

In addition this lease should be accompanied by proper evidence in the form of a certificate signed by the secretary of the company, or otherwise to the effect that the president of the company was authorized to execute the lease in question.

Respectfully,

EDWARD C. TURNER,
Attorney General.

819.

OHIO BOARD OF CLEMENCY—AUTHORITY TO ESTABLISH RULES AND REGULATIONS UNDER WHICH PRISONER OF OHIO STATE REFORMATORY, REIMPRISONED FOR VIOLATION OF PAROLE, MAY AGAIN BE ALLOWED TO GO ON PAROLE—TRANSFER TO OHIO PENITENTIARY.

SYLLABUS:

1. *The Ohio Board of Clemency has authority to establish rules and regulations under which prisoners of the Ohio State Reformatory, reimprisoned for a violation of their parole, may be allowed again to go upon parole in legal custody, the only limitation upon the board's power being that such prisoners must be recommended as worthy of such consideration by the superintendent and chaplain of the reformatory before such applications for parole may be considered.*

2. *If a prisoner of the Ohio State Reformatory commits a felony while upon parole and upon conviction thereof the court, being unaware of his previous sentence to a state prison, sentences such prisoner to the Ohio State Reformatory, by the terms of Section 2140, General Code, upon it being shown such prisoner had previously been convicted of crime the Ohio Board of Clemency, with the written consent of the Governor may transfer such prisoner to the Ohio Penitentiary.*

3. *Prisoners reimprisoned in the Ohio State Reformatory upon the written order of the superintendent in accordance with the established rules and regulations are to be considered as serving under their original commitment and may not be transferred to the Ohio Penitentiary.*

4. *By the terms of Section 2140, General Code, the Ohio Board of Clemency, with the written consent of the Governor, may transfer to the Ohio Penitentiary an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution.*

COLUMBUS, OHIO, August 2, 1927.

Ohio Board of Clemency, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your letter of recent date reading as follows:

"1. In view of your recent opinion, No. 727, in regard to parole violators at the Ohio Penitentiary, we beg leave to ask if the rules laid down in your opinion applies in any way to parole violators from the Ohio State Reformatory? The language in 2144 differs materially from that in Sections 2174 and 2175 (O. P.). That is to say, does the violation of a parole by a prisoner from the Ohio State Reformatory forfeit his right to be heard for a restoration to parole?

2. Also, in the case of a parole violator from the Ohio State Reformatory convicted of a second felony, should the Judge order him to be returned to the Ohio State Reformatory to serve time as a violator, or should he be committed directly to the Ohio Penitentiary under Section 2131.

3. In the case of prisoners now in the Ohio State Reformatory who are serving a second sentence after being returned there as parole violators should they be recommended for transference to the Ohio Penitentiary in view of Section 2131?

4. In the case of a very vicious young criminal committed to the Ohio State Reformatory on account of his age, being under twenty-one, may he be recommended for transfer to the Ohio Penitentiary when he attains his majority, twenty-one?

These questions are propounded for the reason that a large number of boys and men are in the Ohio State Reformatory notwithstanding the fact that they have been convicted two or three times. Also, at the last meeting we found one prisoner who had been admitted when he was thirty-two years of age, notwithstanding the provisions of Section 2131."

The act creating the Ohio State Reformatory is found in 81 Ohio Laws, page 206; and is entitled:

"An Act—To establish an intermediate penitentiary and to provide for the appointment of a board of managers to locate, construct and manage the same."

Section 1 thereof is as follows:

"Be it enacted by the general assembly of the State of Ohio that there be established an intermediate penitentiary for the incarceration of such persons convicted and sentenced under the laws of Ohio as have not previously been sentenced to a state penitentiary in this or any other state or country."

By an act passed April 30, 1891 (88 Ohio Laws 418) the name of this institution was changed to the Ohio State Reformatory, which name it now bears. The statutes applicable to this institution appear as Sections 2129 to 2147 of the General Code, both inclusive.

From an examination of Sections 2131, 2135 and 2136, General Code, it will be noted that the Ohio State Reformatory is a penal institution, to which young offenders, not known to have been previously sentenced to a state prison, are committed and in which repressive and punitive measures are subordinated to training in industry and the exercise of the physical, mental and moral faculties.

In the light of the foregoing, it is only reasonable and proper that the legislature should have provided rules and regulations for parole and return of parole violators different from those applicable to inmates of the Ohio Penitentiary (Sections 2160, 2169, 2170, 2171, 2174 and 2175, General Code).

In answer to your first question your attention is directed to that portion of Section 2141, which provides:

"The Ohio Board of Administration shall establish rules and regulations under which prisoners may be allowed to go upon parole in legal custody,

under the control of the Ohio Board of Administration and subject to be taken back into the enclosure of the reformatory * * *”,

and to Section 2144, General Code, which provides:

“The superintendent shall enforce the rules and regulations relating to paroles, and may retake and reimprison a prisoner upon parole. His written order shall be sufficient warrant for officers named therein to arrest and return to actual custody a conditionally released or paroled prisoner. If the paroled prisoner is in the custody of an officer of the law, either under an order of arrest or by virtue of a conviction and sentence for a crime other than murder in the first degree, manslaughter, rape or arson, such order shall be a sufficient warrant to take such paroled prisoner into the custody of an officer of the reformatory. The officers named in such order shall arrest and return to custody a conditionally released or paroled prisoner. The Ohio Board of Administration may make rules and regulations necessary and proper for the employment, discipline, instruction, education, removal, temporary or conditional release and return of prisoners of the reformatory.”

By Section 92, General Code, it is provided that the Ohio Board of Clemency

“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.”

As provided in Section 2141, *supra*, the Ohio Board of Clemency shall establish rules and regulations under which prisoners may be allowed to go upon parole in legal custody, under the control of the Ohio Board of Clemency and subject to be taken back into the inclosure of the reformatory.

As provided in Section 2144, *supra*, the Ohio Board of Clemency may make rules and regulations necessary and proper for the employment, discipline, instruction, education, removal, temporary or conditional release and return of prisoners of the reformatory.

By the terms of Section 2144, *supra*, the superintendent of the reformatory shall enforce the rules and regulations relating to paroles, and may retake and imprison a prisoner upon parole who violates any rule or regulation promulgated under Sections 2141 and 2144, *supra*. The written order of such superintendent shall be sufficient warrant for officers named therein to arrest and return to actual custody a conditionally released or paroled prisoner.

Although Sections 2141 and 2144, *supra*, may be said to be analogous to Sections 2160, 2169, 2170, 2171, 2174 and 2175, General Code, the provisions of Sections 2141 and 2144, *supra*, authorizing the parole and return of paroled prisoners to the Ohio State Reformatory are entirely different from the provisions of Sections 2160, 2169, 2170, 2171, 2174 and 2175, General Code, which make provisions for the parole and return of paroled prisoners to the Ohio Penitentiary.

Applying the foregoing, and answering your first question specifically, it is my

opinion that the ruling made in Opinion No. 727 dated July 11, 1927, Opinions, Attorney General for 1927 with reference to parole violators of the Ohio Penitentiary does not apply to parole violators of the Ohio State Reformatory. There is no provision in the statutes relating to the Ohio State Reformatory which prevents the Ohio Board of Clemency from again restoring to parole a prisoner who had previously been paroled but reimprisoned as a parole violator. Such action is within the sound judgment of the Ohio Board of Clemency, the only limitation upon the board's power so to do, being that the application for parole shall not be considered by the Ohio Board of Clemency until such prisoner again has been recommended as worthy of such consideration by the superintendent and chaplain of the reformatory and that notice of such recommendation shall be published for three consecutive weeks in two newspapers of opposite politics in the county from which the prisoner is sentenced or in the county of the residence of the prisoner.

2. The provisions of the following sections of the General Code are pertinent in answering your second inquiry:

"Sec. 2131. The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory, *if they are not known to have been previously sentenced to a state prison.* Male persons between the ages of sixteen and twenty-one years convicted of felony shall be sentenced to the reformatory instead of the penitentiary. Such persons between the ages of twenty-one and thirty years may be sentenced to the reformatory if the court passing sentence deems them amenable to reformatory methods. No person convicted of murder in the first or second degree shall be sentenced or transferred to the reformatory."

Section 2140, General Code, provides as follows:

"The Ohio Board of Administration, with the written consent of the governor, may transfer to the penitentiary a prisoner who, subsequent to his committal, shall be shown to have been more than thirty years of age at the time of his conviction or to have been previously convicted of crime. The Ohio Board of Administration may so transfer an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution."

Sections 2141 and 2144, General Code, are quoted above.

As provided in Sections 2141 and 2144, *supra*, authority is vested in the Ohio Board of Clemency to establish rules and regulations under which prisoners may be allowed to go upon parole in legal custody, under the control of the Ohio Board of Clemency and subject to be taken back into the inclosure of the reformatory and to make rules and regulations necessary and proper for the employment, discipline, instruction, education, removal, temporary or conditional release and return of prisoners of the reformatory. By the terms of Section 2144, *supra*, it is the duty of the superintendent to enforce the rules and regulations relating to paroles and he may retake and reimprison a prisoner on parole and his written order shall be sufficient warrant for officers named therein to arrest and return to actual custody a conditionally released or paroled prisoner.

A prisoner of the Ohio State Reformatory upon parole who commits a second felony and is convicted therefor may or may not be ordered returned to the reformatory depending upon the circumstances.

If, under the rules and regulations established, the superintendent of the Ohio State Reformatory determines to retake and reimprison such a paroled prisoner, by the terms of Section 2144, supra, his written order shall be sufficient warrant for officers named therein to arrest and return to actual custody such paroled prisoner. If such paroled prisoner is in the custody of an officer of the law by virtue of a conviction and sentence for a crime other than murder in the first degree, manslaughter, rape or arson, such order shall be a sufficient warrant to take such paroled prisoner into the custody of an officer of the reformatory whose duty it then is to arrest and return to custody such paroled prisoner.

If, under the rules and regulations established, the superintendent of the Ohio State Reformatory does not determine to retake and reimprison such paroled prisoner the court, if it has knowledge of such prisoner's prior sentence to a state prison, is without lawful authority to sentence such prisoner to the Ohio State Reformatory upon conviction for the second felony and should commit such prisoner to the Ohio Penitentiary as provided by law.

If the trial court in passing sentence upon conviction for the felony committed by such person upon parole is without knowledge of the prior sentence to a state prison and commits such prisoner to the Ohio State Reformatory and subsequent to his committal therein it shall be shown that he had been previously convicted of crime, the Ohio Board of Clemency, with the written consent of the Governor, may, as provided in Section 2140, General Code, transfer such prisoner to the Ohio Penitentiary.

In this connection your attention is directed to the case of "In the Matter of Clayton", 13 Ohio Decisions 546, in which proceedings in habeas corpus were instituted to release the petitioner who was then confined in the Ohio Penitentiary under an indeterminate sentence.

The petitioner had been sentenced by the Court of Common Pleas of Washington County to the Ohio State Reformatory under an indeterminate sentence. He was conveyed to the reformatory and after being imprisoned there it was discovered that he had been previously convicted of a crime and had served a term in the penitentiary and was therefore not eligible to imprisonment in the Ohio State Reformatory. Thereupon he was transferred to the Ohio Penitentiary and therein imprisoned. The return of the Warden of the Penitentiary to the writ showed

"that the prisoner was received into the penitentiary by virtue of the statute and the proceedings of the board of managers of the Ohio State Reformatory under and pursuant to the authority vested in them by the said statute, Section 7388-28 of the Revised Statutes. The return states the fact of his sentence by the court to serve an indeterminate sentence in the state reformatory, and that pursuant to that sentence he was imprisoned in the state reformatory until after the 28th day of September, 1901, at which date he was transferred by the state board of managers of the Ohio State Reformatory to the Ohio Penitentiary.

That after his imprisonment in the reformatory the superintendent thereof discovered that the petitioner had been previously convicted of a crime and had a criminal record which at the time of the sentence was not known or disclosed to the trial judge who sentenced the prisoner, and that thereafter the manager ordered his removal to the Ohio penitentiary, having obtained the written consent of the governor thereto as required by the statute."

The court held :

"1. Section 7388-28 Rev. Stat., which provides for the transfer from the reformatory to the penitentiary of any prisoner, who, subsequent to his com-

mittal, shall be shown to have been, at the time of his conviction, more than thirty years of age, or to have been previously convicted of crime, is not in contravention of Art. 4, Section 1 of the constitution of Ohio, Sec. 16 of the bill of rights, or Art. 14, Sec. 1 of the constitution of the United States.

2. The age of a prisoner and the fact as to his previous conviction and imprisonment, which determine whether he shall be confined in the reformatory or the penitentiary, need not be judicially determined, and an order of the court that he is to be confined in one prison or the other is merely advisory. Hence, the board of managers of the reformatory in finding that a prisoner is not eligible to the reformatory and ordering him transferred to the penitentiary under Sec. 7388-28 Rev. Stat., does not exercise judicial powers nor deprive such prisoner of his liberty without due process of law."

Section 7388-28, Revised Statutes, is now Section 2140, General Code, and except for minor changes now reads the same as it did when the Clayton case was decided.

On page 551 of the Clayton case the court said :

"There is no requirement of law that the indictment shall state the age of the prisoner or whether or not he had been before convicted and imprisoned. * * * The question not being judicially determined, the order of the court that he is to be confined in one or the other prison would * * * seem to be only advisory. * * * When the sentence is imposed, it is with the knowledge of both the court and the prisoner, that if it be found by the authorities in charge of the prisoner that the judge was laboring under a mistake of fact when he sentenced the prisoner, that the prisoner may be transferred to the other prison. * * * I have no doubt the petitioner may be released from the Ohio penitentiary in the same manner that he would be released from the reformatory."

Answering your second inquiry specifically it is my opinion that if, in passing sentence upon such paroled prisoner upon his being convicted for a felony committed while upon parole the trial court has knowledge of such prisoner's previous sentence to a state prison, then such court is without lawful authority to commit such prisoner to the Ohio State Reformatory and should commit such prisoner to the Ohio Penitentiary as provided by law. By the terms of Section 2140, supra, the Ohio Board of Clemency, with the written consent of the Governor, may transfer to the penitentiary a prisoner who, subsequent to his committal, shall be shown to have been previously convicted of crime.

3. In answering your third inquiry reference again must be made to Sections 2131, 2140, 2141 and 2144, supra, and to the discussion in answer to your second inquiry.

Summarizing and answering your question specifically it is my opinion that as regards those prisoners who, under the rules and regulations established (Sections 2141 and 2144) were declared to be parole violators by the superintendent of the reformatory and returned to actual custody but not convicted and sentenced for a felony committed while upon parole, their status is the same as if serving out their original sentence and this class of prisoners may not be transferred to the Ohio Penitentiary. As regards those prisoners who, while upon parole committed a felony and were convicted therefor and sentenced to the Ohio State Reformatory for that crime and not returned to the reformatory by order of the superintendent as parole violators, the Ohio Board of Clemency, with the written consent of the governor, by the terms of Section 2140, supra, upon it being shown that such prisoner had been previously convicted of crime, may transfer such prisoner to the Ohio penitentiary.

4. Your fourth question is answered by that portion of Section 2140, supra, which provides:

“ * * * The Ohio board of administration may so transfer an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution.”

By the terms of this section the Ohio Board of Clemency, with the written consent of the governor, may transfer to the penitentiary an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution and upon such fact being determined by the Ohio Board of Clemency, with the written consent of the Governor, such transfer may be made irrespective of the age of such prisoner.

Respectfully,
EDWARD C. TURNER,
Attorney General.

820.

CONSTABLE—WHEN CONVICTED OF A FELONY—CONCERNING REMOVAL FROM OFFICE.

SYLLABUS:

1. *The office of constable is not ipso facto vacant because the incumbent thereof is convicted of a felony against the laws of the United States.*
2. *If such incumbent refuses to resign he may be removed from office “upon complaint and hearing” as provided by Sections 10-1, et seq., General Code, or by the Governor in accordance with the terms of Section 6212-34, General Code.*
3. *If, by the methods prescribed by Sections 10-1, et seq., General Code, or Section 6212-34, General Code, such officer is removed from office, the township trustees, by the terms of Section 3261, General Code, shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term.*

COLUMBUS, OHIO, August 3, 1927.

HON. RALPH E. HOSKOT, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads as follows:

“The following situation has arisen in this county and our opinion has been sought regarding it. We should like very much to have your opinion thereon under the circumstances.

Two elected constables of the same township in this county were convicted in the United States District Court here for conspiracy to violate the Volstead Act. One was sentenced to the Federal Prison at Atlanta, Georgia, for a period of twenty months. The other was sentenced to be confined in the county jail of one of the counties of this state for a period of four months.

FIRST—Are these men disqualified from holding office as constables to which they were elected and which office they held until the time of their conviction?