No language contained in Section 8301, supra, has the effect of extending the open season for hunting rabbits. Obviously, Section 10216, supra, has no application because the "taking and possessing" of hares and rabbits is "not an act required by law to be done."

In this connection your attention is directed to Section 13048, General Code, which provides in part as follows:

> "Whoever, being over fourteen years of age, engaged in * * * hunting, fishing or shooting on Sunday, on complaint made within ten days thereafter, shall be fined not more than twenty dollars or imprisoned not more than twenty days, or both."

In view of the foregoing and answering your question specifically, it is my opinion that the last day on which hares and rabbits may lawfully be hunted during 1927 will be December 31st.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1425.

PRISONER—COMMUTATION AND PAROLE DISTINGUISHED—CONDITIONS AND EFFECT OF EACH DISCUSSED.

SYLLABUS:

1. *By the terms of Section 99, General Code, a pardon or commutation of sentence may be granted by the governor upon such conditions as the governor may impose, but such pardon or commutation shall not take effect until the conditions so imposed are accepted by the convict; and while the conditions attached to the granting of a pardon may be either conditions precedent or conditions subsequent, the conditions upon which a commutation may be granted must be conditions precedent.*

2. *The Ohio Board of Clemency is without authority to order the return of one who has violated the conditions of a conditional pardon. Such return may be accomplished only upon the written request of the governor and in accordance with the provisions of Sections* 101, *et seq. of the General Code.*

3. *Where a commutation has been granted by the governor to a prisoner convicted of a felony so as to render such prisoner eligible for parole by the Ohio Board of Clemency, he may be paroled by such board the same as though he were eligible under the sentence originally imposed and upon violation of his parole such prisoner may be returned into custody to serve the remainder of his sentence.*

COLUMBUS, OHIO, December 23, 1927.

Ohio Board of Clemency, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your letter which reads as follows:

> "The Ohio Board of Clemency, at times, recommends the commutation of a prisoner's sentence to the governor, recommending at the same time that the commutation is for release as on parole for some definite period.

As we understand Section 99, a clear distinction is made between a pardon and a commutation. Under Section 101, the law prescribes how to proceed against a violator of the conditions of his parole, but nothing is said in Sections 101, 102 and 103 as to commutations.

Question—When a prisoner has been released by commutation of sentence by the governor upon the recommendation of the Ohio Board of Clemency that he remain as on parole for a period of time and report as a paroled man, if such prisoner violates the conditions of his commutation as on parole has the Ohio Board of Clemency the sole power to order him returned as a violator, or must the procedure be under Sections 101, 102 and 103?

I am enclosing herewith the blank form used by the warden in which he uses the heading "CONDITIONAL PARDON," which, of course, brings it under the head of Sections 101, 102 and 103.

That is to say, is a commutation as the term is used in Section 99 only a conditional pardon, or is it something else and distinct from a pardon?"

Section 11 of Article III of the Constitution of the State of Ohio, reads in part as follows:

"He (the governor) shall have power, after conviction, to grant reprieves, commutations and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. * * *"

As stated by Mr. Chief Justice Taft in Ex Parte Grossman, 267 U. S. 86, at page 120,

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts, power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it, but whoever is to make it useful have full discretion to exercise it."

The words "commutation" and "pardon" are not defined in either the Constitution or the General Code and one must look elsewhere for the definitions thereof.

A pardon is said by Lord Coke to be "a work of mercy, whereby the king, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical, (3 Inst. 233). It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend. (Co. Litt. 274, 276; 4 Black. Com. 401). And if the felon does not perform the conditions of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced."

As defined in 29 Cyc. 1559:

> "A pardon is an act of grace proceeding from the power intrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. There are several kinds of pardons; thus a pardon may be full and unconditional, partial, or conditional."

Mr. Justice Holmes in the case of *Biddle* vs. *Perovich,* 47 Sup. Ct. Rep. 664, (decided May 31, 1927) used the following language:

> "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of our Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."

