contains an affidavit of publication to the effect that a news item, stating that the property owners on the respective improvements would have until October 24th in which to pay cash for street assessments, was published once, in "The Hilltop Weekly," on the 29th of September, 1927.

The provisions of Section 3895, General Code, are mandatory, and unless the same are fully complied with the assessments are, in my opinion, invalid.

In this instance it appears that an attempt was made to serve a notice of the filing of assessments on all property owners personally, but it further appears that some twenty-six or twenty-seven property owners could not be found, and hence were not served. The news item above referred to does not, in my opinion, constitute a notice of the filing of assessments, nor is the publication sufficient in point of time.

For the foregoing reason I am compelled to advise you not to purchase the above issue of bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1927.

PARDON—POWER OF GOVERNOR DISCUSSED—DIFFERENCE BETWEEN PARDON AND COMMUTATION—POWER OF OHIO BOARD OF CLEMENCY AFTER COMMUTATION HAS BEEN GRANTED BY GOVERNOR.

SYLLABUS:

1. *By the provisions of Article III, Section 11 of the Constitution of Ohio the Governor has power, after conviction, to grant commutations for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper. While the conditions attached to the granting of a pardon may be either conditions precedent or conditions subsequent, the conditions upon which a commutation may be granted must be conditions precedent. (See Opinion No. 1425, Opinions, Attorney General for 1927, dated December 23, 1927).*

2. *In its legal acceptation, a commutation is a change of punishment from a higher to a lower degree, in the scale of crimes and penalties fixed by the law. As soon as the commutation is made, the new penalty becomes the one fixed by law, and the original penalty cannot be restored.*

3. *Where a commutation or partial pardon has been granted by the Governor to a prisoner convicted of a felony so as to render such prisoner eligible for parole by the Ohio Board of Clemency, upon serving the minimum term provided in such commutation or partial pardon, such person may be paroled by such board the same as though the commuted sentence was originally imposed.*

COLUMBUS, OHIO, April 2, 1928.

HON. VIC DONAHEY, *Governor of Ohio, Columbus, Ohio.*

DEAR GOVERNOR:—This will acknowledge your letter dated March 23, 1928, which reads:

> "Of late I have commuted minimum sentences of several convicts in the Ohio Penitentiary so as to make them eligible for parole by the Ohio Board of Clemency. In each case the statutory minimum had been served, and the court's minimum was reduced so as to permit early parole.

The object of the foregoing practice has been to keep the men under a period of restraint, subject to return to the institution, instead of granting them full release and freedom.

The Board of Clemency has recommended to me now a commutation for the purpose of parole in a case where the prisoner has not yet served the statutory minimum. I understand the Governor has the constitutional authority to grant commutations effective whenever he sees fit; but has the Board of Clemency the authority to release on parole any prisoner who has not yet served the statutory minimum for his crime?"

Article III, Section 11 of the Constitution of Ohio, in so far as pertinent, provides:

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

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

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

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

It is regrettable that courts have seen fit to use the terms "pardon," "conditional pardon," "partial pardon" and "commutation" interchangeably and often as though the terms were synonymous. Your attention is directed to the following authorities which define the term "commutation."

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

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

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

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

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

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

And at page 209, the Chief Justice said:

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

As stated in 20 Ruling Case Law at page 530:

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

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

> "Commutation is the change of a punishment to which a person has been condemned into a less severe one, and can be granted only by the executive authority in which the pardoning power resides. The executive authority, having the pardoning power, may commute the punishment imposed by the sentence of a court to a lighter punishment, as from death to imprisonment for life or for a fixed time, or from imprisonment for life to imprisonment for a fixed time, or from imprisonment for a definite period to a shorter period."

In the recent case of *Gerald Chapman* vs. *Scott,* 10 F. (2d) 156, decided December 14, 1925, Chapman, convicted of murder in the State of Connecticut, sought, by habeas corpus, to avoid the sentence of death imposed by a court of that state. In 1922, Chapman was convicted of the crime of robbery of mail matter, and of having placed the life of a mail carrier in jeopardy and was sentenced to serve a term of twenty-five years in the Federal Penitentiary in Atlanta. He escaped from that penitentiary and was at large nearly two years. While at large he committed the crime for which he was convicted in Connecticut. Subsequent to his conviction of murder the President of the United States commuted the sentence of Gerald Chapman, imposed for robbery of mail matter, to the term of imprisonment he had already served. At page 160 of the opinion the following language appears:

> "The rule that a pardon requires acceptance is, after all, nothing more than an application of the old principle that a gift must be accepted in

order to be effective. Every pardon involves a grant, and a grant is something which cannot be imposed against the will of the grantee. A commutation, on the other hand, is merely a withdrawal of a restraining jurisdiction, a cessation of the exercise of the confining power and authority of the sovereign, and it is not within the ability of the prisoner to compel the sovereign to continue that restraint. He may refuse to accept a gift from the state, but the state does not need his acquiesence to terminate its right to his servitude."

Answering the contention that the commutation issued by the President was one in name only—that in substance and in law it was a pardon, the Court, on page 160, said:

"I can find no real merit in the contention. A pardon would be something essentially different from a commutation, even if the commutation were issued immediately upon sentence, to become immediately effective. A commutation thus granted would not obliterate the stain of guilt, nor would it restore the prisoner to his civil rights. However, in the instant case, the commutation has in fact substituted a lesser penalty for the one originally imposed."

From the authorities above enumerated, you will note that a commutation, in its legal acceptation, is a change of punishment from a higher to a lower degree, in the scale of crimes and offenses fixed by the law, and is presumed to be for the culprit's benefit. Stated somewhat differently, it is merely a withdrawal of a restraining jurisdiction, a cessation of the exercise of the confining power and authority of the sovereign. When a sentence is commuted the old sentence is utterly destroyed, and a new sentence substituted therefor. As stated by Chief Justice Welch, in the Victor case above quoted from:

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

By way of example let us assume "A" was convicted of robbery and sentenced to the Ohio Penitentiary for not less than ten years nor more than twenty-five years. The minimum period to be served by "A" would then be ten years and "A" would not be eligible to parole until he had served the minimum period fixed by the trial court, viz., ten years. Now, suppose that the Governor commuted "A's" sentence to an indeterminate sentence of from three to twenty-five years. As soon as the commutation is made, the new penalty becomes the one fixed by law. After commutation the commuted sentence is the only one in existence, and the only one to be considered. After commutation, the commuted sentence has the same legal effect, and the status of the prisoner is the same, as though the sentence had originally been for the commuted term. As stated in 20 Ruling Case Law, supra:

"If the whole offense may be pardoned, *a fortiori,* a part of the punishment may be remitted or the sentence commuted."

On March 22, 1927, this office addressed an opinion to Hon. P. E. Thomas, warden of the Ohio Penitentiary, being Opinion No. 221, the first paragraph of the syllabus of which reads:

"The Ohio Board of Clemency is without authority to allow a prisoner to go upon parole outside the building and inclosure of the penitentiary unless and until such prisoner shall have served within the penitentiary, the minimum term of imprisonment fixed by the trial court for the felony of which the prisoner was convicted."

As above pointed out a commutation substitutes a new penalty in place of the original and the original penalty cannot be restored. In other words the commuted sentence becomes the penalty fixed by law. In the example, supra, the penalty fixed by law, after commutation of sentence was granted, would be a sentence of not less than three nor more than twenty-five years.

After the expiration of the three year period "A" would be eligible to parole, and the Ohio Board of Clemency would have the power and authority to parole him just as though the sentence originally imposed had been an indeterminate sentence of three to twenty-five years. If "A" were in fact paroled and violated the conditions of his parole, in such a case he could be returned to custody according to law.

In view of the foregoing and specifically answering your inquiry, it is my opinion:

1. By the provisions of Article III, Section 11 of the Constitution of Ohio the Governor has power, after conviction, to grant commutations for all crimes and offenses, except treason and cases of impeachment, upon such condition as he may think proper. While the conditions attached to the granting of a pardon may be either conditions precedent or conditions subsequent, the conditions upon which a commutation may be granted must be conditions precedent. (See Opinion No. 1425, Opinions, Attorney General for 1927, dated December 23, 1927).

2. In its legal acceptation, a commutation is a change of punishment from a higher to a lower degree, in the scale of crimes and penalties fixed by the law. As soon as the commutation is made, the new penalty becomes the one fixed by law, and the original penalty cannot be restored.

3. Where a commutation or partial pardon has been granted by the Governor to a prisoner convicted of a felony so as to render such prisoner eligible for parole by the Ohio Board of Clemency, upon serving the minimum term provided in such commutation or partial pardon, such person may be paroled by such Board the same as though the commuted sentence was originally imposed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1928.

APPROVAL, LEASES TO OHIO CANAL, MIAMI & ERIE CANAL, PORTAGE LAKES AND LAKE ST. MARYS LANDS.

COLUMBUS, OHIO, April 2, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter dated March 27, 1928, in which you enclose the following leases, in triplicate, for my approval: