987.

PRISONER NOT AFFECTED BY SUBSTITUTE HOUSE BILL 116, 92nd GENERAL ASSEMBLY, UNTIL FINALLY RELEASED—"PAROLE" NOT A "RELEASE".

SYLLABUS:

1. *A prisoner in the Ohio Reformatory for Men or the Ohio Reformatory for Women is not entitled to the privileges provided for in Substitute House Bill No.* 116, *enacted by the* 92nd *General Assembly, until he or she has been finally released from the institution.*

2. *A "parole" is not a "release" and therefore a prisoner paroled from the Ohio Reformatory for Men or the Ohio Reformatory for Women does not come within the terms of Substitute House Bill No.* 116, *enacted by the* 92nd *General Assembly.*

COLUMBUS, OHIO, August 9, 1937.

HON. MARGARET M. ALLMAN, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR MADAM: This will acknowledge receipt of your recent letter in which you enclose the inquiry of the Chairman of the Ohio Board of Parole, which inquiry reads as follows:

> "The newly enacted General Code Section 2146, 2147, 2148-6, and 2148-7, relative to restoration of citizenship rights to prisoners from the Ohio State Reformatory and to released convicts from Ohio Reformatory for Women, becomes effective August 13, 1937.
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> The Board respectfully requests an Attorney General's opinion as to whether or not General Code 2147 effective as of August 13, 1937, does in any way affect the rights of the Parole Board under General Code 2211-9 as to time the Board of Parole may keep any inmate on parole up to the maximum sentence."

Sections 2146 and 2147 of Substitute House Bill No. 116, passed by the 92nd General Assembly, to which you refer provide:

> Sec. 2146. "A prisoner who has served his entire time at the Ohio state reformatory without a violation of the rules and discipline, except such as the superintendent has excused, shall be restored to the rights and privileges forfeited by his

conviction. He shall receive from the governor a certificate of such restoration, to be issued under the great seal of the state, whenever he shall present to the governor a certificate of good conduct which shall be furnished by the superintendent."

Sec. 2147. "A prisoner not entitled to restoration under the next preceding section, having conducted himself in an exemplary manner for a period of not less than twelve consecutive months succeeding his release, may present to the governor a certificate to that effect signed by ten or more good and well known citizens of the place where he has resided during such period. The good standing of such citizens and the genuineness of their signatures must be certified to by the probate judge of the county where they reside. Such prisoner shall be entitled to a restoration of his rights and privileges as provided for in the next preceding section."

Inasmuch as Sections 2148-6 and 2148-7 of Substitute House Bill No. 116 are identical with the foregoing provisions with the exception that they pertain to the Ohio Reformatory for Women, it would be merely repetitious to set them forth.

The pertinent portion of Section 2211-9, to which you refer in your letter is:

"A paroled prisoner who in the judgment of the board has violated the conditions of his parole or pardon shall be declared a violator. In the case of an escaped prisoner or a prisoner who has been declared a violator, the time from the date of his escape or of his declared violation of parole or pardon to the date of his return shall not be counted as a part of time or sentence served. For violation of the conditions of a parole or pardon, any parole officer may arrest such violator, or, upon the order of any parole officer having custody or charge of such violator, any sheriff, probation officer, constable or police officer shall make the arrest. A person so arrested may be confined in the jail or detention home of the county in which he is arrested, until released, re-paroled or removed to the proper institution as provided by law. In the case of every such arrested parole violator, the board of parole shall determine whether such arrested person shall be released upon the same conditions as the original parole or re-paroled upon different conditions or shall be imprisoned in a penal or reformatory institution. In the case of a determination of imprisonment, the prisoner shall be returned to the institution from which he was

> paroled. In the case of release or re-parole, the board of parole shall issue its order accordingly, and the prisoner shall be released or re-paroled in accordance with such order. * * *"

Your question simmers down to the determination of whether a paroled prisoner has "served his entire time in the Ohio State Reformatory". The courts of Ohio have never exactly defined the status of a paroled prisoner. Section 2211-6, which authorizes the parole of prisoners in the Ohio reformatories (Section 2169 only applies to persons incarcerated in the Ohio State Penitentiary) provides as follows:

> "Subject to the limitations imposed by law, the board of parole shall have full, continuous and exclusive power to determine the time when, the period for which and the terms and conditions in accordance with which any prisoner now or hereafter confined in a penal or reformatory institution may be allowed to go upon parole outside the premises of the institution to which he has been committed, assigned or transferred. All prisoners on parole shall remain in the legal custody of the department of public welfare. The concurrence of at least three members of the board at a meeting of the board shall be necessary for the parole or release of a prisoner. When a paroled prisoner shall have performed all the terms and conditions of his parole the board may finally release him."

A reading of this statute quickly reveals that a paroled prisoner is under the absolute control and custody of the state although allowed to leave the confines of the institution. For this reason one of my predecessors aptly termed "parole" as "constructive imprisonment". 1933 O. A. G., Vol. 1, No. 106, p. 111, 120. The appropriateness of this definition is borne out by the following language from *Woodward* vs. *Murdock,* 124 Ind., 439, 444:

> "During the time that he was out on parole he was not a free citizen; he was, as we have seen, still a prisoner, and notwithstanding his prison bounds were not so contracted as were the prison bounds of the insolvent debtor, at the time our laws recognized imprisonment for debt, still he was given prison bounds. * * * All the consequences of the judgment were upon him, except that he had leave of absence from the prison."

Additional auhtority may be found in the language used by the courts in *Crooks* vs. *Sanders,* 115 S.E. 760 (N.C.) ; *Ex Parte Prout,* 86 Pac.

275 (Idaho) ; *Orme, et al.* vs. *Rogers,* 260 Pac. 199 (Ariz.) In re Eddinger, 211 N.W. 54 (Mich.).

That a parole is not a pardon or commutation of sentence, has long been established in Ohio. In considering the constitutionality of one of the earliest Ohio statutes authorizing parole, the court in *State, ex rel. Attorney General* vs. *Peters,* 43 O.S. 629, said at page 650:

> "Section 8 does not purport to discharge the prisoner or shorten his term of service. It simply authorizes the board of managers to allow the prisoner to go outside the buildings and inclosures of the penitentiary, but he is to remain in their legal custody and under their control. Neither is it a commutation of the sentence; commutation is 'the change of a punishment to which a person has been condemned into a less severe one.' Bouvier Law Diet.
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> It 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. *Ex parte Victor,* 31 Ohio St., 206." (Italics the writer's.)

This distinction is further borne out by the fact that pardons and commutations of sentence are provided for in a separate statutory provision, namely, Section 2211-7, wherein the procedure for pardons and commutations is outlined. Therefore I am of the opinion that a prisoner on parole has not served his period of imprisonment. The following quotation from *In re Bailus,* 8 O.C.s (n.s.) 454, affirmed in 74 O.S. 452, provides some authority for this viewpoint:

> "The term 'period of imprisonment' as used in Section 7388-8 of the Revised Statutes, (one of the earliest restoration of rights enactments) means the term of sentence, less the time which, under the rules of the penitentiary, may be deducted for good conduct." (Parenthetical matter ours.)

Additional authority is the case of *In re Naples,* 142 Fed. 781, which involved the right of local workhouse officials to parole federal prisoners. The court in considering this issue said:

> It is quite apparent, from these provisions of the federal statutes, that the rules respecting the matter of disciplining and restraining prisoners confined in city workhouses apply to federal prisoners. The 'parole' of a prisoner, under Section 2102, Rev. St. of Ohio, 1892, is a method of 'discipline and treatment.'

He remains, while on 'parole' in the custody of the workhouse officials. He is legally in the workhouse."

On this point also see *Nagle* vs. *Foon,* 48 Fed. (2nd) 51, wherein it was held as disclosed by the sixth Headnote:

"'Parole' of alien sentenced for crime involving moral turpitude does not constitute 'termination of imprisonment' within statutory provision limiting deportation, since parole is subject to revocation."

Certainly a prisoner has not served his "entire time" at the reformatory who has not completed the term of his imprisonment. I am therefore compelled to the conclusion that a paroled prisoner has not served his "entire time" in the language of Substitute House Bill No. 116 until he has obtained a release, and it is quite evident that there is a marked distinction between a "parole" and a "release". The peculiar characteristic of a "release" is that the state loses all control over a prisoner. Furthermore, the statutes relating to this subject separately enumerate a "parole" and "release" as in Section 2211-4:

"All powers and duties vested in or imposed by law upon any other officers, boards or commissions of the state, excepting the governor, with respect to recommendation, grant, or order of pardon, communication of sentence, *parole,* reprieve reimprisonment or *release* of persons confined in or under sentence to any of the penal and reformatory institutions of the state excepting the boys' industrial school and the girls' industrial school are hereby transferred to, vested in and imposed upon the board of parole and shall be exercised in accordance with the provisions of this act. * * *" (Italics ours.)

and in Section 2211-5:

"The board of parole shall have the power to exercise its functions and duties in relation to *parole, release,* pardon, commutation, or reprieve upon its own initiative or the initiative of the superintendent of a penal or reformatory institution. * * *" (Italics ours.)

Applying the well-accepted rule of statutory construction that a tautological interpretation is to be avoided, it is clear that the legislature did not intend to use the words synonymously. Further indication of the clear recognition by the legislature of the distinction is found in Section 2211-6, General Code, which provides in part as follows:

"* * * When a paroled prisoner shall have performed all

the terms and conditions of his parole the board may finally release him."

The distinction is important for the determination of your question because of the following language in Section 2147 of Substitute House Bill No. 116:

"A prisoner not entitled to restoration under the next preceding section, having conducted himself in an exemplary manner for a period of not less than twelve consecutive months succeeding his *release.* * * *" (Italics ours.)

Sections 2146 and 2147 of Substitute House Bill No. 116 are in *pari materia* and when read together the conclusion becomes inevitable that the words "served his entire time" and "his release" are used to describe the same status. This being so it follows that a prisoner has not "served his entire time" until he has obtained his release.

It is also appropriate to consider the effect that would be produced by interpreting Substitute House Bill No. 116 so as to apply to paroled prisoners. 37 O. J., 631 and cases cited in Footnote No. 19. Under such procedure the custody and control of paroled prisoners provided for in Sections 2211-5, 2211-6 and 2211-9, General Code, would be eliminated in so far as it applied to inmates coming within the provisions of Substitute House Bill No. 116. Consequently the Board of Parole would lose, to all effects and purposes, its power of parole over this class of prisoners, as a parole would be the equivalent in many cases of a release. This would amount to a repeal by implication of part of Section 2211-5, General Code, and it is to be presumed that the legislature did not intend so to do. 37 O. J., 619, Lewis Sutherland Statutory Construction, Vol. I, page 464.

In view of the foregoing reasons and authorities, it is my opinion that Substitute House Bill No. 116 enacted by the 92nd General Assembly does not affect the rights of the Board of Parole under Section 2211-9, General Code, to keep an inmate on parole up to the maxinmum sentence.

Respectfully,

HERBERT S. DUFFY,
Attorney General.