It is full when it freely and unconditionally absolves the party from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided. See Bishop on Criminal Law, Section 916. It is partial where it remits only a portion of the punishment or absolves from only a portion of the legal consequences of the crime. See Bishop on Criminal Law, Section 914. A pardon is conditional where it does not become operative until the grantee has performed some specified act, or where it becomes void when some specified event transpires. (29 Cyc. 1561.)

As stated by Judge Rodney in the case of In Re McKinney, 138 A. 649 (Del.), decided July 15, 1927, at page 652,

> "That a conditional pardon may be granted seems to be so well established by all the authorities as to need no citations. The right to grant a pardon inherently carries with it the right to impose reasonable conditions thereon, the only limitations being that the conditions imposed shall not be illegal, immoral or impossible of performance. * * * A conditional pardon should in itself contain the requirements demanded of the pardoned person so that from an inspection of the pardon itself, it may be readily ascertained what acts would nullify it. * * * A conditional pardon, besides being an act of grace, is in the nature of an agreement between the pardoning power and the person pardoned, by which the pardon cannot become effective without the consent of the offender and the acceptance of the conditions imposed; he may refuse the conditions and prefer to serve his sentence."

The fourth paragraph of the syllabus of the case of In Re Court of Pardons, 129 A. 624 (N. J.) reads:

> "4. The pardoning power is an attribute of sovereignty, and a pardon may be conditional; meaning that mercy may be extended upon terms."

As stated in 20 Ruling Case Law 569,

> "The acceptance of a pardon binds the person accepting it to all conditions, limitations and restrictions contained therein that are legal, moral and possible of performance."

The first paragraph of the syllabus of the case of *State* vs. *Horne,* 42 So. 388 (Fla.), reads:

> "Where a prisoner has accepted a conditional pardon and has been released from imprisonment by virtue thereof but has violated or failed to perform the condition, conditions, or any of them, the pardon, in case of a condition precedent, does not take effect, and in case of a condition subsequent becomes void, and the criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence or so much thereof as he had not suffered at the time of his release."

In 29 Cyc. at page 1561, commutation of sentence or punishment is said to be "the change of a punishment to which a person has been condemned to a less severe one."

Bouvier's Law Dictionary, Vol. I defines "commutation" as

> "The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the authority in which the pardoning power resides."

In the case of In the Matter of Sarah M. Victor, 31 O. S. 206, the third paragraph of the syllabus reads:

> "Commutation is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit."

As stated by Chief Justice Welch, at page 207 thereof:

> "A commutation is not a conditional pardon; nor is it simply the substitution of one punishment for another. In its legal acceptation, it is a change of punishment from a higher to a lower degree, in the scale of crimes and penalties fixed by the law, and is presumed, therefore, to be beneficial to the convict. It is an act of executive clemency, equally as a pardon, only in a less degree.

And at page 209, the Chief Justice said:

> "As soon as the commutation is made, the new penalty becomes the one fixed by law, and the original penalty cannot be restored."

In *Lee* vs. *Murphy,* 22 Grat. (Va.) 789, 12 Am. Rep. 563, at page 798, Judge Staples, of the Supreme Court of Appeals of Virginia, pointed out the distinction between a conditional pardon and a mere commutation in the following language:

> "It is to be borne in mind that there is a material distinction between a conditional pardon and a mere commutation of punishment. A conditional pardon is a grant, to the validity of which acceptance is essential. It may be rejected by the convict; and, if rejected, there is no power to enforce it upon him. A commutation is the substitution of a less for a greater punishment, by authority of law, and may be imposed upon the convict without his acceptance, and against his consent."

In the Matter of Charles and Howard, Petitioners, 115 Kan. 323, 222 Pac. 606, decided by the Supreme Court of Kansas, with reference to the distinction between a conditional pardon and commutation, at page 327 (222 Pac. 608), Judge Burch said:

> "Although power to commute is logically derivable from power to pardon, on the principle that the greater includes the less, commutation is essentially different from pardon. Pardon exempts from punishment, bears no relation to term of punishment, and must be accepted, or it is nugatory. Commutation merely substitutes lighter for heavier punishment. It removes no stain, restores no civil privilege, and may be effected without the consent and against the will of the prisoner."

