beneficiaries as are entitled thereto from the government, and cannot be said to set at naught general rules of construction as they affect such an important matter as taxation. The general rule relating to exemption from taxation cannot be nullified by a liberal construction to promote the object of the federal law granting pensions to beneficiaries. An exemption from taxation must never be presumed or assumed. It is the right of the state in the interest of the whole community, unless it is plainly waived or relinquished, and all such tax exemption statutes must be strictly construed."

I can add only this: If the present law as to exemptions works a hardship in some cases, the remedy is legislative.

Respectfully,
JOHN W. BRICKER,
Attorney General.

106.

PAROLE — OHIO PENITENTIARY AND REFORMATORY — WHEN PRISONERS ELIGIBLE FOR PAROLE OR FINAL RELEASE—SINCE ENACTMENT OF SECTION 2166-1 G. C. SENTENCES ARE INDEFINITE—ELIGIBILITY OF SECOND DEGREE MURDERER FOR PAROLE.

SYLLABUS:

1. *The Board of Parole has authority to allow an inmate of the Ohio State Reformatory to go out on parole before he has served the minimum term fixed by law for the felony of which the prisoner was convicted. However, the Board of Parole cannot terminate a sentence of such an inmate by granting a final release until he has served, either by actual or constructive imprisonment, at least the minimum term of imprisonment fixed by law for the felony.*

2. *The Board of Parole cannot grant a final release to a prisoner sentenced to the Ohio Penitentiary until the prisoner has served, by actual or constructive imprisonment, at least the minimum term provided by law for the felony of which the prisoner was convicted.*

3. *Where a trial judge, as authorized by section* 2166 *prior to its repeal and re-enactment in* 1931, *sentenced a person to serve a minimum term of imprisonment equal to the maximum term of imprisonment fixed by law for the offense of robbery, to wit, twenty-five years, such sentence, by virtue of the provisions of section* 2166-1, *becomes an indefinite sentence of ten to twenty-five years and the prisoner is entitled to the benefits of sections* 2210, 2166 *and* 2169.

4. *A life termer convicted and sentenced for the crime of murder in the second degree since the enactment of section* 2210-1 *is eligible for parole at the end of fifteen years' imprisonment, as provided by that statute, and not at the end of ten years' imprisonment, as provided by section* 2169.

COLUMBUS, OHIO, FEBRUARY 6, 1933.

HON. JOHN MCSWEENEY, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter which reads as follows:

"The Ohio Board of Parole has requested that an opinion be obtained on the Board's jurisdiction in granting final release from the various penal and reformatory institutions.

Since the Board has been in existence and acting under the new laws, it has been the policy of the Superintendents of the Ohio State Reformatory and the Ohio Reformatory for Women to recommend for the Board's action on *final releases* only such prisoners as have actually completed either in prison or on parole the full statutory minimum penalty for the crime for which he or she was sentenced; for example, ten years for Robbery, five years for Breaking and Entering an Inhabited Dwelling in the Night Season, etc.

Under Section 2163 G. C., prisoners of the Ohio State Reformatory and the Ohio Reformatory for Women are permitted to leave the institution on parole at any time the Board of Parole may deem such parole advisable. Under Section 2169 G. C., no inmate of the Ohio Penitentiary and the London Prison Farm is considered for parole until after he has served within the prison the penalty prescribed by law less the diminution of the minimum sentence.

Section 2132 G. C. (103 v. 885) governs the release of prisoners from the Ohio State Reformatory and the Ohio Reformatory for Women.

'*Sentences must be general.* Courts imposing sentences to the Ohio state reformatory shall make them general, and not fixed or limited in their duration. The term of imprisonment of prisoners shall be terminated by the Ohio board of administration*, as authorized by this chapter, but the term of such imprisonment shall not exceed the maximum term, nor be less than the minimum term provided by law for such felony.'

*Sections 86 to 92 G. C. Ohio Board of Parole has jurisdiction in the release of prisoners.

Sections 2166 (114 v. 188), 2166-1 (114 v. 189), 2169 (107 v. 527) and 2211-6 (114 v. 591) read as follows:

"Section 2166. *Sentence shall not be fixed or limited in duration; exceptions; terms of imprisonment defined.* 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 chapter, 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.'"

'Section 2166-1. *Who may have imprisonment terminated.* 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.'

'Section 2169. *Rules and regulations as to parole of prisoners.* The Ohio Board of Administration shall establish rules and regulations by which a prisoner under sentence other than for treason or murder in the first or second degree, having served a minimum term provided by law for the crime for which he was convicted or 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. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner. The board may designate geographical limits within and without the state to which a paroled prisoner may be confined or may at any time enlarge or reduce such limits, by unanimous vote.'

'Section 2211-6. *Board to determine conditions of parole; custody of prisoners; final release.* Subject to the limitations imposed by law, the board of parole shall have full, continuous and exclusive power to determine the time when, the period for which and the terms and conditions in accordance with which any prisoner now or hereafter confined in a penal or reformatory institution may be allowed to go upon parole outside the premises of the institution to which he has been committed, assigned or transferred. All prisoners on parole shall remain in the legal custody of the department of public welfare. The concurrence of at least three members of the board at a meeting of the board shall be necessary for the parole or release of a prisoner. When a paroled prisoner shall have performed all the terms and conditions of his parole the board may finally release him.'

Section 2163 (88 v. 556) provides a certain diminution of sentence for good behavior for prisoners serving a definite term of imprisonment other than life.

Section 2210 (114 v. 530) provides a diminution of sentence for prisoners 'not eligible to parole before the expiration of a minimum sentence or term of imprisonment, or hereafter sentenced thereto under a general sentence * * *' and stipulates 'At the expiration of the minimum sentence diminished as herein provided, each prisoner shall be eligible for parole as provided by law.'

Section 2210-1 governing diminution of sentence on a life or fifteen-year term, contains the provision 'The above provisions shall apply to prisoners sentenced before or after the taking effect of this act.'

Questions:

1. Must prisoners of the Ohio State Reformatory and the Ohio Reformatory for Women have completed the full minimum penalty

prescribed by the statutes for the crime committed either by confinement in the institution or on parole before they can be granted a final release? Or, does the paroled prisoner have to serve on parole only such period as may be prescribed by the Board at the time of the granting of the parole; namely twelve months, or any other time decided upon by the Board up to the statutory minimum?

2. Does Section 2210 (114 v. 530) automatically reduce the statutory penalty in sentences to *any* or all of the four penal and reformatory institutions? Is a statutory penalty of ten years reduced to six years and four months for *final release,* to a prisoner 'who has faithfully observed the rules of said institution'; or does this section contemplate only a reduction in the statutory minimum penalty for purposes of parole and not *final release?* For example, a prisoner serving a sentence in the Penitentiary for Robbery under a statutory penalty of ten years, is by diminution of sentence, given a parole after having served within the prison six years and four months. Can this prisoner be given his final release by the Board of Parole before the expiration of the ten years' statutory minimum penalty, counting the time served within the institution and on parole?

3. In the case of a prisoner now serving a sentence in the Ohio Penitentiary who was sentenced under the old law permitting the court to fix a judicial minimum, and the court fixed the minimum the same as the statutory maximum, thus imposing a definite sentence, (for instance, a prisoner who was convicted of Robbery was given a sentence of twenty-five to twenty-five years, the minimum being the statutory maximum for the offense) when does such a prisoner become eligible to parole under sections of law governing diminution of sentence? When does he become eligible to his final release?

4. Section 2210-1 (114 v. 531) provides:

'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 2169 (107 v. 527) provides that '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.'

Considering the provisions of these two sections, when does a prisoner serving a sentence of life for murder in the second degree become eligible to parole? When may a prisoner under sentence for murder in the second degree be given a final release?"

The first question raised by your inquiry was passed upon by one of my predecessors in an opinion which may be found in the Opinions of the Attorney General for 1927, page 918. The syllabus reads as follows:

"The Ohio Board of Clemency has authority to establish rules and regulations under which prisoners of the Ohio State Reformatory may be allowed to go upon parole in legal custody before such prisoners have

served the minimum term provided by law for the felony for which they were convicted, the only limitation upon the board's power being that such prisoners must be recommended as worthy of such consideration by the superintendent and chaplain of the reformatory before such applications for parole may be considered."

The conclusion reached therein was due to the provisions of section 2141, contained in Title V, Division IV, Chapter 1, Part First of the General Code, relating to the Ohio State Reformatory. See pages 921 and 922. Section 2141 reads:

"The Ohio board of administration shall establish rules and regulations under which prisoners may be allowed to go upon parole in legal custody, under the control of the Ohio board of administration and subject to be taken back into the enclosure of the reformatory. A prisoner shall not be eligible to parole, and an application for parole shall not be considered by the board, until such prisoner has been recommended as worthy of such consideration by the superintendent and chaplain of the reformatory."

Sections 2131, 2133 and 2136 are pertinent to your inquiry. Section 2131 reads as follows:

"The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory, if they are not known to have been previously sentenced to a state prison. Male persons between the ages of sixteen and twenty-one years convicted of felony shall be sentenced to the reformatory instead of the penitentiary. Such persons between the ages of twenty-one and thirty years may be sentenced to the reformatory if the court passing sentence deems them amenable to reformatory methods. No person convicted of murder in the first or second degree shall be sentenced or transferred to the reformatory."

Section 2133 provides that:

"If, through oversight or otherwise, a sentence to the reformatory should be for a definite period, it shall not for that reason be void, but the person so sentenced shall receive the benefits and be subject to the liabilities of this chapter, as if he had been sentenced in the manner required by law. In such case the Ohio board of administration shall deliver to such person a copy of this chapter and written information of his relations to them."

Section 2136 reads as follows:

"The discipline to be observed in the institution shall be reformatory and the Ohio board of administration shall employ such means for reformation or improvement as may be expedient."

