1987.

"PARDON", "REPRIEVE", "COMMUTATION", CONSTRUED—ARTICLE III, SECTION II, CONSTITUTION OF OHIO—"PAROLE" — DOES NOT DISCHARGE OR ABSOLVE PAROLEE FROM LEGAL CONSEQUENCES OF OFFENSE OR REMIT GUILT—PAROLEE, UNTIL DISCHARGE, IN LEGAL CUSTODY, DEPARTMENT OF PUBLIC WELFARE—AUTHORITY, PARDON AND PAROLE COMMISSION — STATUS WHERE PRISONER DURING IMPRISONMENT GUILTY OF CRIMES, OFFENSES OR CONDUCT INVOLVING MORAL TURPITUDE —REVOCATION OF PAROLE.

SYLLABUS:

1. *Since the terms "pardon", as well as "reprieve" and "commutation", as used in Section II, Article III of the Constitution of Ohio, were adopted into our Constitution without definition, such terms must be construed to have the meaning given by the English common law at the time of the adoption of the Constitution. This being true the Legislature is without power to abridge the constitutional pardoning power of the Governor, as granted in said section. (Sterling v. Drake, Sheriff,* 29 *O. S.* 457.)

2. *A "pardon" is a remission of guilt and all its consequences. A "parole" is a release from actual confinement in the state penal or reformatory institution in which the prisoner is confined. A parole does not discharge or absolve the parolee from the legal consequences of his crime or offense; nor does it remit his guilt, and a parolee remains and is in the legal custody of the Department of Public Welfare until his final discharge, and is subject to reimprisonment for good cause shown upon the order of the proper authority.*

3. *Under the law of Ohio, including Sections* 2209, 2209-8, 2209-19, 2209-20, *General Code, the power and authority to determine when and for what reasons a parole should be revoked, is exclusively vested in and imposed upon the Pardon and Parole Commission of Ohio, whose decision in the premises is final, except upon a showing in a court of competent jurisdiction of fraud or gross abuse of discretion.*

4. *Where a prisoner has been paroled by the old Board of Parole, or by the new Pardon and Parole Commission, and it is subsequently discovered*

that during his confinement in prison such prisoner had been guilty of certain crimes or offenses, or other conduct involving moral turpitude, which if disclosed to the Board of Parole or the Pardon and Parole Commission would have stayed the granting of such parole, the Pardon and Parole Commission may under the Pardon and Parole Code of Ohio, in proper cases and upon being satisfied of the guilt of the parolee, revoke such parole and order the parolee to be reconfined in the institution from which he was paroled.

Columbus, Ohio, March 8, 1940.

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

Dear Sir:

I have your letter requesting my opinion, which reads as follows:

> "Following our discussion, we are herewith requesting an opinion as to whether or not the Pardon and Parole Commission has the right to re-order a prisoner previously paroled to be retaken to the institution without declaring him a parole violator, or revoke the parole previously granted.
>
> My thought is that the prisoner on parole, being a ward of the State, can be re-taken without a technical declaration of violation of parole, or without a revocation of parole, if the Pardon and Parole Commission, upon the discovery of evidence not previously available to it, feels that the prisoner should not be allowed on parole outside of the walls of an institution. May we have your conclusions on this point?"

In considering your question, it is at all times necessary to differentiate, and to keep in mind the differences, between a pardon on the one hand and a parole on the other. Probably the most quoted definition of a "pardon" and its effect is the classic passage of Lord Coke, in these words:

> "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."

In connection with this definition, however, it should be noted that by the express terms of Section 11, Article III, of the Constitution of Ohio, the Governor has power to pardon only *"after conviction."*

The above definition of pardon was followed, and the legal effect thereof recognized by the Supreme Court of Ohio, in the case of Knapp v. Thomas, 39 O. S. 377, 48 Am. Rep. 462 (1883.)

In contrast, a "parole" is simply a release from actual confinement, or, as might be otherwise stated, it is a territorial enlargement of the place of confinement or custody. The parolee *remains in legal custody;* and the parole does not discharge him from the legal consequences of his crime, and does not wash away the stain or remit the penalty.

An illuminating discussion of the differences between pardon and parole is contained in the "Atty. Genl's Survey Release Procedure, Vol. 4, Parole," prepared in 1939 by M. L. Morse, of the United States Department of Justice, to which your attention is invited.

The legal concept of "parole" adopted by the courts of Ohio is set forth in the case of State ex rel. Attorney General v. Peters, 43 O. S. 629, 4 N. E. 81 (1885), in which it was held that the act of May 4, 1884 (82 v. 236), authorizing the old board of managers to establish rules and regulations under which certain prisoners in the Ohio Penitentiary might "be allowed to go upon parole outside of the buildings and inclosures, but to remain while on parole *in the legal custody and control of the board, and subject at any time to be taken back within the inclosure of the institution,* is not an interference with the executive or judicial powers conferred on these departments by the constitution of the state."

The old sections of the General Code relating to parole (Sections 2211 to 2211-9, G. C.) did not define either pardon or parole. And while the new Pardon and Parole Code does define these two terms, as well as certain others, it is evident that these definitions are but declaratory of common law definitions. Indeed, in so far as the definition of pardon and the other terms contained in Section 11, Article III of the Constitution is concerned, any attempt by the Legislature to deminish or enlarge the powers granted to the Governor would be unconstitutional. As stated at page 460 of the opinion in the case of Sterling v. Drake, Sheriff, 29 O. S. 457, 23 Am. Rep. 762 (1877):

> "The terms 'pardon' and 'reprieve' have been adopted into the constitution of this state without defining or explaining them. The substance of the provisions of our constitution relative to pardons and reprieves has been borrowed and adopted from the laws of England, and the construction or effect that is there given to them was adopted with and must be given to them here."

By Section 2209, General Code, pardon and parole are each respectively defined as follows:

> " * * *
>
> 5. The word 'pardon' shall mean the remission of penalty by the governor in accordance with the power vested in him by the constitution. Pardons may be granted after conviction, and may be absolute and entire, or partial, and may be granted upon conditions precedent or subsequent.
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> * * *
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> 8. The word 'parole' shall mean the release from confinement in any state penal or reformatory institution, by the pardon and parole commission upon such terms and conditions as the commission may prescribe. *A prisoner on parole shall remain and be in the legal custody of the department of public welfare, and under the control of the commission.* * * * " (Emphasis mine.)

The other sections of the Pardon and Parole Code pertinent to your inquiry are Sections 2209-8, 2209-19, 2209-20 and 2209-23 of the General Code. Former analogous sections were, respectively, Sections 2211-5, 92-5 and 92-6, 2211-9 and 2211-4 of the General Code.

Section 2209-8 provides in part as follows:

> "The commission shall have the power and authority to exercise its functions and duties *** in relation to the parole of a prisoner eligible for parole, upon the initiative of the head of the institution wherein the prisoner is confined, or upon its own initiative. *** The commission shall have continuing power and authority to investigate and examine, or to cause the investigation and examination of, prisoners confined in state penal or reformatory institutions concerning their conduct therein, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society. * * * "

Section 2209-19 reads as follows:

> "Persons conditionally pardoned or paroled shall be supervised by the commission and by the proper state parole and field officers and the purpose of such supervision shall be to require them to comply with the terms and conditions of their pardon or parole and to assist them to become law-abiding members of society."

Section 2209-20 in part:

> " *** a prisoner who has been paroled, who in the judgment of the commission has violated the terms *** of his *** parole shall be declared a violator. *** For violation of the terms or conditions of a *** parole, any parole officer may arrest such violator, or, upon the order of the commission or any parole officer having custody or charge of such violator, any sheriff, probation officer, constable or police officer shall make the arrest. *** In the case of every such arrested parole violator, the commission 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 penal or reformatory institutions. In the case of a determination of imprisonment, the prisoner shall be returned to the institution from which he was paroled. *** The procedure for submitting such matters to the commission and the hearing and disposition thereof shall be governed by the rules and regulations adopted by the commission. The provisions of law governing the prosecution and transportation of convicts shall apply to the apprehension and return of violators."

Section 2209-23, supra, provides, in substance, that all powers and duties vested in or imposed by law upon any officers, boards or commissions, excepting the governor in matters of executive clemency under the constitution, with reference to the parole of any prisoner, *or the re-imprisonment or recommitment to the institution of any person confined in or under sentence to any penal or reformatory institution,* shall be vested in or imposed upon the commission, to be exercised in accordance with the Pardon and Parole Code.

The former analogous sections of the General Code are in substance and in spirit similar to the new sections of the Pardon and Parole Code above set forth.

From what has been said it is apparent that both under the law as it existed prior to the enactment of the new Pardon and Parole Code and under the law as it now exists, a prisoner on parole *is still in legal custody and is still a prisoner,* subject to having his parole revoked and to being brought

back to the penal or reformatory institution when good cause for such action exists. In fact, Section 2209, General Code, plainly and expressly provides that a parolee *"shall remain and be in the legal custody of the department of public welfare"*, although, as above pointed out, this is but declaratory of the common law principle of parole. The same section provides that a parolee shall remain and be (that is, until his final release by the Commission as provided in Section 2209-16, General Code) "under the control of the Commission", which is authorized to revoke a parole and cause the prisoner on parole to be reconfined. While it might be argued that Section 2209-20, General Code, prescribes the only conditions under which a parolee may be returned to an institution from which he was paroled, it seems to me to be the sounder view that when a prisoner obtains a parole by fraud, or when it is later discovered that the conduct of the prisoner while in confinement was such that he would not have been paroled had his misconduct not been concealed, and especially in cases where the prisoner has been guilty of committing crimes or offenses of a serious character while in the institution, the Legislature intended that the Commission should have the power and authority lawfully to revoke the parole. Certainly it cannot be seriously argued that a prisoner who continued in a career of crime in the very institution where it was sought to rehabilitate him so that he might take his place in society as a law abiding citizen, was a fit subject for parole.

It is obvious, of course, that Section 2209-20, supra, is in *pari materia* with the other sections of the Pardon and Parole Code and that all such sections must be read together, and in the light of each other. See Black on Interpretation of Laws, page 331. Indeed, the very fact that the Legislature saw fit by express words in Section 2209, supra, to define the act "as the 'Pardon and Parole Code of Ohio' ", as well as the fact that the act in question repealed numerous scattered sections throughout the Code and amended others so as to make them consistent with the Pardon and Parole Code, clearly indicates a legislative intention to provide a complete and comprehensive scheme governing the administration of the laws relating to pardon and parole. The Pardon and Parole Code must be read as a whole and Section 2209-20, supra, is not to be given effect to the exclusion of the other sections of the Code here under consideration. I have already pointed out that Section 2209, supra, unequivocally provides that a parolee "shall remain and be in legal custody of the department of public welfare, and under the control of the commission." And Section 2209-8, supra, as unmistakably

requires the Commission to give due and full consideration to the "mental and *moral* qualities and characteristics" of prisoners in confinement, when determining the fitness of such prisoners to be paroled. Certainly, if the spirit of the entire Pardon and Parole Code is to be given the weight and consideration it deserves, it must be said that it was never intended by the Legislature that a prisoner whose "mental and moral qualities and characteristics" continued to be such that he repeatedly committed crimes and offenses while in actual confinement should be allowed to go on parole without the institution. It seems to me, therefore, that Section 2209-20, supra, should not be read as a limitation on the power of the Pardon and Parole Commission, but as only providing what shall be done when a parolee violates his parole after his release, and for the arrest and detention of a parole violator by any of the peace officers named in the section.

The views herein expressed are consonant with the holding of the Court of Appeals of California in the case of In re Tobin, The People, Appellant v. John J. Tobin, Respondent, 130 Cal. App. 371, 20 P. 91 (1933), in which headnotes 2 and 4 read as follows:

> "2. Falsification by a prisoner of the registry of all convicts, which the warden of a state prison is required to keep, when discovered, furnishes a basis for the revocation of such prisoner's credits.
>
> 4. A prisoner who has been guilty of fraud and deceit, thereby securing credits and a parole to which he was not entitled, is still amenable to the board of prison terms and paroles and is not beyond the jurisdiction of the said board to recall the privilege granted under such circumstances; and where it was discovered, after granting parole, that such a prisoner had falsified the record of the prison where he had been confined, such board had ample authority to revoke his parole and, after notice and a hearing, to declare a forfeiture of all credits earned and to be earned by such prisoner."

In the Tobin case the petitioner was sentenced to Folsom prison for twelve years for the crime of robbery. He was paroled on September 15, 1931, effective immediately by "the board of prison terms and paroles", which had no knowledge of his delinquencies during his incarceration, and after his release he was arrested and returned to the prison. On September 20, 1931, the board revoked the parole, whereupon Tobin filed an application for a writ of habeas corpus. In denying his application, the court said as follows at pages 373, 375 and 376 of the opinion:

"This contention (i. e. the petitioner's) is supported by the decision of the United States District Court for the District of Kansas in Ex Parte Urbanowicz, 24 Fed. (2nd) 574, where it was held that a parole granted to a United States prisoner could not be cancelled or rescinded save and except for some offense committed by him subsequent to the date of the parole, which constituted a violation of the terms of the parole. The decision proceeds upon the theory that the order granting the parole is akin to a judgment of a court, and precludes inquiry as to all matters known or unknown preceding the granting thereof. That a parole when granted becomes a matter of right and not a privilege, and proceeds upon the theory that a paroled prisoner is entitled to notice, entitled to a hearing or trial, and opportunity to present his defense or explanation, if any he has, before an order or revocation can be legally made." (p. 373) (Words in parenthesis mine.)

"Subdivision 2 of Section 1578 of the Penal Code requires the warden of a state prison to keep a registry of all convicts. The falsification of this record is a public offense. The petitioner in this case was guilty of a public offense not shown by the record and not discovered by the officers having charge of the record until after July 11, 1931. The falsification of the record by the petitioner, once it was discovered, furnishes a basis for the board of prison terms and paroles to revoke his credits. *** " (p. 375)

"To adopt the petitioner's contention and hold that a prisoner who has been guilty of fraud and deceit, thereby securing credits and a parole to which he was not entitled, is no longer amenable to, and beyond the jurisdiction of the board of prison terms and paroles to recall the privilege granted under such circumstances, seems to us to undermine the very purpose for which credits are allowed for good behavior, exemplary conduct, lawful action and obedience to the rules and regulations of state prisoners leading up to the extension of the further privilege of personal liberty outside the walls of the institution to which the prisoner has been committed."

Subparagraph 4, section 1168, of the Penal Code of California, reads as follows:

" * * *

Prisoners on parole shall remain under the legal custody and control of the *State Board of Prison Directors* and shall be subject at any time to be taken back within the inclosure to the prison. If any paroled prisoner shall leave the State without permission of the Board of Prison Terms and Paroles he shall be held as an escaped prisoner and arrested as such. * * * " (Emphasis mine.)

While it may be conceded that the words in the above section "and

shall be subject at any time to be taken back within the inclosure to the prison", are not in Section 2209, supra, or elsewhere in our Pardon and Parole Code, I am inclined to the view that since it is provided that the parolee "shall remain and be in legal custody", the power of the proper authority to revoke the parole and reimprison necessarily exists. Legal custody of the parolee until final discharge is retained for two reasons: First, to exercise the necessary supervision and extend the proper help, and, Second, to permit reimprisonment for good cause and in proper cases.

An Ohio case, not squarely in point but of great persuasiveness, is the case of Morton v. Thomas, Warden, 27 Ch. App. 486 (C. of A., Franklin Co., 1928). The first three headnotes in this case read:

> "1. A conditional release of a convict from Ohio penitentiary is subject to a revocation by the Ohio Clemency Board.
>
> 2. A release of a convict granted by the Ohio Board of Clemency is not made absolute by the words 'out of Ohio forever with no final release.'
>
> 3. A convict in Ohio released by conditional release to a Michigan officer, taken to the state of Michigan, and held for trial in the state of Michigan, may be returned by the state of Michigan to the state of Ohio, and there be retaken and retained as a convict in Ohio under a revocation of a conditional release."

In that case Morton was given a one to fifteen years sentence to the Ohio Penitentiary. He was granted by the then Ohio Board of Clemency, "a conditional release" to Michigan authorities, effective when called for "out of Ohio forever with no final release." Morton was delivered to certain police officers of the city of Detroit. Subsequently the Board of Clemency made the following order:

> "The conditional release of James Morton *** to Michigan authorities on July 30, 1925, was granted by the Board of Clemency on representations as to certainty of conviction for another crime, which representations have proven to be unfounded, therefore, said conditional release is hereby rescinded, the entire action taken on the above mentioned is held for naught and Morton's return to the Ohio Penitentiary is requested."

Morton was delivered to Ohio authorities at the State line, taken into custody by a penitentiary field parole officer and returned to the penitentiary.

On the above facts the court held as stated in the headnotes, Judge Allread saying as follows at page 489:

" *** The Board of Clemency was authorized to grant paroles at any time after the minimum service had been served. The release or parole so authorized was in no sense a pardon. A release or parole, and especially if conditional, left the prisoner subject to such orders as the Board of Clemency might thereafter make."

On page 490, et seq., Judge Allread continued in the following language:

"We, therefore, find that there may be conditional releases. Whatever might be the rule in cases where the Board of Clemency has issued an unconditional release, we are of the opinion that the release in the present case is a conditional one. In the body of the release it is stated that the release is conditional, and at the conclusion are the words 'Out of Ohio forever with no final release.' Had the release or parole ended with the words, 'Out of Ohio forever,' there would be some force in the claim as to its finality, but with the added 'no final release,' the conclusion is that the release is conditional. The release, therefore, being conditional, it was competent for the Board of Clemency to rescind its release or parole and provide for the retaking of the convict. ***

Morton claims that at the time of his first release in Ohio he was willing to accept the conditional pardon, and agreed to go to Michigan and be tried there on the Michigan charge. Nevertheless, his pardon in Ohio was a conditional one, and, notwithstanding the fact that he was transferred out of the state, he still was subject to the jurisdiction of the Ohio state officers, and subject to the parole laws of the state of Ohio and to the right of the Board of Clemency to retake him at any time. *** "

It will be noticed that in the Morton case the court used the terms "release", "parole", "conditional release" and "conditional pardon" as though they all meant one and the same thing. Manifestly, Morton was not pardoned either conditionally or otherwise. In legal effect he was paroled in order that he might be taken to Michigan for the purpose of being tried there. And this view finds support in the case of United States, ex rel. Nicholson v. Dillard, 102 F. (2d), 94 (C. of A., 4th, 1939), in which it was held at page 96:

"The status of the prisoner while under conditional release was that of a prisoner on parole. 18 U. S. C. A. 716b. While this was an amelioration of punishment, it was imprisonment in legal effect. Anderson v. Corall, 263 U. S. 193, 44 S. Ct. 43, 45, 68 L. Ed. 247. He was bound to remain in the legal custody and under the control of the warden of the penitentiary; and the issuance of the warrant for his arrest was but the assertion of the authority

over him vested by law in the Board of Parole because of his imprisonment."

Coming now to the question as to what authority has the power to revoke a parole, I have no difficulty in determining that this power is exclusively lodged in and imposed upon the Pardon and Parole Commission. By the terms of Section 2209-23, supra, all powers in this connection, including those formerly possessed by the now non-existent Board of Parole, are "transferred to vested in and imposed upon the commission". Section 2209 provides that while parolees shall be in the legal custody of the Department of Public Welfare, they shall be "under the control of the commission". Section 2209-10, supra, provides that parolees "shall be supervised by the commission"; and the only section having to do with the revocation of paroles (Section 2209-20, G. C.) provides for revocation by the Commission. And in this connection it may be observed that the parole of prisoners is not a judicial function, and that the Pardon and Parole Commission does not sit to reverse or modify the judgments of the courts. The Commission is an administrative body, created by the Legislature for the purpose of determining where, in accordance with law, convicts shall serve their sentence and to supervise and aid parolees.

In conclusion, I think it proper to say that, while Section 2209-5, General Code, especially provides that the "attorney general shall by the legal adviser of the commission, its officers and employees (and this in addition to the general section of similar import, viz., Section 333, G. C., to which your attention is directed)", this opinion or nothing therein is to be construed as an indication as to how the Pardon and Parole Commission should exercise its discretion, or in any wise to interfere with the powers and duties conferred upon it by law. The Commission is clearly the arbiter of the facts in any case over which it has jurisdiction.

In view of the foregoing, upon the principles annunciated and authorities cited, and in specific answer to your questions, it is my opinion that:

1. Except where there is a violation of the terms of a parole coming within the provisions of Section 2207-20, General Code, a parolee may not legally be returned to the penal or reformatory institution from which he was paroled, until the Pardon and Parole Commission shall have declared such parolee to be a parole violator.

2. Where, after a prisoner in one of the state penal or reformatory

institutions has been paroled by the now non-existent Board of Parole, or its successor, the Pardon and Parole Commission, and it is subsequently discovered that during his incarceration, such parolee was guilty of certain crimes and offenses, of which facts the Board of Parole or the Pardon and Parole Commission had no knowledge at the time it granted parole to the prisoner, who concealed or at least failed to make known his delinquencies, the Pardon and Parole Commission has the power and authority to revoke the parole granted upon a misunderstanding or lack of knowledge of the facts as they actually existed, and to order such parolee to be taken into custody and returned to the institution from which he was paroled, to serve his incompleted sentence, or until he be otherwise released according to law.

Respectfully,

THOMAS J. HERBERT,
Attorney General.