1621.

SENTENCES TO OHIO PENITENTIARY—SECTION 2166, G. C., PROVIDES SENTENCES SHALL BE GENERAL, NOT FIXED OR LIMITED—EXCEPTION—TREASON OR MURDER IN THE FIRST DEGREE — PROCEDURE WHERE SENTENCE IS FOR DEFINITE TERM — RULE WHEN PRISONER ELIGIBLE FOR PAROLE—SECTION 2209-17, G. C.—FIXED MINIMUM TERM—PAROLE AND RECORD CLERK WITHOUT AUTHORITY TO CHANGE OR CORRECT JUDGMENT OF SENTENCING COURT—HAS AUTHORITY TO PLACE ADDITIONAL DATA UPON RECORDS — PURPOSE — ADVISE STATUS — PARDON AND PAROLE COMMISSION.

SYLLABUS:

1. By the express terms of Section 2166, General Code, courts imposing sentences to the Ohio penitentiary for felonies other than treason or murder in the first degree, are required to make such sentences general and not fixed or limited in their duration. If, through oversight or otherwise, a sentence to the Ohio penitentiary is for a definite term, the person so sentenced is subject to the liabilities and entitled to receive the benefits of Chapter 2, Title V, Division IV of the General Code, entitled "Ohio Penitentiary", as if he had been sentenced in the manner required by said section.

2. A prisoner committed to the Ohio penitentiary to serve a sentence for the violation of a statute which does not fix a minimum term of imprisonment, is eligible for parole at any time after his commitment to the Ohio penitentiary, subject, however, to the requirements of Section 2209-17, requiring notice of such intended parole for the periods of time specified in said section. (Opinion No. 160, O. A. G., 1933, Vol. I, p. 184, approved and followed.) And this rule applies, even though the trial court, through oversight or otherwise, sentences such prisoner for a definite term or attempts to fix the minimum term at a definite number of years. (Opinions Nos. 76 and 1396, O. A. G., 1933, Vol. I, p. 69, and Vol. II, p. 1261, overruled.)

3. The parole and record clerk at the Ohio penitentiary is without authority to change or correct the judgment of a court sentencing a prisoner to the Ohio penitentiary, or to change or correct a commitment to the penitentiary, issued pursuant thereto, or otherwise "to eliminate" the minimum sentence fixed by the trial court. The parole and record clerk may, however, place additional data upon his records to the end that the Pardon and Parole Commission may be advised when a prisoner,

who through oversight or otherwise, has been sentenced to a fixed minimum term, shall have become eligible for parole under the law.

COLUMBUS, OHIO, December 28, 1939.

HONORABLE CHARLES L. SHERWOOD, *Director, Dept. Public Welfare, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your letter requesting my opinion, which letter reads as follows:

> "Opinion No. 1396, August 14, 1933, holds that when the statutes do not fix a minimum penalty, a prisoner sentenced to a penal or reformatory institution is eligible for parole only upon the serving of the minimum fixed by the sentencing court.
>
> Query:
>
> In view of this decision, does the parole and record clerk have authority to eliminate the minimum fixed by the court in similar cases now serving sentence and to enter such prisoners on a 0—(a statutory maximum sentence) thereby making them eligible to consideration for parole at any time, subject to notice and advertising as provided by Section 2211-8, G. C.?
>
> There are many offenses for which no statutory minimum is set, such as violation of the Blue Sky Laws, Bribery, Counterfeiting, Destroying Public Utility Property, Prostitution, etc."

To determine the question submitted by you, it is necessary to give consideration to Sections 2166, 2166-1, 2209-8, 2209-16, 2209-23, 2210 and 2210-1 of the General Code. These sections provide in part as follows:

Sec. 2166:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. 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. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced and, for the purposes of this chap-

ter, he shall be held to be serving one continuous term of imprisonment. If through over-sight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter and receive the benefits thereof, as if he had been sentenced in the manner required by this section. As used in this section the phrase 'term of imprisonment' means the duration of the state's legal custody and control over a person sentenced as provided in this section."

Sec. 2166-1:

"The power granted by section 2166, General Code, as amended in this act, to terminate terms of imprisonment shall apply to any prisoner who shall have served the minimum term provided by law for the felony of which he was convicted, notwithstanding the fixing by the court of a larger minimum period under the authority of the act passed March 15, 1921, entitled 'To amend section 2166 of the General Code relative to indeterminate sentences to the Ohio penitentiary,' or under authority of section 13451-19 of the General Code and shall apply to any person hereafter sentenced, notwithstanding that the felony may have been committed previous to the enactment of said laws."

Sec. 2209-8:

"The commission shall have the power and authority to exercise its functions and duties in relation to the pardon, commutation or reprieve of a convict upon direction of the governor or upon its own initiative, and 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. When a prisoner shall have become legally eligible for parole the head of the institution in which such prisoner is confined shall notify the commission in such manner as may be prescribed by the commission. 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.

The commission may recommend the pardon or commutation of sentence of any convict or prisoner, or order the parole

of any prisoner, if in its judgment there is reasonable ground to believe that, if the convict be granted a pardon or commutation, or the prisoner be paroled, he will be and remain at liberty without violating the law, and that the granting of such pardon, commutation or parole is consistent with the welfare and security of society. * * *"

Sec. 2209-16:

"Subject to the limitations imposed by law, including section 19 (G. C., § 2209-18) of this act, the commission 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 state penal or reformatory institution may be allowed to go upon parole outside the building, inclosure and premises of the institution to which he or she has been committed, assigned or transferred. * * *"

Sec. 2209-23:

"All powers and duties vested in or imposed by law upon any other officers, boards or commissions, excepting the governor in matters of executive clemency under the constitution with respect to the recommendation of pardon, commutation, or reprieve of any convict or prisoner, or to the parole of any prisoner, or the re-imprisonment or re-commitment to the institution of any person confined in or under sentence to any state penal or reformatory institution, are hereby transferred to, vested in and imposed upon the commission and shall be exercised in accordance with law and this act. Upon the appointment of the members of the commission and their qualification, said commission shall be and become the successor of and shall supersede any and all other boards, commissions and officers, excepting the governor, with respect to such powers and duties. * * *"

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 or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of ten full years' imprisonment. This provision shall apply to prisoners sentenced before or after the taking effect of this act."

Sections 2166 and 2166-1, supra, were enacted by the 89th General Assembly as "An act—To restore the statutory minimum for sentences to the Ohio penitentiary by amending Section 2166 of the General Code and enacting supplemental Section 2166-1, and to repeal Section 13451-19." This act became effective on August 2, 1931 (114 v. 188). The act of March 15, 1921 (referred to in Section 2166-1), popularly called the "Norwood Act," was entitled "An Act—To amend Section 2166 of the General Code, relative to indeterminate sentence to the Ohio Penitentiary" and was passed by the 84th General Assembly on March 21, 1921 (109 v. 64). With reference to the purpose or object of the Legislature in passing the "Norwood Act," your attention is directed to Opinion No. 221, Opinions Attorney General 1927, Vol. I, p. 371, 377, where the then Attorney General said as follows:

> "It is a matter of common knowledge that in 1921, and for some time prior thereto, whether due to the World War, to unsettled conditions engendered by changing from an agriculture to an industrial people, to sumptuary legislation or to other causes, this state and the entire nation was experiencing a so-called 'crime wave.' There was a justifiable demand on the part of the citizenship that something be done to suppress crime and punish criminals. In response to that demand the legislature amended Section 2166 and gave to the trial court, who probably better than anyone else knows or at least has the means of knowing the character of the prisoner he is sentencing and the circumstances surrounding the crime of which the prisoner was convicted, the power to fix the minimum term the prisoner was to spend in the penitentiary. Whether or not such legislation was wise or best suited to attain the object desired, it is unnecessary to decide. It was at least plainly adapted to the purpose intended."

See also Opinion No. 141, Id., p. 248.

Section 13451-19, General Code, also referred to in Section 2166-1, General Code, was repealed in the act which became effective on August 2, 1931 (114 v. 188, supra). This section was a part of the new Criminal Code of Ohio which became effective on July 21, 1929. See 113 v. 123, 201. This section read:

> "Courts imposing sentences to the Ohio penitentiary for felonies, other than those where the penalty is death or imprisonment for life, shall make them general but they shall fix within the limits prescribed by law, a minimum period of duration of such sentences.",

and should not be confused with present Section 13451-19, General Code, enacted by the 93rd General Assembly (Am. S. B. No. 9; Eff. 9-8-39), which has to do with "Mentally Defective Prisoners."

Section 2210, supra, was amended, and Section 2210-1 was first enacted by the same General Assembly (89th) that enacted Sections 2166 and 2166-1, supra, in their present form and repealed former Section 13451-19, General Code. See 114 v. 530.

You will note that Section 2209-16, above quoted, in part, refers to "the limitations imposed by law, including Section 19 (G. C. §2209-18)" of the Pardon and Parole Code of Ohio (Sections 2209 to 2209-23, General Code). Investigation reveals that, due to the striking out of one of the sections contained in Amended Substitute Senate Bill No. 82, in which the Pardon and Parole Code was enacted, the words "including section

19 (G. C. §2209-18)" should have read "Section 18 (G. C. §2209-17)," which reads in part as follows:

> "At least three weeks before the commission recommends any pardon or commutation of sentence, or grants any parole, notice of the pendency of such matter, setting forth the name of the person on whose behalf it is made, the crime of which he was convicted, the time of conviction and the term of sentence, shall be sent to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the convict was found; provided, however, that where there is more than one such judge, then the notice shall be sent to the presiding judge of said county. The said notice shall also be published once each week for two consecutive weeks in a newspaper published and of general circulation in said county. When notice of the pendency of any such matter shall have once been given as provided in this section, and hearing on the matter is continued to a date certain, it shall be unnecessary again to publish such notice, but notice of the further consideration of such matter shall be given by mail to the proper judge and prosecuting attorney at least ten days before such further consideration. * * *"

In your communication you refer to Opinion No. 1396, dated August 14, 1933, Opinions Attorney General, 1933, Vol. II, p. 1261, and correctly state that this opinion holds that "a prisoner sentenced to a penal or reformatory institution is eligible for parole only upon the serving of the minimum fixed by the sentencing court." Other opinions bearing on your question are Opinion No. 76, Opinions Attorney General, 1933, Vol. I, p. 69; Opinion No. 160, Id., p. 184; and Opinion No. 3567, Opinions Attorney General, 1931, Vol. II, p. 1152.

In Opinion No. 76 (1933), supra, after tracing the history of Sections 2166 and 2166-1, General Code, the then Attorney General held as follows:

> "It is to be noted, however, that the legislature, in enacting section 2166-1, failed to take into consideration the fact that in many instances there is no statutory minimum provided by law for a felony. The failure of the legislature to take that fact into consideration on the enactment of section 2166-1, was evidently an oversight which can be rectified only by the legislature. To interpret section 2166-1 so as to include indeterminate sentences imposed for the violation of statutes which do not provide in their penalties for minimum terms of imprisonment would be reading something into the statute that does not otherwise exist. As heretofore stated, section 2166, at the time the prisoner referred

to in your letter was sentenced, required the court to impose an indeterminate sentence with a minimum term of imprisonment within the bounds fixed by the statute defining the felony. The court having fixed the minimum term of imprisonment at ten years and there being no 'minimum term provided by law' for the violation of section 710-172, General Code, I am of the opinion that such a sentence does not come within the purview of the provisions of section 2166-1, General Code."

The syllabus of Opinion No. 160 (1933), supra, reads:

"A prisoner committed to the Ohio Penitentiary to serve a naught to thirty year sentence for the violation of a statute which does not fix a minimum term of imprisonment is eligible for parole at any time after his commitment to the Ohio Penitentiary, but such prisoner cannot be released from confinement on parole by the Board of Parole until the provisions of section 2211-8, General Code, have been met."

In the opinion it was said at page 186:

"A prisoner serving a naught to thirty year sentence is eligible for parole at any time after his commitment to the Ohio Penitentiary; however, before such prisoner can be released on parole, the Board of Parole must comply with the provisions of section 2211-8 (now Section 2209-17), * * *.

It is apparent on a reading of section 2211-8 that the Board of Parole is required to give notice to the prosecuting attorney and the judge of the common pleas court of the county in which the prisoner was indicted and convicted, at least three weeks before the Board of Parole grants a parole or recommends the pardon or commutation of sentence of a prisoner in any of the penal institutions enumerated in Section 2211-4, General Code. This is also true in respect to the notice which must be published once a week for two consecutive weeks. On the compliance with the provisions of Section 2211-8, General Code, the Board of Parole may release at any time after his commitment to the Ohio Penitentiary a prisoner who is sentenced to serve a naught to thirty-year sentence."

In view of the provisions of and the language used in Sections 2166 and 2166-1, supra, and what seems to me to have been the obvious intention of the Legislature in enacting these sections in their present form, I find it difficult to reconcile Opinions Nos. 76 and 1396 (1933) with Opinion No. 160 (1933), and am constrained to disagree with the conclusions arrived at in Opinions Nos. 76 and 1396.

As stated at page 1154 of Opinion 3567 (1931), supra:

> "The purpose of this legislation was to relieve the housing conditions at the Ohio penitentiary by permitting persons whose cases are meritorious and who deserve another chance to be released from the penitentiary at the earliest date possible and to nullify the results of the Norwood Act which has caused a serious problem not only in the housing of the prisoners but also in the matter of providing work for them.
>
> I also call your attention to the phraseology contained in Section 2166-1, wherein the legislature specifically states that prisoners serving minimum terms of imprisonment fixed by the sentencing court under the Norwood Act are to be the recipients of the benefits contained in Section 2166-1, General Code. The language that I refer to reads as follows:
>
> 'The power granted by Section 2166, General Code, as amended * * * shall apply to any prisoner who shall have served the minimum term *provided by law for the felony of which he was convicted, notwithstanding the fixing by the court of a larger minimum period* under the authority of the act passed March 15, 1921, entitled "To amend Section 2166 of the General Code relative to indeterminate sentences to the Ohio Penitentiary." ' "

If, as held in Opinion No. 3567 (1931), the "provisions contained in Section 2166, as amended, and supplemental Section 2166-1, as enacted, in 114 Ohio Laws (188) * * * apply to prisoners already confined in the Ohio penitentiary as well as those who may be hereafter sentenced to that institution, that is, to those prisoners who were required to serve a minimum term fixed by the court under authority of the act of March 15, 1921, or former Section 13451-19, General Code, and if, as held in Opinion No. 160 (1933), a "prisoner committed to the Ohio Penitentiary to serve a naught to thirty-year sentence for the violation of a statute which does not fix a minimum term of imprisonment is eligible for parole at any time after his commitment to the Ohio penitentiary" after the requirements of law with reference to notice are complied with, I fail to see why a prisoner who has been sentenced to serve a fixed minimum term *contrary to law* may not be paroled by the proper authority when he shall have become eligible for parole in accordance with the statutes duly enacted by the Legislature. To hold otherwise unduly narrows and restricts the application of the positive direction of Section 2166, that if *"through oversight or otherwise,* a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities" of the chapter containing that

section and receive the benefits thereof "as if he had been sentenced in the manner required" by Section 2166.

Moreover, Section 2166, General Code, defines the phrase "term of imprisonment", as used in such section, as "the duration of the state's legal custody and control over a person sentenced". Sub-paragraph 8 of Section 2209, General Code, provides that " 'parole' shall mean the release from confinement" (that is, actual confinement in any state, penal or reformatory institution) by the Pardon and Parole Commission, and further that 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." And Section 2209-19, General Code, requires that persons "paroled shall be supervised by the commission and by the proper state parole and field officers." Quite obviously a parolee is still in the state's legal custody and under its control, and the duration of his "term of imprisonment" is not at an end.

It seems to me that not only do the reasoning contained in Opinions Nos. 76 and 1396 (1933) and the holdings of such opinions, do violence to the wording of Sections 2166 and 2166-1, supra, and fail to give consideration to the purpose for which these two sections were enacted, but such reasoning and conclusions ignore completely Sections 2209-8, 2209-16, 2209-23 and 2210. The first three of these sections were respectively former analogous Sections 2211-5, 2211-6 and 2211-4, while Section 2209-17 was former Section 2211-8, all containing similar provisions with reference to the old Board of Parole. By Article 4, Constitution of Ohio, it is provided that the "jurisdiction of the courts of common pleas and of the Judges thereof, shall be fixed by law." And, as held in the first branch of the syllabus in the case of Municipal Court of Toledo, et al., v. State, ex rel. Platter, 126 O. S., 103:

> "Criminal procedure in this state is regulated by statute, and the state has thus created its system of criminal law covering questions of crime and penalties, and has provided its own definitions and procedure."

By the terms of Section 2210, supra, all prisoners confined in a state penal institution, whether sentenced thereto under a general sentence or otherwise, are eligible for parole as provided by law at the expiration of the minimum sentence, diminished as provided in such section, while Sections 2209-8, 2209-16 and 2209-23, and cognate sections of the General Code, vest in the Pardon and Parole Commission broad and plenary power and jurisdiction to parole prisoners when eligible, in accordance with the terms of the statutes enacted by the Legislature. That is to say, the Legislature has made provision for the creation and administration of a pardon and parole commission and has reposed in that body the exclusive power to determine when prisoners may be released upon parole after

they become eligible therefor. This does not mean that the Pardon and Parole Commission is invested with power to change or correct the judgments of the courts, but that such Commission may exercise the power and jurisdiction conferred upon it to accomplish the purpose for which it was created. And in this connection, it should here be pointed out that in both Sections 2165 and 2166-1, supra, the Legislature has authorized the termination of the term of imprisonment as that term is defined above, when the prisoner shall have served "the minimum term *provided by law*" for the felony of which he was convicted, and not the minimum term imposed by the court; that is, the minimum term fixed by the Legislature. If the Legislature has not seen fit to fix a minimum term for all crimes, it by no means follows that the courts may do so, especially in view of the positive enactments contrariwise.

In your letter you ask, in substance, if the parole and record clerk at the penitentiary has authority to eliminate the minimum fixed by the court and enter prisoners of the kind described in your letter on a naught to the statutory maximum sentence and thereby make them eligible to consideration for parole at any time, subject to notice and advertisement as provided by Section 2209-17, supra. It is unnecessary to cite authority to the effect that the parole and record clerk has no authority to change the judgment of a court or to change a commitment issued by virtue of such judgment. However, it does not follow that because the parole and record clerk is without this authority, the power and jurisdiction duly vested in the Pardon and Parole Commission cannot be exercised in accordance with law. It seems to me that rather than attempt, as you put it, "to eliminate the minimum fixed by the court", additional data should be supplied to the proper records, to the end that the Pardon and Parole Commission may be advised when a prisoner shall have become eligible for parole, and exercise the discretion with which it is invested.

In view of the foregoing, and in specific answer to your question, it is my opinion that:

1. By the express terms of Section 2166 of the General Code, courts imposing sentences to the Ohio penitentiary for felonies other than treason or murder in the first degree, are required to make such sentences general and not fixed or limited in their duration. If, through oversight or otherwise, a sentence to the Ohio penitentiary is for a definite term, the person so sentenced is subject to the liabilities and entitled to receive the benefits of Chapter 2, Title V, Division IV of the General Code, entitled "Ohio Penitentiary", as if he had been sentenced in the manner required by said section.

2. A prisoner committed to the Ohio penitentiary to serve a sentence for a violation of a statute which does not fix a minimum term of imprisonment, is eligible for parole at any time after his commitment to the Ohio penitentiary, subject, however, to the requirements of Section 2209-17 of

the General Code, requiring notice of such intended parole for the periods of time specified in said section. (Opinion No. 160, O. A. G. 1933, Vol. 1, p. 184, approved and followed.) And this rule applies, even though the trial court, through oversight or otherwise, sentences such prisoner for a definite term, or attempts to fix the minimum term at a definite number of years. (Opinions Nos. 76 and 1396, O. A. G. 1933, Vol. I, p. 69, and Vol. II, p. 1261, overruled.)

3. The parole and record clerk at the Ohio penitentiary is without authority to change or correct the judgment of a court sentencing a prisoner to the Ohio penitentiary, or to change or correct a commitment to the penitentiary issued pursuant thereto, or otherwise "to eliminate" the minimum sentence fixed by the trial court. The parole and record clerk may, however, place additional data upon his records to the end that the Pardon and Parole Commission may be advised when a prisoner, who through oversight or otherwise, has been sentenced to a fixed minimum term, shall have become eligible for parole under the law.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1622.

CITY FIREMEN—HOURS ON DUTY—WHEN EMPLOYED ON SCHEDULE TWENTY-FOUR CONSECUTIVE HOURS — FOLLOWED BY PERIOD OFF DUTY TWENTY-FOUR CONSECUTIVE HOURS—MAY IN EVERY FOURTEEN DAY PERIOD BE KEPT ON DUTY ONLY SIX TWENTY-FOUR HOUR PERIODS—SECTION 17-1a G. C., HOUSE BILL 648, 93rd GENERAL ASSEMBLY.

SYLLABUS:

Under the provisions of Section 17-1a of the General Code, as amended by House Bill No. 648 by the Ninety-third General Assembly, effective September 6, 1939, city firemen who are employed on a schedule of twenty-four consecutive hours on duty followed by a period of twenty-four consecutive hours off duty, may in every fourteen-day-period be kept on duty for only six twenty-four-hour periods.

COLUMBUS, OHIO, December 28, 1939.

HON. ROBERT E. FULLER, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication wherein you request my opinion as follows:

> "My attention has been directed to a question of the proper interpretation of Section 17-1a ot the General Code (H. B. 648,