It is obvious from a reading of the statutes quoted, including section 2141, repealed by the General Assembly in 1931, that the legislature, motivated

no doubt by a desire to make humane provision in case of first offenders between the ages of sixteen and thirty and to encourage them to reform without requiring them to serve a period of imprisonment confined in a penal institution for such duration that they might abandon the hope of regaining their standing in society, conferred upon the Board of Administration (later the Ohio Board of Clemency) the power to grant paroles to inmates of the Ohio State Reformatory when recommended as worthy of such consideration by the superintendent and chaplain of that institution. A parole under the provisions of law quoted herein could be granted to an inmate of the reformatory at any time and even before the expiration of his minimum term of imprisonment, providing the prisoner was recommended for parole by the superintendent and the chaplain of the Ohio State Reformatory. By virtue of such a parole, the prisoner was permitted to go outside of the walls of the reformatory, remaining, however, in the legal custody and under the control of the Ohio Board of Clemency until his final release or absolute discharge was granted by the Ohio Board of Clemency. See section 2141.

Under section 2132, as interpreted by my predecessor in the Opinions of the Attorney General, supra, at page 922, a paroled prisoner of the Ohio State Reformatory could not be granted a final release or discharge until the expiration of his minimum term of imprisonment. The final release or absolute discharge of a paroled prisoner from that institution by the Ohio Board of Clemency under section 2132 terminated his indeterminate sentence as effectually as if it had been a definite sentence expiring at the time. See *People* vs. *Kaiser,* 203 N. Y. S. 375; *People* vs. *Kaiser,* 205 N. Y. S. 317; *People* vs. *Division of Paroles,* 248 N. Y. S. 511.

The authority of the Ohio Board of Clemency, prior to its abolishment and the creation of the Board of Parole in 1931, to grant paroles and absolute discharges to prisoners in the Ohio State Reformatory was different and not as restrictive as it was in respect to the parole and discharge of prisoners confined in the Ohio Penitentiary. See former sections 91 to 92-3, inclusive, 2160, 2171 (repealed in 114 O. L. 589), section 2166 (repealed in 114 O. L. 189) and section 2169. The following statutes, in addition to section 2211-6, quoted in your letter, contained in the act creating the Board of Parole, are pertinent to your first inquiry. Section 2211-4 reads:

> "All powers and duties vested in or imposed by law upon any other officers, boards or commissions of the state, excepting the governor, with respect to recommendation, grant, or order of pardon, commutation of sentence, parole, reprieve, reimprisonment, or release of persons confined in or under sentence to any of the penal and reformatory institutions of the state excepting the boys' industrial school and the girls' industrial school are hereby transferred to, vested in and imposed upon the board of parole and shall be exercised in accordance with the provisions of this act. Upon the appointment of the members of the board of parole and their qualification, said board shall be and become the successor of and shall supersede any and all other offices, boards and commissions of the state, excepting the governor, with respect to such powers and duties."

Section 2211-5 provides that:

"The board of parole shall have the power to exercise its functions and duties in relation to parole, release, pardon, commutation or reprieve upon its own initiative or the initiative of the superintendent of a penal or reformatory institution. When a prisoner becomes legally eligible for parole the superintendent of the institution in which he is confined shall notify the board of parole in such manner as may be prescribed by the board. The board shall have the continuous power to investigate and examine or to cause the investigation and examination of persons confined in the penal or reformatory institutions of Ohio, both concerning their conduct therein, the development of their mental and moral qualities and characteristics, and their individual and social careers, and the board's action shall take into account the results of such investigation and examination. But the board shall not order or recommend the release of any person from actual confinement unless in its judgment there is a reasonable ground to believe that, if so released, he will be and remain at liberty without violating the law, and that such release is not incompatible with the welfare of society. It shall be the duty of all state and local officials to furnish information to the board of parole when requested to do so and to co-operate with the said board in the performance of its duties."

Section 2210 and 2210-1 are also pertinent. Section 2210 reads in part 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:

* * * * * * * * *

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

Section 2210-1 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 provisions shall apply to prisoners sentenced before or after the taking effect of this act."

The issuance of a parole under the board of parole act is made to depend upon the sound discretion of the Board of Parole within the limitations of the act. The act further provides that paroles may be granted only to those prisoners who have become legally eligible for parole, as provided by law, and it is the duty of the superintendent of a penal institution to notify the Board of Parole when a prisoner in that institution becomes legally eligible for parole. Under section 2211-6, the Board of Parole has the authority to

determine "when, the period for which and the terms and conditions in accordance with which any prisoner now or hereafter confined in a penal institution or reformatory institution may be allowed to go upon parole." This broad power is, however, subject to whatever limitations the legislature has enacted in respect to allowing prisoners to go out on parole. Since section 2141 was repealed, there are no inhibitions or limitations whatsoever contained in the chapter relating to the Ohio State Reformatory in respect to when a prisoner in that institution may go out on parole and, in fact, it is less restrictive today because under section 2141 a prisoner in the reformatory was not eligible for parole until he was first recommended for that privilege by the superintendent and chaplain of the reformatory.

The provisions of section 2132 have been construed, as previously stated herein, as restricting the Ohio Board of Clemency in the matter of granting final releases to inmates of the Ohio State Reformatory. There is no statute in the chapter dealing with the Ohio State Reformatory (sections 2129 to 2140, inclusive) which contains a section similar to section 2169, quoted in your letter and found in the chapter relating to the Ohio Penitentiary (Title V, Division IV, Chapter 2, Part First of the General Code). The provisions of that section limit the Board of Parole in granting paroles only to prisoners, other than those serving sentences for murder in the first and second degree and treason, who have served the minimum term of imprisonment provided by law for the offense. The limitations imposed upon the Board of Parole by that section are lessened by the provisions of section 2210 and 2210-1 only in respect to the time when a prisoner serving an indeterminate or general sentence may become eligible for parole. The phrase "subject to the limitations made by law," as contained in section 2211-6, relates to provisions such as contained in section 2169 relating to the parole of prisoners serving indeterminate sentences in the Ohio Penitentiary. Inasmuch as there is no statute similar to section 2169, contained in the chapter relating to the Ohio State Reformatory, it is apparent at once that the phrase "subject to the limitations imposed by law" contained in section 2211-6 does not apply to the granting of paroles to prisoners in the Ohio State Reformatory. In other words, under section 2211-6, the Board of Parole undoubtedly has been given the authority to grant paroles to inmates in the Ohio State Reformatory in the same manner and with less restrictions than previously granted by the legislature to the Ohio Board of Clemency under repealed section 2141. Thus the enactment of the board of parole act and the repeal of section 2141 left unaffected the authority of the Board of Parole to act in reference to inmates of the Ohio State Reformatory as in the past in respect to the power to grant paroles to such inmates. The legislature in creating the Board of Parole did not intend, as regards such offenders, to abolish the heretofore established method and procedure of granting paroles and final releases to such prisoners and thus do away with the inducements to reformation.

The phrase in section 2211-6 which reads that "when a paroled prisoner shall have performed all the terms and conditions of his parole the board may finally release him" does not apply to inmates of the Ohio State Reformatory out on parole, inasmuch as the legislature has expressly stated in section 2132 that the Ohio Board of Administration (now the Board of Parole) may terminate the sentence of a prisoner in the reformatory whenever the prisoner shall have served not less than the minimum term of imprisonment provided by law for the felony for which he was committed to the institution. It must be borne in mind that section 2132 applies to a special class of penal inmates,

whereas, section 2211-6 relates to the inmates in all of the penal institutions of the state. In other words, section 2132 is a statute on a special subject matter and not one of an inclusive nature as is section 2211-6. That being the case, the rule of statutory construction announced in the case of *State, ex rel. Elliott Company,* vs. *Connar,* 123 O. S. 310, that:

> "Special statutory provisions for particular cases operate as exceptions to general provisions which might otherwise include the particular cases and such cases are governed by the special provisions."

is applicable. In view of that rule of statutory construction, the language in section 2211-6 is limited and qualified by the specific provisions of section 2132 in reference to the termination of the sentences of prisoners in the Ohio State Reformatory.

In view of the provisions of sections 2132, 2211-5 and 2211-6, I am of the opinion that the Board of Parole has the authority to parole a prisoner in the Ohio State Reformatory before he has served his minimum term of imprisonment. However, the Board of Parole cannot grant a final release to a paroled inmate of that institution until he has served his minimum term of imprisonment either by actual or constructive imprisonment.

The parole law (sections 2211 to 2211-9, inclusive) places in the Board of Parole the power to determine when, if at all, a prisoner is entitled to parole, subject, however, to the provisions contained in sections 2169, 2210 and 2210-1. The provisions for diminution of sentences for good behavior contained in section 2210 apply only to the minimum terms of general sentences. The diminution of sentence clause contained in section 2210 expressly provides that "At the expiration of the minimum sentence diminished as herein provided, *each* prisoner shall be eligible for *parole* as provided by law." The words "parole" and "final release" have separate and distinct meanings in criminal law. A parole is merely a release from the actual confines of the prison bounds without the suspension of the running of a prisoner's sentence. See *Crooks* vs. *Sanders,* 115 S. E. 760 (S. C.); Ex parte Prout, 86 Pac. 275 (Idaho); *Woodward* vs. *Murdock,* 124 Ind. 439; and Ex parte Casey, 115 Pac. 1104 (Calif.). However, in some jurisdictions it has been held that the running of the sentence is suspended while a prisoner is out on parole. See *State* vs. *Yeates,* 111 S. E. 337 (N. C.); *Commonwealth, ex rel.,* vs. *Minor,* 241 S. E. 856 (Ky.); Ex parte Mounce, 269 S. W. 385 (Me.); and *Kirkpatrick* vs. *Hollowell,* 196 N. W. 91 (Ia.). In this state the legislature has expressly provided that a parole shall not have the effect of suspending the running of the prisoner's sentence except when a parole is revoked. See section 2211-9.

A prisoner, while on parole, is in the legal custody and under the control of the state, although he is permitted to go outside of the prison walls and enclosures. In the case of In re Eddinger, 211 N. W. 54 (Mich.), it was stated that the "purpose of a parole is to keep prisoner in legal custody while permitting him to live beyond prison enclosure, so that he may have opportunity to show that he can refrain from committing crime." The absolute discharge or release of a prisoner before the expiration of his maximum term of imprisonment, either while in confinement or out on parole, is a remission of the remaining portion of his sentence. Thus in the case of *Orme, et al.,* vs. *Roger,* 260 Pac. 199 (Ariz.), it was held that "discharge is more than a parole in that it releases the prisoner from any further imprisonment for the same offense, no

matter what his conduct thereafter, but less than a pardon in that it does not restore his right to vote." Release is defined in 46 C. J. 1211 as follows:

> "An absolute discharge is something more than a release from parole; it terminates the sentence, and is a remission of the remaining portion of the sentence."

See also *People* vs. *Kaiser,* 205 N. Y. S. 317.

A prisoner on parole in this state is merely released from actual confinement on the expiration of his minimum term of imprisonment as diminished by the good time provisions of sections 2210 and 2210-1, if the prisoner is serving an indeterminate sentence in the Ohio Penitentiary. See sections 2169 and 2211-6. If the prisoner is an inmate at the Ohio State Reformatory, he is eligible for parole at any time before the expiration of his minimum term of imprisonment. While on parole, the prisoner remains in the custody of and subject to the supervision, control and surveillance of the Department of Public Welfare. See section 2211-6. If the conditions of a parole are violated and the same occurs any time before the expiration of the maximum term of imprisonment provided by law for the offense, the parole may be revoked and the parole violator be re-arrested and again imprisoned until he has served his maximum term of imprisonment, unless he is again re-paroled or otherwise released or discharged. Section 2211-9. See also In re Sutton, 145 Pac. 6 (Mont.); *Anderson* vs. *Wirkman,* 215 Pac. 225 (Mont.). The only statute which authorizes the remission of a prisoner's term of imprisonment in the Ohio Penitentiary is section 2166, as enacted in 114 O. L. 188.

In view of the statutes and authorities cited herein, it is clear that a prisoner on parole is not discharged or released from his sentence but is merely serving his sentence outside the enclosure of the prison walls, or, as it is generally said, in constructive imprisonment. The presumption must be indulged in that, in using the word "parole" in sections 2210, 2210-1 and 2169, the legislature used it in the same sense in which it is commonly used. If the legislature had intended that the provisions of section 2210 were to supersede the provisions of section 2166, as to when an indeterminate sentence can be terminated, it would have used appropriate language to confer upon the Board of Parole that power. The fact that the legislature did not use the words "release" or "final discharge" in sections 2210 and 2210-1 clearly indicates that it did not intend to confer upon the Board of Parole the power to terminate sentences upon the expiration of the minimum term of imprisonment less good time off for good behavior. There is no provision in either section 2169, 2210 or 2210-1 which authorizes the Board of Parole to grant a final release or discharge to a prisoner. The provisions of sections 2210, 2210-1 and 2169 must be construed as being in pari materia. By construing sections 2210 and 2210-1 as an addition to the provisions of section 2169, effect is given to all those sections. Under section 2169 a prisoner is not eligible for parole until he has served the minimum term of imprisonment fixed by law for the felony. The provisions of sections 2210 and 2210-1 hasten or accelerate the time when a prisoner may become eligible for parole and at which time the Board of Parole may consider whether such prisoner shall be paroled.

The phrase "When a paroled prisoner shall have performed all the terms and conditions of his parole the board may finally release him," contained in section 2211-6, must be construed together with the provisions of section 2166,

as enacted in 114 O. L. 188. The provisions of section 2211-6, quoted herein are limited by the provisions of section 2166 as to when a prisoner sentenced to serve an indeterminate sentence in the Ohio Penitentiary may be given a final release or discharge. Section 2166 specifically provides that 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.*" The language contained in that section is so free from ambiguity that there can be but one conclusion and that is that the sentence of a prisoner serving an indeterminate term in the Ohio Penitentiary cannot be terminated by the Board of Parole until he has served either actually or constructively the minimum term of imprisonment provided by law for the felony. Although a prisoner serving an indeterminate sentence of ten to twenty-five years in the Ohio Penitentiary may be granted a parole at the expiration of six years and four months, as provided by section 2210, yet such a prisoner cannot be given a final release or discharge by the Board of Parole until he has served actually or constructively at least his minimum term of imprisonment of ten years.

Your attention is also called to the fact that the authorities are in conflict on the question of the constitutionality of statutes conferring on prison boards authority to terminate sentences by granting final releases before the expiration of the maximum term of imprisonment. See 20 R. C. L. 578. In many jurisdictions statutes granting prison boards authority to grant final releases to inmates of penal institutions before the expiration of their maximum terms of imprisonment have been declared unconstitutional on the ground that such a power was an invasion of the pardoning power vested in the governors by the constitutions of the various states. See Opinions of the Judges in the Matter of Constitutional Discharge of Convicts, 56 L. R. A. 1064 (Vt.), and *Board of Prison Commissioners* vs. *DeMoss,* 163 S. W. 183 (Ky.). There are also many authorities which hold that the power to wholly relieve a person from a judgment resulting from a conviction belongs to the pardoning power. See *People* vs. *Brown,* 19 N. W. 571 (Mich.); *State ex rel.,* vs. *Miesen,* 108 N. W. 513 (Minn.); and *State ex rel. Langrun,* 146 N. W. 1102 (Minn.). Chief Justice Hughes, in the recent case of *Sorrells* vs. *United States,* 53 Supreme Court 210, said that clemency was the function of the executive. This statement was quoted with approval by Day, Judge, in the case of *Municipal Court of Toledo, et al.,* vs. *State, ex rel. Platter,* decided by the Supreme Court of Ohio on January 11, 1933, in support of the holding of that court that courts in this state do not have the inherent power to suspend the execution of sentences in criminal cases for purposes other than error proceedings. Your attention is also called to the fact that in many jurisdictions the constitutionality of statutes conferring on prison boards power to give paroled prisoners final releases before the expiration of their maximum terms of imprisonment have been sustained where the statutes also provide that the release is not to become full and complete until approved by the Governor. See *People* vs. *Joyce,* 246 Ill. 124; *State* vs. *Duff,* 144 Ia. 142; *Kirkpatrick* vs. *Hollowell,* supra; *People* vs. *Doras,* 125 N. E. 2 (Ill.); and 20 R. C. L. 578. This particular question has never been decided in Ohio, although the case of *State, ex rel. Attorney General,* vs. *Peters,* 43 O. S. 629, is often cited as holding that a prison board may terminate an indeterminate sentence. However, an examination of that case reveals that the Supreme Court merely held that the power of a parole board to grant paroles to prisoners serving indeterminate sentences in the Ohio Penitentiary was not an interference with

the executive or judicial powers conferred on those departments by the Constitution of the state. In the case of *In re Kline,* 70 O. S. 25, at page 28, the court said that:

> "In *State* vs. *Peters,* 43 Ohio St., 629, this court held that this statute (section 7388-11, Revised Statutes) was constitutional and that it did not interfere with the executive or judicial departments of the state government, and the court so held for the reason that the statute did not undertake to confer upon a prisoner the right to a pardon, absolute or conditional, nor to commute the sentence, nor to modify the sentence by *shortening the term or by discharging the prisoner.* The court construed this statute as being merely a 'disciplinary regulation,' which was clearly within the power and discretion of the legislature to make or not to make." (Italics the writer's.)

However, the power of the Ohio Board of Clemency to grant final releases to prisoners sentenced to the Ohio Penitentiary before the expiration of their maximum terms of imprisonment was upheld by my predecessor in the Opinions of the Attorney General for 1929, page 1593. The first paragraph of the syllabus reads as follows:

> "The Ohio Board of Clemency has authority to grant paroles, conditional releases or absolute releases to prisoners who violated their paroles or conditional releases and were declared delinquent and returned to the Ohio Penitentiary and are now serving the unexpired period of the maximum term of their sentence in accordance with the provisions of section 2174 prior to its repeal."

No question was raised in that opinion as to the constitutionality of the statutes authorizing the Ohio Board of Clemency to grant final releases or discharges to prisoners committed to the Ohio Penitentiary before the expiration of their maximum terms of imprisonment. The same authority was sustained without being questioned in the cases of *People, ex rel. Lewis,* vs. *Kaiser, supra,* and *People, ex rel. Kaupt,* vs. *Lasch,* 202 N. Y. S. 416. Because of the opinion of my predecessor on this question, I am assuming, for the purposes of this opinion, that the provisions contained in sections 2211-4 and 2211-6, authorizing the Board of Parole to grant final releases, are valid, even though under the Constitution of this state the pardoning power is vested solely in the Governor, subject to such rules and regulations as may be made by law. See section 11, article III of the Constitution of the State of Ohio.

The Supreme Court of Ohio in the case of *Reeves* vs. *Thomas,* 122 O. S. 22, held that:

> "Where a trial judge, authorized to fix, within the limits prescribed by law, a minimum period of duration of imprisonment in the penitentiary for a felony, has imposed a sentence 'for a period of seven years,' and the maximum sentence provided by law for such offense, to-wit, grand larceny, is seven years, such sentence becomes a definite one, and the person so sentenced is entitled to the benefits of the diminution of sentence for good behavior as provided in Section 2163, General Code."

It was further held by the Supreme Court in the case of *O'Neill* vs. *Thomas,* 123 O. S. 42, that:

> "Section 2163, General Code, providing for diminution of sentence for good behavior, applicable to persons confined in the Ohio penitentiary for a definite term, does not apply to a prisoner who has received a general sentence under the provisions of Section 2166, General Code, the board of clemency having power, under the statute, in that class of sentences, to reward good conduct and obedience to rules of the penitentiary."

Judge Day, in the course of his opinions in the above cases, held that two kinds of sentences in criminal cases could be imposed by the courts in this state, to wit, definite and indefinite sentences. A prisoner serving a definite sentence was entitled to the diminution of his sentence as provided by section 2163, which reads in part as follows:

> "A person confined in the penitentiary, or hereafter sentenced thereto for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, will be entitled to the following diminution of his sentence:
>
> * * * * * * * * *
>
> (f) A prisoner sentenced for a term of six or more years, shall be allowed a deduction of eleven days from each of the months of his full sentence."

The only way the Board of Clemency (now the Board of Parole, section 2211-4) could affect such a prisoner was by deducting or restoring to him his good time. See sections 2164 and 2165. In other words, the prison board could not parole or terminate the sentence of a person serving a definite sentence in the Ohio Penitentiary. Accordingly only a prisoner serving an indeterminate sentence in the Ohio Penitentiary could be paroled or released by the prison board as provided by sections 2166, 2169 and 2171, repealed in 114 Ohio Laws. Judge Day, in the course of his opinion in the case of *Reeves* vs. *Thomas, supra,* page 27, said:

> 'We cannot take the view that the board has the power to reduce the minimum fixed by the trial judge. Such would be a violation of the plain letter of Section 2166, wherein it is provided: '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 fixed by the court for such felony.' "

Although a prison board may not have the power to reduce a minimum term of sentence fixed by a court, as stated by Judge Day, nevertheless there is no question but that the legislature can reduce the penalties fixed by a statute or sentence, providing the same do not become more onerous than those originally imposed by a court or prescribed by a statute.

The power of the legislature to modify the penalties prescribed by statute for offenses, either by means of an insolvent debtors' statute or parole laws, has

been sustained by the Supreme Court of Ohio in the cases of *Ex parte Scott*, 19 O. S. 581, and *State, ex rel, Attorney General,* vs. *Peters, supra.* The court, in the course of its opinion in the case of *State, ex rel. Attorney General,* vs. *Peters, supra,* at pages 651 and 652, said:

> "It may be claimed that this act (Board of Managers Act), so far as it affects past sentences, is retroactive, and therefore unconstitutional. This can not be, as by this provision the legislature is only prevented from interfering with the vested rights of individuals.
>
> It does not hinder the state from divesting itself of any right of claim of its own. The only party who could object is the prisoner, and he can not, where it is clearly for his benefit. If the provisions of the law are not *ex post facto* in their nature, he can not complain."
>
> (Words in parenthesis the writer's.)

Since the decisions in the cases of *Reeves* vs. *Thomas* and *O'Neill* vs. *Thomas, supra,* the legislature of Ohio has repealed the Norwood Act and re-enacted section 2166 as it read prior to 1921. The legislature at the same time enacted section 2166-1. By the terms of that statute the legislature has expressly reduced or modified the minimum terms of imprisonment fixed by trial courts in indeterminate sentences to the Ohio Penitentiary, as authorized by section 2166 prior to 1931, to the minimum terms of imprisonment fixed by law for the felony and a prisoner whose minimum term of imprisonment was greater than that fixed by statute is and would be entitled to the benefits resulting from the provisions of section 2166-1. Thus a prisoner convicted of violating section 12432 (Robbery Statute) and sentenced to the Ohio Penitentiary to serve a minimum term of imprisonment of not less than twenty-five years and the maximum term of imprisonment of not more than twenty-five years should, by virtue of section 2166-1, be considered as serving an indeterminate term of not less than ten years and not more than twenty-five years, instead of a definite sentence of twenty-five years. Such a prisoner would be further benefited by the provisions of sections 2210, 2166 and 2169 in that he would become eligible for parole at the expiration of the minimum term of imprisonment of ten years less good time for good behavior which would be approximately six years and four months. Not only would such a prisoner be eligible for parole and entitled to the benefits thereof but he could also be granted a final release from the Ohio Penitentiary at the expiration of his minimum term of imprisonment (ten years) as provided by section 2166, whereas, under a definite sentence of twenty-five years, he would not be released from the penitentiary until he had served approximately eighteen years or more of his twenty-five-year sentence. The ultimate result of applying the provisions of section 2166-1 to a sentence of twenty-five to twenty-five years is to reduce the minimum term fixed by a court to the minimum term fixed by statute for the felony, thus enabling such a prisoner to become eligible for parole and final release at a much earlier date than if he were deemed to be serving a definite sentence of twenty-five years.

In view of that fact, I am of the opinion that section 2166-1 is not, in its nature, ex post facto, inasmuch as the benefits accruing to a prisoner sentenced to serve a twenty-five-year to twenty-five-year sentence in the Ohio Penitentiary, when reduced by section 2166-1 to a ten to twenty-five-year sentence, outweigh the benefits that would result to such a prisoner if he were deemed to be serving a definite sentence.

Your last question is whether a life termer convicted and sentenced for the crime of murder in the second degree is eligible for parole under section 2169 or as provided by section 2210-1, enacted in 114 O. L. 530. Section 2169, in so far as pertinent, reads as follows:

> "The Ohio Board of Administration shall establish rules and regulations by which a prisoner under sentence other than for treason or murder in the first or second degree, having served a minimum term provided by law for the crime for which he was convicted or 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. * * *"

Section 2210-1, enacted in 1931, provides:

> "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.*"
>
> (Italics the writer's.)

It is apparent from a reading of these sections that an incompatibility exists in reference to when a prisoner under sentence for murder in the second degree is eligible for parole. The rule of statutory construction applicable to these statutes was stated in the first paragraph of the syllabus in the case of *City of Cincinnati* vs. *Holmes, et al.,* 56 O. S. 104, as follows:

> "Where the general provisions of a statute and those of a later one on the same subject are incompatible, the provisions of the latter statute must be read as an exception to the provisions of the earlier statute."

The court, at page 115, quoted the following from the case of *The Dean of Ely* vs. *Bliss,* 5 Beav. 574, 582:

> "That if two inconsistent acts be passed at different times, the last is to be observed, and if obedience cannot be observed without derogating from the first, it is the first that must give way. Every act of parliament must be considered with reference to the law subsisting when it came into operation and when it is to be applied; it cannot otherwise be rationally construed. Every act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment."

In view of that rule of statutory construction, the provision of section 2210-1, as to when prisoners serving life terms for crimes other than murder in the first degree and treason are eligible for parole, supersedes the provision contained in section 2169 relating to the same subject as well as the provision contained therein

in reference to the eligibility for parole of life termers sentenced for murder in the second degree. A life termer convicted and sentenced for the crime of murder in the second degree, since the enactment of section 2210-1, is eligible for parole at the expiration of fifteen years' imprisonment, as provided by section 2210-1, and not at the expiration of ten years' imprisonment, as provided by section 2169. Although the legislature may have intended that section 2210-1 was to have a retroactive effect as to prisoners sentenced prior to its enactment, yet the provisions contained in section 2210-1, which provides that that section is to be retroactive and which reads that:

> "The above provisions shall apply to prisoners sentenced before or after the taking effect of this act."

is not applicable to prisoners sentenced to the Ohio Penitentiary for the crime of murder in the second degree, prior to the enactment of section 2210-1, since it is a rule of law that the benefits of parole and diminution of sentence statutes, in force at the time judgment is imposed in a criminal case, are considered a part of the original sentence. See *Crooks* vs. *Sanders, supra,* and *Reeves* vs. *Thomas, supra,* 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 termer is entitled to the benefits of that statute and is therefore eligible for parole at the expiration of ten years of imprisonment.

Your attention is called to the Opinions of the Attorney General for 1932, Opinion No. 4455, wherein my predecessor held, in the third and fourth paragraphs of the syllabus, as follows:

> "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.
>
> 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."

Therefore, in specific answer to your questions, I am of the opinion that:

1. The Board of Parole has authority to allow an inmate of the Ohio State Reformatory to go out on parole before he has served the minimum term fixed by law for the felony of which the prisoner was convicted. However, the Board of Parole cannot terminate a sentence of such an inmate by granting a final release until he has served, either by actual or constructive imprisonment, at least the minimum term of imprisonment fixed by law for the felony.

2. The Board of Parole cannot grant a final release to a prisoner sentenced to the Ohio Penitentiary until the prisoner has served, by actual or constructive imprisonment, at least the minimum term provided by law for the felony of which the prisoner was convicted.

3. Where a trial judge, as authorized by section 2166 prior to its repeal and re-enactment in 1931, sentenced a person to serve a minimum term of imprison-

ment equal to the maximum term of imprisonment fixed by law for the offense of robbery, to wit, twenty-five years, such sentence, by virtue of the provisions of section 2166-1, becomes an indefinite sentence of ten to twenty-five years and the prisoner is entitled to the benefits of sections 2210, 2166 and 2169.

4. A life termer convicted and sentenced for the crime of murder in the second degree since the enactment of section 2210-1 is eligible for parole at the end of fifteen years' imprisonment, as provided by that statute, and not at the end of ten years' imprisonment, as provided by section 2169.

Respectfully,
JOHN W. BRICKER,
Attorney General.

107.

APPROVAL, BONDS OF VILLAGE OF DENNISON, TUSCARAWAS COUNTY, OHIO—$1,000.00.

COLUMBUS, OHIO, February 7, 1933.

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

108.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS PUBLIC UTILITIES COMMISSIONER OF THE STATE OF OHIO—FRANK W. GEIGER.

COLUMBUS, OHIO, February 7, 1933.

HON. FRANK W. GEIGER, *Public Utilities Commissioner, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a bond upon which your name appears as principal and the New York Casualty Company of New York appears as surety, in the penal sum of five thousand dollars, conditioned to cover the faithful performance of the duties of the principal as Public Utilities Commissioner of the State of Ohio.

Said bond, being properly executed in accordance with section 492, General Code, I have endorsed my approval thereon, and return the same herewith.

Respectfully,
JOHN W. BRICKER,
Attorney General.