In *State ex rel. Murphy* vs. *Wolfer,* 127 Minn. 102, 148 N. W. 896, the Supreme Court of Minnesota held:

> "It is well settled that a commutation of a sentence is a substitution of a less for a greater punishment. After commutation the commuted sentence is the only one in existence, and the only one to be considered. After commutation, the sentence has the same legal effect, and the status of the prisoner is the same, as though the sentence had originally been for the commuted term."

As stated in 20 Ruling Case Law at page 530:

> "A commutation is the substitution of a less for a greater punishment, by authority of law, and may be imposed upon the convict without his acceptance, and against his consent. In this respect it differs from a pardon to the validity of which acceptance is essential. The power to commute sentence is a part of the pardoning power, and may be exercised under a general grant of that power. The general power necessarily contains in it the lessor power of remission or commutation. If the whole offense may be pardoned, *a fortiori,* a part of the punishment may be remitted or the sentence commuted."

In the case of *Gerald Chapman* vs. *Scott, Warden,* 10 F. (2d) 156 at page 160, Judge Thomas said:

> "The rule that a pardon requires acceptance is, after all, nothing more than an application of the old principle that a gift must be accepted in order to be effective. Every pardon involves a grant, and a grant is something which cannot be imposed against the will of the grantee. A commutation, on the other hand, is merely a withdrawal of a restraining jurisdiction, a cessation of the exercise of the confining power and authority of the sovereign, and it is not within the ability of the prisoner to compel the sovereign to continue that restraint. He may refuse to accept a gift from the state, but the state does no need his acquiescence to terminate its right to his servitude."

As stated by Judge Dunn in *People* vs. *Jenkins,* 152 N. E. 549, (322 Ill. 33), decided June 16, 1926, at page 551:

> "Commutation is the change of a punishment to which a person has been condemned into a less severe one, and can be granted only by the executive authority in which the pardoning power resides. The executive authority,

having the pardoning power, may commute the punishment imposed by the sentence of a court to a lighter punishment, as from death to imprisonment for life or for a fixed time, or from imprisonment for life to imprisonment for a fixed time, or from imprisonment for a definite period to a shorter period."

From the authorities above enumerated, it will be noted that a commutation is not a pardon or a conditional pardon; nor is it simply the substitution of one punishment for another. In its legal acceptation, it is a change of punishment from a higher to a lower degree, in the scale of crimes and offenses fixed by the law, and is presumed to be for the culprit's benefit. Stated somewhat differently it is merely a withdrawal of a restraining jurisdiction, a cessation of the exercise of the confining power and authority of the sovereign.

Sections 92-2, 92-3, 94, 95 and 97, General Code, relate to the manner in which applications for pardon or commutation shall be made and outline the procedure incident thereto.

Section 93, General Code, reads:

"Notwithstanding the action of the state board of pardons (now the Ohio Board of Clemency), the governor may grant or reject an application for a pardon, commutation of sentence, or reprieve, if in his judgment the public interests would be promoted thereby."

Section 99, General Code, provides:

"A pardon or commutation of sentence may be granted upon such conditions as the governor may impose, which shall be stated in the warrant; but such pardon or commutation shall not take effect until the conditions so imposed are accepted by the convict and his acceptance indorsed upon the warrant, signed by him, and attested by one witness. In case of commutation of sentence, such witness shall go before the clerk of the court in whose office the sentence is recorded and prove the signature of the convict. The clerk shall thereupon record the warrant, indorsement, and proof in the journal of the court, which record, or a certified transcript thereof, shall be evidence of such commutation, the conditions thereof, and the acceptance of the conditions."

While the above section provides that a "pardon or commutation of sentence may be granted upon such conditions as the governor may impose, * * *; but such pardon or commutation shall not take effect until the conditions so imposed are accepted by the convict * * *", from the very nature of a commutation as distinguished from a pardon, it is obvious that the conditions annexed to the commutation of a sentence are and must be different from the conditions upon which a pardon is granted.

