

to issue contracts of insurance providing for the payment of stipulated payments at stipulated intervals, which contracts should not be subject to any additional assessments.

Answering your inquiry, therefore, I am of the opinion that a mutual protective association or company organized under the provisions of sections 9427, et seq., General Code, has the authority to issue closed contracts of insurance, that is, contracts which provide for the payment of stipulated premiums and which are not subject to additional assessments, provided that such association or company maintains as to each of such contracts the reserves required to be maintained by legal reserve companies.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4454.

APPROVAL, NOTES OF WADSWORTH CITY SCHOOL DISTRICT, MEDINA COUNTY, OHIO—\$9,000.00.

COLUMBUS, OHIO, June 25, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4455.

PAROLE—GOOD CONDUCT LAW—HABITUAL CRIMINAL ELIGIBLE FOR PAROLE AT END OF FIFTEEN YEARS IMPRISONMENT—NOT ENTITLED TO DIMINUTION OF SENTENCE FOR GOOD BEHAVIOR—PERSON CONVICTED OF MURDER IN SECOND DEGREE ELIGIBLE FOR PAROLE AT END OF TEN YEARS.

SYLLABUS:

1. *Habitual criminals serving life sentences are eligible for parole at the expiration of fifteen years' imprisonment, as provided for by section 2210-1, General Code. However, such life termers are not entitled to any diminution of sentence for good behavior, as provided for by sections 2210 and 2210-1, General Code.*

2. *Persons serving life sentences for the crimes of kidnapping, rape, maiming with acid, burglary, bank robbery and larceny of an inhabited dwelling are eligible for parole at the expiration of fifteen years' imprisonment, as provided by section 2210-1, General Code.*

3. *The minimum time provided for in section 2210-1, General Code, in which a person serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree can become eligible for parole, is not subject to the diminution of sentence for good behavior provided for in section 2210, General Code.*

4. *Life termers convicted and sentenced for the crime of murder in the second degree, prior to the enactment of section 2210-1, General Code, are eligible for*

parole at the expiration of ten years' imprisonment, as provided by section 2169, General Code.

COLUMBUS, OHIO, June 27, 1932.

HON. P. L. A. LIEGHLEY, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—This will acknowledge a letter from your predecessor in office, which reads as follows:

"We desire to call your attention to Sections 13744-1 and 2 of the General Code of Ohio providing maximum statutory penalties for persons convicted for the third time of any of a series of major crimes listed, and life sentences for persons convicted for the fourth time.

The new revised Good Conduct law of Ohio became effective on August 5th (1931). Section 2 of the Good Conduct Law reads as follows:

'A prisoner serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree, or a prisoner sentenced for a minimum term of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of fifteen years imprisonment subject to the provisions of law governing diminution of sentence for good behavior in prison. The above provision shall apply to prisoners sentenced before or after the taking effect of this act.'

One of the provisions of law referred to above is another section of the Good Conduct Law which reads as follows:

'A person confined in a state penal institution and not eligible to parole before the expiration of a minimum sentence or term of imprisonment, or hereafter sentenced thereto under a general sentence, who has faithfully observed the rules of said institution shall be entitled to the following diminution of his minimum sentence * * * a prisoner sentenced for a minimum term of six or more years shall be allowed a deduction of eleven days from each of the months of his minimum sentence.'

In connection with the enactment of the provisions of the above law known as Substitute Senate Bill No. 116, and also known as the Ohio Good Conduct Law, we are interested in obtaining an opinion from your office on the following questions:

1st: Does the enactment of Substitute Bill No. 116 make habitual criminals eligible for parole at the expiration of fifteen years? If so does this provision operate automatically?

2nd: If habitual criminals are eligible for parole automatically at the expiration of the service of 15 years imprisonment, may their sentences be further reduced to nine years and six months service of imprisonment through diminution provided in the Good Conduct Law, that is eleven days for each month of a minimum term of six years or over.

3rd: Do the provisions quoted above reducing all but first degree and treason life sentences to fifteen years also reduce life sentences imposed for kidnapping, rape, maiming with acid, burglary, and larceny of an inhabited dwelling and bank robbery to a minimum term of fifteen years subject to good conduct diminution applicable to the fifteen year minimum?"

The following sections and parts of sections are pertinent to your inquiries. Section 2166, General Code, reads in part as follows:

“ * * * 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. * * * ”

Sections 2210 and 2210-1, General Code, read:

Sec. 2210.

“A person confined in a state penal institution and not eligible to parole before the expiration of a minimum sentence or term of imprisonment, or hereafter sentenced thereto under a general sentence, who has faithfully observed the rules of said institution, shall be entitled to the following diminution of his minimum sentence:

(a) A prisoner sentenced for a minimum term of one year shall be allowed a deduction of five days from each of the twelve months of his minimum sentence.

(b) A prisoner sentenced for a minimum term of two years shall be allowed a deduction of six days from each of the twenty-four months of his minimum sentence.

(c) A prisoner sentenced for a minimum term of three years shall be allowed a deduction of eight days from each of the thirty-six months of his minimum sentence.

(d) A prisoner sentenced for a minimum term of four years shall be allowed a deduction of nine days for each of the forty-eight months of his minimum sentence.

(e) A prisoner sentenced for a minimum term of five years shall be allowed a deduction of ten days from each of the sixty months of his minimum sentence.

(f) A prisoner sentenced for a minimum term of six or more years, shall be allowed a deduction of eleven days from each of the months of his minimum sentence.

(g) A prisoner sentenced for a minimum of a number of months or fraction of years shall be allowed the same time per month as is provided for the year next higher than such minimum sentence.

At the expiration of the minimum sentence diminished as herein provided, each prisoner shall be eligible for parole as provided by law.”

Sec. 2210-1.

“A prisoner serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree, or a prisoner sentenced for a minimum term of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of fifteen years' imprisonment, subject to the provisions of law governing diminution of sentence for good behavior in prison. The above provisions shall apply to prisoners sentenced before or after the taking effect of this act.”

Section 13744-1, General Code, provides in part as follows:

"A person convicted in this state of" (various enumerated offenses) "who shall have been previously two times convicted of any of the herebefore 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."

Section 13744-2, General Code, reads:

"A person convicted in this state of any of the offenses in the next preceding section specified, who shall have been previously convicted three times of any of the said offenses, separately prosecuted and tried therefor either in this state or elsewhere, shall be adjudged an habitual criminal, and shall be sentenced to imprisonment for the term of his or her natural life; 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 purposes of this section as one conviction."

Your first inquiry raises the question of whether a person sentenced to a penal institution for life, under the provisions of section 13744-2, is eligible for parole by virtue of the provisions of section 2210-1.

Sections 13744-1 to 13744-3, inclusive, known as the habitual criminal statutes, were enacted in 113 Ohio Laws, House Bill No. 9. It is significant to note that the title of that act reads "To provide punishment for habitual felons"; whereas the title of Substitute Senate Bill No. 116 in 114 Ohio Laws, which enacted sections 2210 and 2210-1, reads "To provide for the diminution of sentence of prisoners for good behavior in prison *and for parole of certain prisoners serving sentences longer than fifteen years*". An examination of sections 13744-1 to 13744-3, inclusive, merely discloses that the trial court must impose certain sentences on third and fourth offenders of certain enumerated felonies. In other words, the habitual criminal act merely provides for increased punishment for successive convictions of certain enumerated felonies. There is no provision in that act which is indicative of a legislative intent that sentences imposed by virtue of those sections are to be irreducible and that persons sentenced to and confined in penal institutions for being habitual offenders are not to be subject to the "good time off" statutes then existing or thereafter enacted.

It must be borne in mind that, under our criminal code of procedure, a trial court, except in certain enumerated instances, cannot fix the term of imprisonment. Section 2166. The law today controls the beginning and expiration of criminal sentences.

It is evident that the habitual criminal act is concerned only with the punishment of habitual offenders and is not concerned with the parole of such offenders. Inasmuch as the parole of a prisoner confined in a penal institution in this state is not a matter for the courts but rests with the parole board, it seems to me that section 13744-2 is not to be construed as a special statute and regarded as

an exception to the provisions contained in section 2210-1. Section 13744-2 and section 2210-1 should be read together and thus give effect to both statutes. Those sections can be harmonized for the reason that one deals with the punishment of a fourth habitual offender and the other deals with the parole or release from confinement of a fourth habitual offender.

Although it was the common belief at the time of the enactment of the habitual criminal law passed in 1929, that the provisions of that act prevented third and fourth habitual offenders from obtaining their liberty until the expiration of their sentences, yet I find no provision either in the habitual criminal act (sections 13744-1 to 13744-3, inclusive) or the good time off statutes (sections 2210 and 2210-1) which would support that conclusion or belief. There is no intimation in the title of Substitute Senate Bill No. 116, enacted in 114 Ohio Laws, or in the provisions of the act itself, which indicates any further exception to the persons eligible for parole under that law other than those serving sentences of life imprisonment for treason or murder in the first degree. To hold that persons sentenced to life imprisonment under section 13744-2 are not eligible for parole under section 2210-1, would have the effect of nullifying the excluding provision of that section and adding thereto another group of life termers who would not be eligible for parole.

Under the code of criminal procedure, the parole of a person confined in a penal institution is not a matter for the courts but rests with the parole board. See sections 2211 to 2211-9, inclusive. Parole is a privilege granted or withheld under the provisions of the parole board act within the discretion of the parole board, and a person who is incarcerated within such an institution is subject to the power of the parole board. Thus, it seems to me that the enactment of section 2210-1 is a sensible appreciation of the fact that the very severity of the punishment provided for by sections 13744-1 and 13744-2 may defeat its own end, to wit, the reformation of the prisoner.

It is the purpose of modern penology to reform rather than punish prisoners and it was for that purpose, no doubt, that the parole board act and the good time off statutes were enacted by the last General Assembly. The enactment of those two laws to encourage reformation of persons convicted of felonies, except for treason and murder in the first degree, was, no doubt, intended to apply to habitual criminals as well as to other persons confined in penal institutions of this state for the violation of felonies, except, as heretofore stated, for the crimes of murder in the first degree and treason. To construe section 13744-2 and section 2210-1 in such a manner as to withhold from a habitual offender sentenced under section 13744-2 the hope of being released from a penal institution upon his reformation, would not be giving effect to the legislative policy expressed in the recent enactment of the parole board act and the good time off statutes. It is to be noted that the general provisions of the habitual criminal act are not in conflict with any of the provisions contained in the act relating to the diminution of sentences of persons confined or incarcerated in penal institutions.

I am therefore of the opinion that the provisions of section 2210-1 apply to a life termers sentenced under section 13744-2.

The other questions in your communication necessitate the construction of the clause in section 2210-1 which reads as follows:

“subject to the provisions of law governing diminution of sentence for good behavior in prison.”

That clause applies only to general or indefinite sentences, since the diminution of sentence for good behavior provided for in section 2210 specifically refers to the minimum term of general sentences. A life sentence is a fixed and not a

general sentence since the law does not fix a minimum or maximum term for such a sentence. The conclusion that a life sentence is not a general or indefinite sentence is supported by the language of section 2163 which reads:

“A person confined in the penitentiary * * * for a definite term other than life,” etc.

The provisions for diminution of sentence for good behavior, contained in sections 2210 and 2210-1, apply only to the minimum term of general sentences and the diminution of sentence clause in section 2210-1 quoted herein cannot be construed as referring back to the clause in that section which provides that a prisoner serving a sentence of life imprisonment for a crime other than treason or murder in the first degree shall be eligible for parole at the end of fifteen years of imprisonment. That clause can and must be construed as applying to a sentence whose minimum term is longer than fifteen years, since the diminution of sentence for good behavior is computed on the basis of the minimum term of a general sentence and deducted from the minimum term only.

It is at once apparent from a reading of section 13744-2 that the only possible sentence for a fourth habitual offender is a term of life imprisonment. It is also well to bear in mind that that section does not prescribe any minimum term and thus a sentence under that section does not come within the diminution provisions of the good time statutes. Incidentally, no power exists either in the habitual criminal act, the good time off statutes or the parole board act which authorizes the parole board to consider the fifteen year proviso in section 2210-1 as a minimum term for a life sentence, from which term good time off could be allowed. Section 2210-1 cannot be construed so as to reduce a life sentence to fifteen years or less. It cannot be contended that the fifteen year proviso in section 2210-1 makes a sentence for life imprisonment an indeterminate sentence, since that section does not read that in case of a life sentence the minimum term shall be fifteen years. Instead, that section reads that “A prisoner serving a sentence of imprisonment for life * * * shall become eligible for parole at the expiration of fifteen years’ imprisonment”. To hold that the time provided for in section 2210-1, when a life term may become eligible for parole, can be further reduced by allowing for good time off, would be, in effect, holding that a life sentence, except for the crime of treason or murder in the first degree, became an indeterminate or general sentence when section 2210-1 was enacted. However, that conclusion would be against the plain provisions of sections 2210 and 2210-1. It is also to be noted that there is no provision in section 2210 governing the diminution of sentence for life imprisonment. It appears to me that the clause in question in the latter part of section 2210-1 applies only to a prisoner whose minimum term of sentence is longer than fifteen years, in which event the prisoner is assured that he will be eligible for parole at the end of fifteen years, if his minimum sentence is one which, even allowing for good time off, would not make the prisoner eligible for parole until after fifteen years. Thus, section 2210-1 can only be interpreted as providing that (1) a prisoner confined in a penal institution for life, except for treason or murder in the first degree, shall be eligible for parole at the end of fifteen years’ imprisonment; (2) a prisoner serving a general sentence, whose minimum term is longer than fifteen years, shall be eligible for parole at the end of fifteen years, providing such prisoner is not eligible for parole sooner than that time after deducting from such minimum term the time allowed for good behavior by section 2210. I am of the opinion that a person serving a life sentence as a fourth offender under section 13744-1 is not eligible for parole until

the expiration of fifteen years of imprisonment and such a prisoner is not entitled to any diminution of sentence for good time off as provided by section 2210. I know of no reason why prisoners serving life sentences for the crimes enumerated in your letter are not within the clause of section 2210-1 which reads "A prisoner serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree * * * shall become eligible for parole at the expiration of fifteen years' imprisonment," etc. The legislature has expressly provided in that part of section 2210-1 just quoted that all life termers shall be eligible for parole at the expiration of fifteen years of imprisonment, except prisoners serving sentences of imprisonment for life for the crimes of murder in the first degree and treason. Therefore I see no reason why persons serving life sentences for the crimes that you have enumerated in your letter are not entitled to the benefits of section 2210-1.

It is also to be noted that life termers under section 2210-1 are merely eligible for parole at the expiration of fifteen years' imprisonment. Whether a life termers, at the expiration of fifteen years' imprisonment, shall be released from confinement, is a matter solely within the discretion of the parole board.

Incidentally, persons convicted and sentenced prior to the enactment of section 2210-1, for the crime of murder in the second degree, are eligible for parole at the expiration of ten years' imprisonment, as provided by section 2169, which reads in part as follows:

" * * * a prisoner under sentence for murder in the second degree, having served under such sentence ten full years, may be allowed to go upon parole outside the building and inclosure of the penitentiary. * * * "

and not at the expiration of fifteen years' imprisonment, as provided by section 2210-1. It is a rule of law that the benefits of parole and diminution of sentence statutes are considered a part of the original sentence. See *Crooks vs. Sanders*, 115 S. E. 760 (S. C.), and *Reeves vs. Thomas*, 122 O. S. 22, at page 28. Inasmuch as the provision of section 2169 quoted herein became a part of the sentence imposed upon a person convicted of the crime of murder in the second degree prior to the enactment of section 2210-1, it follows that such a life termers is entitled to the benefits of that statute and is therefore eligible for parole at the expiration of ten years of imprisonment.

I do not deem it necessary in this opinion to decide whether a person convicted and sentenced for the crime of murder in the second degree, since the enactment of section 2210-1, is eligible for parole under the provisions of that section or under the provisions of section 2169.

It is therefore my opinion, in specific answer to your inquiry, that:

1. Habitual criminals serving life sentences are eligible for parole at the expiration of fifteen years' imprisonment, as provided for by section 2210-1 General Code. However, such life termers are not entitled to any diminution of sentence for good behavior, as provided for by sections 2210 and 2210-1, General Code.

2. Persons serving life sentences for the crimes of kidnapping, rape, maiming with acid, burglary, bank robbery and larceny of an inhabited dwelling are eligible for parole at the expiration of fifteen years' imprisonment, as provided by section 2210-1, General Code.

3. The minimum time provided for in section 2210-1, General Code, in which a person serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree can become eligible for parole, is not subject to the

diminution of sentence for good behavior provided for in section 2210, General Code.

4. Life termers convicted and sentenced for the crime of murder in the second degree, prior to the enactment of section 2210-1, General Code, are eligible for parole at the expiration of ten years' imprisonment, as provided by section 2169, General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4456.

OHIO NATIONAL GUARD—MEMBERS NOT IN FEDERAL SERVICE—
MAY NOT RECEIVE BENEFITS OF SOLDIERS RELIEF COMMISSION.

SYLLABUS:

Members and former members of the Ohio National Guard who were not mustered into federal service are not entitled to the benefits of relief to be allowed by a soldiers' relief commission under the provisions of sections 2930 to 2941, General Code.

COLUMBUS, OHIO, June 27, 1932.

HON. G. H. BIRRELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—This will acknowledge a request for my opinion over the signature of your assistant which reads as follows:

“We would appreciate an opinion from your office, on the following question, to-wit:

Are members, and former members of the Ohio National Guard, entitled to the benefits of relief to be allowed by the Soldiers Relief Commission, under the provisions of §§ 2930 to 2941?”

I assume for the purpose of this opinion that the member or members in question were not at any time engaged in active federal service.

Section 2934, General Code, relative to those who are entitled to pecuniary relief allowed by soldiers' relief commission, reads:

“Each township and ward soldiers' relief committee shall receive all applications for relief under these provisions, from applicants residing in such township or ward, examine carefully into the case of each applicant and on the first Monday in May in each year make a list of all needy soldiers, sailors, and marines, and of their needy parents, wives, widows and minor children, including widows of soldiers, sailors and marines who have remarried, but again have become needy widows, who reside in such township or ward, and including the soldiers, sailors and marines of the Spanish-American war, or of the world war and their wives, widows, needy parents, minor children and wards, who have been