counts or offenses? In other words, may the accused be assessed the total of two or more penalties; that is, be given a minimum equal to the combined maximums penalty for each offense?

Is the minimum penalty, under the Habitual Criminal Act, in the case of J. W. F., five years or ten years?"

In your letter, you state that "J. W. F." was admited to the Ohio State Reformatory on July 3, 1930, to serve a term of from one to five years, having been convicted of the crime of "house breaking". By this I assume that the prisoner in question was convicted under Section 12442, General Code, of the crime of "Breaking and entering in daytime". You further state that on August 11, 1932, he was sentenced to be imprisoned in the Ohio Penitentiary for from one to twenty years for stealing a motor vehicle (Section 12619), and that his last convictions were on two counts in the same indictment, each charging breaking and entering two separate dwelling houses in the daytime on separate dates, in violation of the provisions of Section 12442, supra, the accused at the same time being adjudged an "habitual criminal" under the terms of Section 13744-1, General Code, quoted in your letter. On his last convictions, he was sentenced to serve a minimum term of ten years and a maximum term of the same duration in the Ohio Penitentiary.

The first question presented by your inquiry is: Since the crime of "Breaking and entering in daytime", as defined in Section 12442, General Code, is not expressly mentioned and included among the felonies specified in Section 13744-1, supra, is it included by implication in the terms "Burglary", or "Burglary of an inhabited dwelling," or in any other of the felonies enumerated in such section.

It will be noted that Section 13744-1, General Code, which was enacted as a part of "An Act—To provide punishment for habitual felons",

passed on March 15, 1929 (113 v. 40), expressly and specifically enumerates twenty felonies, and provides that a person convicted of any one of *such* crimes after having been "two times convicted of any of the *hereinbefore specified* felonies separately prosecuted, and tried therefor, either in this state or elsewhere, shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for *such* offense". The crimes specified, with the proper section numbers of the General Code, are: (1) Arson, Section 12433; (2) Burning property to defraud insurer; Section 12434; (3) Robbery, Section 12432; (4) Pocket picking, Section 12449; (5) Burglary, Section 12438; (6) Burglary of an inhabited dwelling, Section 12437; (7) Murder of the second degree, Section 12403; (8) Voluntary manslaughter, Section 12404; (9) Assault to kill, rob or rape, Section 12421; (10) Cutting, stabbing or shooting to kill or wound, Section 12420; (11) Forcible rape, Section 12413; (12) Rape of a child under twelve years of age, Section 12413; (13) Incest, Section 13023; (14) Forgery, Section 13083; (15) Grand Larceny, Section 12447; (16) *Stealing motor vehicle, Section* 12619; (17) Receiving stolen goods of the value of more than $35.00, Section 12450; (18) Perjury, Section 12842; (19) Kidnapping, Section 12424; and (20) Child stealing, Section 12425.

As above pointed out, the words "Breaking and entering in daytime" (Section 12442, G. C.) or "Breaking and entering a dwelling in the daytime" nowhere appear in Section 13744-1, General Code, although, as will be seen from the words last above underscored, the section does include the felony of stealing a motor vehicle as denounced by Section 12619 of the General Code.

While it is stated in 12 O. Jur. 949, that "statutes relating to habitual criminals are liberally construed", the cases cited in support thereof, namely, Hawkins v. State, 27 Oh. App. 297, 161 N. E. 284 (1928) and Bumbaugh v. State, 32 O. L. R. 52, 8 Abs. 350 (1930), do not sustain the text. Each of the two cases cited had to do with the conviction of an accused of a third murder offense under the then existing prohibition laws of Ohio, commonly called the "Crabbe Act" (Sections 6212-13 to 6216-20, General Code), which made a third offense a felony, these cases only holding, in so far as the instant question is concerned, that an accused, who had been twice previously convicted under such act, might be convicted of a third

offense, notwithstanding the fact that the affidavit filed when the second conviction was had did not expressly and specifically charge a second offense.

The true rule here applicable is set forth in 25 Am. Jur. 260, in the following words:

> "The general principles of statutory construction and interpretation are applicable to statutes providing for an increased punishment upon conviction for a subsequent offense. *Such a statute is highly penal and must be strictly construed,* unless the rule is changed by statute. * * * " (Emphasis ours.)

In the case of State v. Barley, 165 La. 341, 115 So. 613, 58 A. L. R. 1 (1927), it was held as stated in the tenth branch of the headnotes:

> "Rev. St. §974, authorizing a more severe punishment to be inflicted upon one convicted of a second or subsequent offense, being highly penal, should not be extended in its application to cases which do not, by the strictest construction, come under its provisions."

See also the cases cited in the Annotations contained in 58 A. L. R. 20, 30; 82 A. L. R. 345, 353; and 116 A. L. R. 209, 216.

That the rule of strict construction of penal statutes applies in Ohio was expressly held in Rogers v. State, 87 O. S. 308, 312 (1913), in which it was said, it "is elementary, in construing statutes defining *crimes and criminal procedure,* that they must be strictly construed, reasonably, of course, but *still strictly.*" In fact, this rule of strict construction is expressly recognized by the Legislature in Section 10214, General Code. See in connection with the construction of statutes of this type, 37 O. Jur. 744, 749, and cases cited.

Touching the question submitted by you, it will be seen that the crimes of "Burglary in an inhabited dwelling" (Section 12437, G. C.) and "Burglary in an uninhabited dwelling or other building" (Section 12438, G. C.) are both contained in that part of Chapter 4 (Offenses pertaining to property), Title I (Felonies and Misdemeanors), Part Fourth (Penal), of the General Code, entitled "Burglary and Other Breaking". These headings and designations were contained in the General Code as adopted by the 78th General Assembly in the act "Being an Act entitled 'An Act to revise and consolidate the general statutes of Ohio' passed February 14, 1910". Under the heading "Burglary and Other Breaking", there were at the time Section 13744-1, supra, was enacted ten different and distinct crimes (Sections

12437 to 12446, inc., G. C.). Since that time none of the essential characteristics of the crimes and offenses defined by these sections has been changed, Section 12441, supra, only having been changed (113 v. 502), so as materially to increase the penalty for the armed malicious entering of a bank or other financial institution. Of the ten crimes grouped under the heading "Burglary and Other Breaking", it is obviously significant that the Legislature saw fit only to include among the felonies specified in Section 13744-1, supra, the crimes of "Burglary" and "Burglary of an inhabited dwelling". And, as above pointed out, it is of equal significance that the crime of "Breaking and entering in daytime" (Sec. 12442, supra) was in nowise mentioned in Section 13744-1.

Likewise, when Section 13744-1 was enacted there were four offenses under the heading "Arson and Other Burning" (Secs. 12433 to 12436, inc., G. C.). The same General Assembly that enacted Section 13744-1, viz., the 88th, in "An Act—Relative to arson and other burning, and to repeal sections 12433 to 12435, inclusive, of the General Code" (113 v. 541; 4-5-29), amended Sections 12433, 12434 and 12435, General Code, respectively defining the crimes of "Arson", "Burning property to defraud insurer" and "Burning (personal property of another",) and added the crimes of "Burning property to defraud" and "Attempt to burn property" (Sections 12433-1 and 12435-1 G. C.) However, Section 13744-1, which specifically includes *only* the crimes of "Arson" and "Burning property to defraud insurer" out of the six offenses contained under the heading here under consideration, was left unchanged.

These examples might be multiplied with reference to practically all the felonies specified in Section 13744-1, as in the case of the crime of "Perjury" (Sec. 12842 G. C.) contained under the heading "Misconduct of Witnesses", for which the penalty is imprisonment in the penitentiary not less than one year nor more than ten years. Other sections defining perjury are Sections 2970, 4785-226 and 8572-116, respectively relating to false statements to obtain benefits for needy blind persons, false swearing under the election laws, and false oaths under the Torrens law pertaining to the registration of land titles. On the other hand, Sections 6319-5, 12698 and 12709, General Code, each define as crimes, false swearing with reference to the particular matters covered by the section with varying penalties. Section 6319-5 requires that a corrective statement demanded to be published by a newspaper shall be sworn to, the penalty for false swearing being

"a fine not exceeding $500.00 or imprisonment not exceeding one year, or both." Section 12698 makes it a crime to swear falsely in certain matters before the state medical board, punishable by imprisonment "in the penitentiary not less than one year nor more than five years," while Section 12709 makes it a crime falsely to swear to certain matters before the state pharmacy board, carrying a penalty of imprisonment "in the penitentiary not less than one year nor more than three years." Whether or not the crimes defined by Sections 2970, 4785-226 and 8572-116, supra, are perjury within the meaning of that term as it is used in Section 13744-1, it is unnecessary here to determine, although it would seem that they are. In any event, it seems quite clear that the types of "false swearing", or "perjury" as that term is sometimes loosely used, provided for in Sections 6319-5, 12698 and 12709, are clearly not perjury within the meaning of that term as it is used in Section 13744-1, supra.

From the above discussion, it is manifest that, *First,* Section 13744-1, General Code, being highly penal in its character, must be strictly construed, and, *Second,* in the enactment of Section 13744-1, the Legislature has with careful discrimination determined and specified the particular felonies, the repeated commission of which, as provided in such section, makes the offender an habitual criminal and subjects him to the pains and penalties of such section.

While the question here presented has not been passed upon by the courts of this state, it has been considered in the courts of certain other jurisdictions.

In the case of People vs. Lohr, 82 P. (2nd) 615 (California C. of A. 1938), it was held that in "order to adjudge a defendant an habitual criminal, the test is not whether he shall have been twice convicted of any felonies, but whether he shall have been twice convicted of felonies enumerated in the Penal Code."

The case of Commonwealth v. Woodward, 110 Pa. Super. 478, 168 A. 347 (1933), clearly supports the conclusions herein reached. In that case the second and sixth branches of the headnotes (168 A. 347) read as follows:

> "2. Habitual Criminal Act, being highly penal, must not be extended to apply to cases not clearly within its language. * * *
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> 6. Court cannot construe Habitual Criminal Act as embrac-

> ing offenses *not plainly within its language,* though deemed within reason of or mischief designed to be remedied by statute ***."
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> (Emphasis ours.)

In this case, as stated in the first and second headnotes (110 Pa. Super. 478), "Section 2 of the Act of April 29, 1929, P. L. 854, authorized imprisonment for life where the defendant has been convicted, under certain conditions enumerated in the Act, of 'treason, *** burglary, entering with intent to steal, robbery, arson, etc.', four or more times. The entering of a railroad car with intent to steal was not a criminal offense under Section 136 of the Act of March 31, 1860, P. L. 382 ***, as amended by the Acts of April 22, 1863, P. L. 531 and March 13, 1901, P. L. 49. The Act of May 23, 1887, P. L. 177, Section 1, without amending Section 136 of the Penal Code relating to entering dwellings, shops, etc., made it a felony to enter railroad cars or locomotives with such intent."

In the third and fourth branches of the headnotes the court held:

> "3. The words 'entering with intent to steal' as used in the act of April 29, 1929, P. L. 854, refer to and include only the offenses enumerated under the act of March 31, 1860, as amended, and do not include the crime of breaking or entering cars punishable under the Act of May 23, 1887, P. L. 177.
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> 4. The act of April 29, 1929, P. L. 854, does not authorize a court to imprison for life a defendant who has been convicted on three different occasions of entering freight cars and on two other occasions of perjury and felonious entry of a building."

In the opinion of the Court, it was said as follows at pages 486, et seq.:

> "The Act of 1929 *is highly penal and is not to be extended, in its application, to cases which do not clearly come within its language.* *** Before we conclude that the Legislature intended that a defendant may, upon a fourth conviction of entering a railroad car with intent to steal, be imprisoned for life, we must be able to find in the statute language, the plain meaning of which expresses such intent.
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> The Legislature did not expressly declare that intent. Does it plainly arise by implication from the language used? In our opinion, it does not.
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> We think it is particularly significant that when the Legislature in 1887 concluded to make the entering of a railroad car by day or by night, with or without breaking, with intent to commit any felony whatever therein, a criminal offense and to prescribe a severe punishment therefor, it did not do so by further amending

> Section 136 of the Code (Habitual Criminal Act). If the Legislature had considered the offense of entering railroad cars of equal gravity with, and of a nature kindred to, the crime of entering buildings, it would naturally have amended Section 136 by incorporating the words, "railroad car, caboose or locomotive, therein.
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> * * *
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> We agree with much that was said by the learned trial judge, in his opinion refusing a new trial, relative to the necessity for and purpose of 'Habitual Criminal Acts'. The evidence upon this record demonstrates that appellant has committed offense after offense and has no regard for the property rights of others; evidently, the infliction of ordinary punishment has had no reformatory effect upon him. It is our duty, however, to construe the law as we find it. *Although we may deem a case to be within the reach of the statute, or the mischief it is designed to remedy, we may not place it under the provisions of the enactment, unless plainly authorized by its language."*
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> (Emphasis and words in parenthesis ours.)

This office is of course cognizant of the fact that there are no common law crimes in this state and that, concomitantly with this rule, all crimes in Ohio are statutory. See 12 O. Jur. 48, 49. However, as held in State vs. Schwabb, 109 O. S. 532, 539, 143 N. E. 29 (1924), "many of the statutory crimes are stated in such general terms that it is necessary to look to the common law definitions", and sometimes it "will be found further that the statutory definition coincides perfectly with the common law definition". In addition, it has been held by the Supreme Court of Ohio that in "the interpretation of our statute, we will follow the analogy of the common law of burglary, giving to particular words the meanings therein acquired." See Wilson v. State, 34 O. S. 199, 202 (1877).

The question presented by your inquiry does not go to the power of the Legislature to define the crime of burglary, or to enlarge the common law definition of this crime, for as held in Ex Parte Fleming O. S. 16, 173 N. E. 441 (1930), the state "in its inherent sovereign power to define crimes and fix penalties, may, acting through the Legislature, create a new offense applicable to all within the class named and of general operation throughout the state." The question here presented is: What did the Legislature intend when it used the words "Burglary" and "Burglary of an inhabited dwelling" in Section 13744-1, supra?

While it is stated in 6 O. Jur. 394, that in "Ohio, under the statutes the crime of burglary may be committed, probably in all instances, either in the night season or in the daytime, notwithstanding some variance with

respect to the character of the buildings as specified in the several statutes, in view of the use of the phrase 'or other building', following the structures specifically enumerated therein," it is doubtful if this be an accurate statement of the law of Ohio. In any event, in so far as the instant question is concerned, this office cannot agree with the sweeping declaration of the text above quoted. In view of the fact that, as hereinbefore pointed out, the General Code, as adopted in the act of February 14, 1910, contained the heading "Burglary and Other Breaking", as did the "Report of Revision of General Statutes of Ohio", made by the Codifying Commission (Vol. 3, p. 2655) : by reason of the common law analogy where burglary was confined to breaking and entering in the *night season;* and especially because of the rule of strict construction above amplified, this office is impelled to the conclusion that the terms "Burglary" and "Burglary of an inhabited dwelling", as used in Section 13744-1, General Code, have reference only to those particular crimes as respectively defined by Sections 12438 and 12437, General Code, and not to those offenses designated "other breakings".

Moreover, it should be noted that by the express language of Section 13744-1, supra, the court is limited to sentencing an habitual criminal "to a term of imprisonment equal to the maximum statutory penalty for *such offense*," and not for two or more such offenses.

It should here be observed that this opinion is confined only to the crimes of "Burglary and other breaking" and that any other offenses mentioned are commented upon merely for the purpose of illustration. This observation is necessary for the reason that the 93rd General Assembly so re-defined the crime of robbery as to separate and increase the penalty of armed robbery as distinguished from robbery. See Sections 12432 and 12432-1, General Code, as amended in 118 v. H. B. 240. In this particular case the holding in the case of People of the State of Illinois vs. Scudieri, et al., 363 Ill. 84 (1936), 1 N. E. (2nd) 225 (1936), would seem to be applicable. The second branch of the headnotes in that case reads as follows:

> "The Habitual Criminal act, although it uses only the term 'robbery,' applies to robbery with a gun, and the commission of one or more of the offenses mentioned in said act, followed by a subsequent conviction of robbery, aggravated or not, subjects the defendant to greater punishment under the statute."

For all of the above reasons, it is my opinion that the Common Pleas

Court, in the case about which you inquire, was without authority to sentence the accused to serve a minimum term of ten years.

This brings us to the question of the power and authority of the Pardon and Parole Commission, in view of the facts set forth in your communication.

Section 2166, General Code, provides as follows:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, 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 in the manner and by the authority provided by law, 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 provided by law 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 been sentencd in the manner required by this section. As used in this section the phrase 'term of imprisonment' means the duration of the state's legal custody and control over a person sentenced as provided in this section."

In connection with the effect of this section, it was said in Opinion No. 1621, rendered to you under date of December 28, 1939, as follows:

> "In your letter you ask, in substance, if the parole and record clerk at the penitentiary has authority to eliminate the minimum fixed by the court and enter prisoners of the kind described in your letter on a naught to the statutory maximum sentence and thereby make them eligible to consideration for parole at any time, subject to notice and advertisement as provided by Section 2209-17, supra. It is unnecessary to cite authority to the effect that the parole and record clerk has no authority to change the judgment of a court or to change a commitment issued by virtue of such judgment. However, it does not follow that because the parole and record clerk is without this authority, the power and jurisdiction duly vested in the pardon and parole commission cannot be exercised in accordance with law. It seems to me that rather, as you put it, 'to eliminate the minimum fixed by the court', additional data should be supplied to the proper records, to the end that the Pardon and Parole Commission may be advised when a prisoner

shall have become eligible for parole, and exercise the discretion with which it is invested."

Your attention is also directed to the case of Thorpe vs. Amrine, No. 147, decided by the Court of Appeals of Madison County, April 16, 1940, as yet unreported. In that case the trial court, without statutory authority, attempted to fix a minimum sentence of imprisonment in the Ohio Penitentiary for two years, under a statute which authorized no minimum, but provided only that upon conviction under such statute the punishment should be imprisonment for "not more than five years." The court held that notwithstanding this effort to determine the minimum sentence, defendant's term of imprisonment (was) fixed by Section 2166, G. C., and that in effect it (was) general and not definite" and that the prisoner was eligible for parole at the termination of the shortest term of imprisonment in the penitentiary, as fixed by the statute under which he was sentenced.

In view of the foregoing, and in specific answer to your question, it is my opinion that:

1. Section 13744-1, together with cognate sections of the General Code, commonly called the "Habitual Criminal Act", being highly penal in character, must be strictly construed and the provisions thereof may not be extended in its application to cases which do not, by the strictest construction, come within such provisions.

2. The crime of "Breaking and entering in daytime" (Section 12442, G. C.) is not among the felonies specified in Section 13744-1, General Code, providing that if any person be convicted of any of the felonies enumerated in such section after having been two times convicted of any of the felonies therein specified, sparately prosecuted and tried therefor, either in this state or elsewhere, he shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense, nor is such crime of "Breaking and entering in daytime" included by implication or otherwise within the terms "Burglary" or "Burglary in an inhabited dwelling", or within any other of the felonies specified in said Section 13744-1.

3. Where a prisoner confined in the Ohio Penitentiary, who was once convicted of "Breaking and entering in daytime" (Section 12442, G. C.), and while on parole was subsequently convicted of stealing a motor vehicle (Section 12619, G. C.) was later convicted of two crimes of breaking and

entering on two counts in the same indictment, each charging breaking and entering two separate dwelling houses in the daytime on separate dates, in violation of the provisions of Section 12442, supra, and at the same time was convicted under a third count of being an habitual criminal under Section 13744-1, General Code, and sentenced to serve a term of five years in the Ohio Penitentiary on the first count, and a term of five years in the same institution on the second count, the "sentence on the second count to commence at the termination of the first count", is eligible for parole in so far as his conviction upon the first count of the indictment is concerned, at the expiration of the minimum term provided by law, viz., at the expiration of one year less time off for good behavior, at which time such prisoner shall commence serving the sentence imposed under the second count of the indictment under which he is eligible for parole at the end of one year imprisonment, less time off for good behavior.

Respectfully,

THOMAS J. HERBERT,
Attorney General.