A pardon, being an act of grace exempting the person pardoned from the legal consequences of his crime and conviction, may be bestowed upon such terms as the pardoning power deems proper. It may be granted to take effect when certain conditions are complied with; or it may be granted, to continue in force and effect, so long as the one pardoned violates none of the conditions attached to the pardon. In other words, the conditions upon which a pardon is given may be conditions precedent or conditions subsequent.

Because of the nature of a commutation, however, the only conditions upon which a sentence may be commuted, are conditions precedent. When a sentence is commuted the old sentence is utterly destroyed, and a new sentence substituted therefor. As stated by Chief Justice Welch, in the Victor case above quoted from:

> "As soon as the commutation is made, the new penalty becomes the one fixed by law and the original penalty *cannot be restored.*"

The only kind of conditions that may be attached to a commutation are conditions that must be complied with, *before* the commutation becomes effective. And the legislature has apparently recognized this distinction, for while provision is made for the return of a convict violating the conditions of a pardon, no provisions whatever are made to return to custody one who violated the conditions imposed when a sentence is commuted.

Section 101, General Code, provides:

> *"A violation of the conditions of a pardon shall constitute a forfeiture of the pardon and render the person pardoned liable to recommitment to the penitentiary to serve the remainder of his sentence as though he had not been pardoned.* Upon written request of the governor, the prosecuting attorney of the county in which the violation occurred shall file an information thereof in the office of the probate judge of the county, who shall thereupon issue a warrant to the sheriff commanding him to pursue and arrest the person named in the information, wherever he may be found within the state, and bring him into court for examination upon the charge." (Italics the writer's.)

This section expressly adopts the rule of common law that, in so far as a pardon is concerned, the sovereign power may extend his mercy upon what terms and conditions he pleases and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend, and if the felon does not perform the conditions of the pardon, it will be altogether void, and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced.

Section 102, General Code, reads as follows:

> "The prosecuting attorney shall also demand and receive from the warden of the penitentiary the evidence required in cases of conditional pardon, and, upon such examination, if the charge set forth in the information is sustained, the probate judge shall issue a warrant to the sheriff, commanding him to deliver the convict into the custody of the warden of the penitentiary to serve the remainder of his sentence. Before a convict who has received a conditional pardon leaves the penitentiary, the warden shall furnish him a copy of this and the preceding sections relating to conditional pardons and explain the provisions thereof."

Although the sections of the General Code, above quoted, provide the manner by which one who violates the conditions of a conditional pardon may be recommitted to the Ohio penitentiary no mention is made, as you state in your letter, how one whose sentence has been commuted may be returned. As above indicated the reason for this seems to be apparent when the distinction between a conditional pardon and

a conditional commutation is considered. With reference to a conditional pardon the conditions attached thereto may be conditions precedent or conditions subsequent, a violation of which, as provided by Section 101, supra, constitutes a forfeiture of the pardon and renders the person liable to recommitment to the penitentiary to serve the remainder of his sentence as though he had not been pardoned. With regard to a conditional commutation, however, the only conditions which may be attached thereto are conditions precedent, the compliance with which by the convict, makes effective the substitution of a lower degree of punishment for that originally imposed. The commutation substitutes a new penalty in place of the original and the original penalty cannot be restored. Upon acceptance by the convict of a conditional commutation and upon compliance with the conditions annexed thereto a different sentence automatically is substituted and if a sentence to imprisonment is commuted the prisoner is entitled to his release and cannot later be again returned to the penitentiary to serve any portion of the commuted sentence. In other words, when the conditions precedent annexed to a conditional commutation wiping out a sentence to imprisonment have been accepted by the convict and the terms thereof have been complied with, he is entitled to his immediate release and may not again be returned to the penitentiary.

In connection with the above, however, one case occurs to me where a commutation may be granted, a prisoner then paroled and upon violation of his parole, returned to custody to serve the remainder of his sentence. Such a case would exist where one is given an indeterminate sentence to the penitentiary, the minimum period of duration of such sentence being fixed by the trial court at a certain number of years, and the sentence commuted by the governor to an indeterminate sentence in which the minimum is so reduced as to render the prisoner eligible to parole. For example: Let us assume that A was convicted of the larceny of property of a greater value than thirty-five dollars and was given an indeterminate sentence to the Ohio penitentiary, the minimum period of duration of such sentence being fixed by the trial court at five years. The minimum period to be served by A would then be five years and the maximum, as fixed in Section 12447, General Code, seven years, and A would not be eligible to parole until he had served the minimum period of the sentence fixed by the trial court, viz., five years. Now, suppose that the governor commuted his sentence to an indeterminate sentence of from one to seven years. After the expiration of the one year period A would be eligible to parole, and the Board of Clemency would have the power and authority to parole him just as though the sentence originally imposed had been an indeterminate sentence of one to seven years. If he were in fact paroled and violated the conditions of his parole, in such a case he could be returned to custody according to law and would be required to serve the remainder of his sentence. You will observe in this case, however, the prisoner would be released upon parole by virtue of the power to release upon parole vested in the Ohio Board of Clemency and not upon the commutation of his sentence by the governor, the only effect of the commutation being to render the prisoner eligible for parole, when in the absence of a commutation of a sentence by the governor, such prisoner would not be eligible until the expiration of the minimum period fixed by the trial court.

From what has been said, I draw the following conclusions, which specifically answer your question.

1. By the terms of Section 99, General Code, a pardon or commutation of sentence may be granted by the governor upon such conditions as the governor may impose, but such pardon or commutation shall not take effect until the conditions so imposed are accepted by the convict; and while the conditions attached to the granting of a pardon may be either conditions precedent or conditions subsequent, the conditions upon which a commutation may be granted must be conditions precedent.

2. The Ohio Board of Clemency is without authority to order the return of one who has violated the conditions of a conditional pardon. Such return may be accomplished only upon the written request of the governor and in accordance with the provisions of Section 101, et seq., of the General Code.

3. Where a commutation has been granted by the governor to a prisoner convicted of a felony so as to render such prisoner eligible for parole by the Ohio Board of Clemency, he may be paroled by such board the same as though he were eligible under the sentence originally imposed and upon violation of his parole such prisoner may be returned into custody to serve the remainder of his sentence.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1426.

SCHOOLS—COUNTY BOARD OF EDUCATION EQUALIZES INDEBTEDNESS WHEN COUNTY SCHOOL DISTRICT TRANSFERRED TO EXEMPTED VILLAGE SCHOOL DISTRICT.

SYLLABUS:

When territory is transferred from a school district of a county school district to an exempted village school district, upon petition of the electors residing in the territory transferred, an equitable division of the funds and indebtedness between the districts involved should be made by the county board of education of the county school district of which the territory transferred is a part.

COLUMBUS, OHIO, December 23, 1927.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication, as follows:

> "In September of this year, upon petition of more than seventy-five per cent of the electors in a certain territory known as the Smithville School District, and which is a part of the Fayette County School District, the Fayette County board of education transferred to the exempted village school district of Greenfield, Highland County, Ohio, said territory. The board of education of said exempted village school district of Greenfield passed a resolution accepting said transfer and have been taking care of the transportation and education of the pupils residing in said territory since the beginning of the school year this fall. The question now arises as to who shall make the equitable division of the funds and indebtedness between the districts involved. This requires a construction of Section 4696 of the General Code which was construed by your department in an opinion dated September 21st of this year rendered to Hon. Herman F. Krickenberger, prosecuting attorney of Darke County, copy of which opinion I have. However, in that case the transfer was from one county school district to another county school district and did not involve a transfer to an exempted village district. We shall appreciate receiving your opinion as to who has the authority to make this equitable division in this instance."

Section 4696, General Code, reads in part, as follows: