36, 37 and 38 of specifications of the Form of Proposal dated October 9, 1939, all according to Plans and Specifications, which Plans, Specifications and Proposal are made a part of this contract. This contract calls for an expenditure of $5,050.00.

You have submitted the following papers and documents in this connection: Notice to bidders; proof of publication; division of contract; form of proposal containing contract bond signed by The Ohio Casualty Insurance Company; its power of attorney for the signer; its certificate of compliance with the insurance laws of Ohio; contract encumbrance record No. 94; tabulation of bids; estimate of cost; Controlling Board's Release; recommendations of State Architect; approval of P. W. A.; Workmen's Compensation Certificate showing a compliance with the laws of Ohio relating to Workmen's Compensation; letter from the Auditor of State, showing all necessary papers are on file in his office.

Finding said contract in proper legal form, I have noted my approval thereon, and same is transmitted herewith to you, together with all other papers submitted in this connection.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1577.

STATE PENAL OR REFORMATORY INSTITUTION—WHERE PAROLEE CONVICTED OF SECOND OR SUBSEQUENT FELONY—COMMITTED WHILE OUT ON PAROLE—SENTENCED TO OHIO STATE REFORMATORY—SHOULD BE TRANSFERRED TO OHIO PENITENTIARY BY DEPARTMENT PUBLIC WELFARE—SECTIONS 2140, 2210-2, G. C.—STATUS WHERE PRISONER SIMULTANEOUSLY CONVICTED OF AND SENTENCED ON TWO OR MORE FELONIES—SENTENCE CONCURRENT, CONSECUTIVE, SAME LENGTH OF TIME—OPINIONS ATTORNEY GENERAL, 1937, VOLUME III, PAGE 2249, BRANCHES 1 AND 3 OF SYLLABUS OVERRULED.

SYLLABUS:

1. Where a parolee from a state penal or reformatory institution is convicted of a second or subsequent felony committed while out on parole and is sentenced to the Ohio State Reformatory, such prisoner should be transferred to the Ohio Penitentiary by the Department of Public Welfare, under authority of and in accordance with the provisions of Sections 2140 and 2210-2, of the General Code. (Opinion No. 5745, Opinions, Attorney General, 1936, approved and followed.)

2. Where a prisoner is simultaneously convicted of and sentenced

on two or more felonies, such person is in the eyes of the law a first offender and is not a prisoner who has been previously convicted of crime. Under the statutes of Ohio, including Sections 2131, 2140 and 2210-2, such a convict should, therefore, if otherwise eligible, be sentenced to the Ohio State Reformatory to serve both or all the sentences imposed upon him, regardless of whether or not the trial court orders that such sentences shall be served concurrently or shall run consecutively and regardless of whether or not the sentences, if they are to be served concurrently, are for the same length of time. (Branches 1 and 3 of the syllabus of Opinion 1317, Opinions Attorney General, 1937, Volume III. p. 2249, overruled.)

COLUMBUS, OHIO, December 14, 1939.

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

DEAR SIR: Receipt of your letter requesting the opinion of this office is hereby acknowledged. Your communication reads:

> "Opinion 5745, June 25, 1936, covers conditions under which prisoners sentenced to the Ohio State Reformatory shall, as illegal sentences, be transferred to the Ohio Penitentiary—Sections 2140 and 2210-2, G. C.
>
> Opinion 1317, October 15, 1937, states 'When a prisoner is convicted of and sentenced on two or more felonies and the sentencing court orders that such sentences shall run concurrently, such sentences do (*not*) place the prisoner in the category of prisoners previously convicted of crime, if the sentences are identical in length of time. However, since the sentence says "run concurrently", the second sentence will have been completed at the same point of time as the first sentence. If the sentences are not identical, the defendant is placed in the category of a prisoner previously convicted of crime upon the completion of the first sentence for purpose of transfer.'
>
> The policy has been to enter the inmate upon both sentences when the sentence is concurrent. If the concurrent sentences are not of the same statutory minimum and maximum, he is entered upon the longer sentence of the two. When the sentences are consecutive, he is entered upon both sentences.
>
> Transfers to the Penitentiary have been made in accordance with Opinion 5745—
>
> (a) Upon the prisoner being received on a second sentence;
> (b) Upon recommission while on parole;
> (c) With two or more consecutive or concurrent sentences,

the second placing the prisoner in the category of men previously having been convicted of crime.

Opinion 1317 appears to direct that when the second sentence is to run concurrently with the first and the two sentences are of unequal duration, the prisoner must be considered as serving the first sentence, and is a subject to transfer only upon completing or being released by the Board of Parole on the first and when beginning on the second. And that in consecutive sentences the prisoner shall complete service on the first conviction before becoming subject to transfer to the Ohio Penitentiary.

Will you please advise us definitely on these questions."

It is noted that you do not correctly quote the first branch of the syllabus of Opinion No. 1317, Opinions Attorney General, 1937, Vol. III, p. 2249, the word "not", emphasized and placed in parenthesis in the above copy of your request, having been omitted. And it is assumed that when you refer to Opinion No. 5745, you refer to the opinion of June 25, 1936, Opinions of Attorney General, 1936, page 915.

Sections 2131, 2140 and 2210-2, General Code, respectively read as follows:

Sec. 2131:

"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."

Sec. 2140:

"The Ohio board of administration, with the written consent of the governor, may transfer to the penitentiary a prisoner, who, subsequent to his committal, shall be shown to have been more than thirty years of age at the time of his conviction or to have been previously convicted of crime. The Ohio board of administration may so transfer an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution."

Sec. 2210-1:

"If through oversight or otherwise, a prisoner is sentenced to * * * the Ohio state reformatory who is not legally eligible for admission thereto, the * * * superintendent of said institution shall receive said prisoner and shall forthwith recommend to the department of public welfare, the transfer of said prisoner to the proper institution. * * *"

In connection with the above two sections, your attention is further directed to Section 2210-3, General Code, which reads:

"Any prisoner legally sentenced or committed to a penal or reformatory institution may be transferred therefrom to another such institution but he shall continue to be subject to the same conditions as to term of sentence, diminution of sentence and parole as if confined in the institution to which he was originally sentenced or committed."

By the terms of Section 154-57, General Code, it is provided, among other things not necessary here to be noticed, that:

"The department of public welfare shall have all powers and perform all duties vested in or imposed upon the Ohio board of administration and the fiscal supervisor thereof, excepting the control of the state school for the deaf, and the state school for the blind, by this chapter transferred to the department of education as a division thereof; and excepting the power to purchase supplies for the support and maintenance of state institutions provided for in section 1849 of the General Code, by this chapter transferred to the department of finance; * * * Wherever powers are conferred or duties imposed by law upon the boards and officers mentioned in this section such powers and duties, excepting as aforesaid, shall be construed as vested in the department of public welfare.
* * *."

In 37 O. Jur., 514, it is said as follows:

"The right of the courts to interpret a duly enacted statute is based upon some apparent uncertainty of meaning, some apparent ambiguity of terms, or some apparent conflict of provisions. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. To interpret what is already plain is not interpretation, but legis-

lation, which is not the function of the courts, but of the general assembly. Some statutes, it has been declared, are so clear that an attempt to make them clearer is a vain labor and tends only to obscurity. An unambiguous statute is to be applied, not interpreted. * * *."

Because of the express and clear provisions of the sections of the General Code, above quoted, and from the context of your request, it is assumed that your one question is: Is a prisoner, who has been at the same time sentenced to the Ohio State Reformatory to serve either consecutive sentences or to serve concurrent sentences, one of which concurrent sentences is for a longer period of time than the other, at the expiration of the first consecutive sentence or of the lesser concurrent sentence a person who is "shown * * * to have been previously convicted of crime," within the meaning of Section 2140, supra?

At the outset it should be remembered that penal statutes must be strictly construed and that to bring into play the application of such statutes the person affected thereby must come within both the letter and spirit of the statute. The rule here applicable is quaintly but well stated in Potter's Dwarris on Statutes and Constitutions, at pages 245 and 247:

"Penal statutes receive a strict interpretation. The general words of a penal statute shall be restrained, for the benefit of him against whom the penalty is inflicted.

* * * * * * * * *

* * * while if the law be, that for a certain offence a man shall lose his right hand, and the offender hath had his right hand before cut off in the wars, he shall not lose his left hand, but the crime shall pass without the punishment which the law assigned, than the letter of the law shall be extended.

A penal law then, shall not be extended by equity; that is, things which do not come within the words, shall not be brought within it, by construction. The law of England does not allow of constructive offences, or of arbitrary punishments. No man incurs a penalty unless the act which subjects him to it, is clearly both within the spirit and the letter of the statute imposing such penalty. 'If these rules are violated,' said Best, C. J., in the case of Fletcher v. Lord Sondes, 'the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws.'"

And in the footnote on page 245, it is said:

"And a further rule is, that an offender who is protected by its letter, cannot be deprived of its benefit on the ground that

his case is not within its spirit. U. S. v. Ragsdale, Kemp. R. 497."

See Black on Interpretation of Laws, pp. 451 et seq.

That the above rule of strict construction applies where a statute authorizes a more severe punishment to be inflicted upon one convicted of a second or subsequent offense, has been repeatedly said by writers of texts upon the law and many times held by the courts. See 16 C. J., 1339, and case notes in 52 A. L. R., 20, 30, and 82 A. L. R., 345, 353. The text of Corpus Juris reads as follows:

"A statute authorizing a more severe punishment to be inflicted upon one convicted of a second or subsequent offense is highly penal, and should not be extended in its application to cases which do not by the strictest construction come under its provisions."

In the case of United States v. Lindquist, et al., 285 Fed., 447 (D. C. Wash.; 1921), it was said as follows at page 448:

"A statute providing for severer punishment on conviction for second offense is highly penal, and must be strictly construed. 16 Corp. Juris., 1339; 25 R. C. L., p. 1081 * * *."

The 4th headnote in the case of Cavassa v. Off., et al., 206 Cal., 307, 274 Pac., 523 (1929), reads as follows:

"The provisions of section 12 of the Pharmacy Act providing for a cancellation of a pharmacist's license upon his third conviction of a violation of said act, is highly and strictly penal in its nature and should therefore, receive a strict construction."

It has been many times laid down that this rule of strict construction requires that before a heavier penalty may be inflicted for the commission of a second or subsequent offense, there must not only be a prior commission of an offense but a conviction thereof. In Potter's Dwarris on Statutes and Constitutions, it is said as follows at page 253:

"Where a statute (as Westm. 2, cap. 47) says offenders shall be punished for the first trespass, in a given manner, (there, by burning their nets,) this ought to be by indictment at the suit of the King, and the punishment cannot be inflicted upon the delinquent, before, upon due conviction *secundum legem et consuctudinem Angline,* judgment is given. And where there are

degrees of punishment inflicted in an increasing *ratio,* for the first, second and third offences, there must be several convictions and judgments given upon legal proceeding for each offence, and an offender cannot be convicted of the third before he is convicted of the second, or of the second before he is convicted of the first. For though 'ex *frequenti delicto augetur poena,'* yet *quod non apparet, non est,* in law; *et non apparet judicialier, ante judicium."*

In his classic Commentaries on the Law of Statutory Crimes, Professor Joel Prentiss Bishop says as follows at page 157:

"So it is a general proposition, that, whenever a statute makes the second offense a felony, the first being a misdemeanor; or punishes the second more heavily than the first,—this must be enlarged to mean, after a *conviction* for the first, and not merely after it is committed."

See also in this connection the case notes in 58 A. L. R. 20, 40, and 82 A. L. R., 345, 358, supra. In the first of these case notes it is said at pp. 40 and 41 as follows:

"In construing many of the statutes enhancing the penalty for a second or subsequent offense, the court have held a previous conviction to be essential."

* * * * * * * *

"Moreover, as a general rule under these statutes, it is a prerequisite to an enhancement of the penalty, that the prior conviction precede the commission of the principal offense."

To sustain the text, among others the Ohio cases of Carey v. State, 70 O. S., 121 (1904), and Columbus v. Carson, 23 O. App., 299, 155 N. E., 498 (1927), are cited.

The second branch of the syllabus in the Carey case reads as follows:

"The term 'offense,' as used in the last named section (4364-20b, Revised Statutes) is the equivalent of conviction. Hence an affidavit for prosecution under said act which charges three separate sales to different persons on the same day, but does not allege a previous conviction, is in legal effect a charge of a first offense only, and the party so charged is not entitled to be tried by a jury." (Words in parenthesis ours.)

At page 124 of the opinion it was said:

"* * * The manifest purpose is to increase the penalty for offenses after the first because the party has persisted in violating

the law. With this purpose in mind it seems clear that the term 'second offense' means second conviction. * * *"

See also Staniforth v. State, 24 O. A., 209, 156 N. E., 924 (1927).

In the case of Biddle, Warden, vs. Thiele, 11 Fed. (2nd), 235 (C. C. of A., 8th; 1926), it was said at page 236 of the opinion:

"* * * Under this act, in order to constitute a second offense, there must be a commission and a conviction of a first offense and subsequently thereto the commission of the second offense, and, in order to constitute a third or subsequent offense, there must be a commission and a conviction of a first offense and subsequently thereto a commission and a conviction of a second offense, and subsequently thereto a commission of the third offense; in other words, the subsequent offenses must follow, not only previous commission, but also previous conviction. * * * Sincer v. U. S. (C. C. A. 3), 278 F., 415; Massey v. U. S. (C. C. A. 8), 281 F., 293."

Another case, and one that is squarely in point, is that of State of Washington, ex rel. v. Simpson, as Judge, 152 Wash., p. 389; 277 Pac., 998 (1929), in which the headnote reads as follows:

"Simultaneous convictions on two counts for offenses against the liquor laws committed simultaneously * * * constitute but one conviction for the 'first time' within the meaning of Rem. Comp. Stat. § 7339, providing increased punishment for persons 'convicted the second time,' and making it felony if 'convicted the third time.'

At page 392 of the opinion, it was said as follows:

"This view of the law is in harmony with the rule of strict construction universally applicable to statutes of this nature. The courts should not impute to the legislature the intent to make simultaneous convictions upon separate counts in one information charging simultaneous acts constituting separate misdemeanors in law, other than one conviction for the purpose of raising a single subsequent conviction to the degree of felony, unless such intent is expressed in unmistakable language. We do not think there is any such clear legislative intent expressed in this statute."

In considering your question, it should at all times be kept in mind that the Ohio State Reformatory was established for the purpose of

affording a place where young offenders who were first offenders might be given an opportunity to reform, and, on their parole or discharge from the Reformatory, take their place in society as law abiding citizens. Many persons, young and old, commit crimes for which they are never convicted, and oftimes not even tried. It seems to me that the plain theory of the law is, that if an offender, even though he be a youthful offender, has once been convicted of a felony and committed to the Ohio State Reformatory and, after his parole or release therefrom, again engages in felonious conduct, such subsequent crime is to be accepted as a demonstration by the felon that he is incapable of or at least recalcitrant toward reformation, especially in view of his failure to profit from the fact that he was once before *convicted* and had had extended to him such help as the reformatory might give. On the other hand, where a person is convicted of or pleads guilty to two or more felonies and is sentenced on the same day, such person obviously has not had the advantage of the help and benefits attempted to be extended at the Reformatory. This concept is in keeping with the oft repeated statement as to the object of punishment in criminal cases contained in the argument of Daniel Webster in the famous trial of John Francis Knapp for the murder of Joseph White. (See Writings and Speeches of Daniel Webster, Vol. II, p. 69). Mr. Webster said as follows:

> "The criminal law is not founded in a principle of vengeance. It does not punish that it may inflict suffering. The humanity of the law feels and regrets every pain it causes, every hour of restraint it imposes, and more deeply still every life it forfeits. But it uses evil as the means of preventing greater evil. It seeks to deter from crime by the example of punishment. This is its true, and only true main object. It restrains the liberty of the few offenders, that the many who do not offend may enjoy their liberty. It takes the life of the murderer, that other murders may not be committed. The law might open the jails, and at once set free all persons accused of offences, and it ought to do so if it could be made certain that no other offences would hereafter be committed; because it punishes, not to satisfy any desire to inflict pain, but simply to prevent the repetition of crimes. * * *"

Touching this question as to the object of punishment in criminal cases, it is said as follows in 15 Am. Jur., p. 155:

> "According to the more enlightened thought, the holdings and decisions of courts and the teachings of penologists, the humane rule has been adopted that the infliction of penalties for violations of the criminal laws is to be considered as in no sense

a punishment, but rather as the reformation of the wayward and the protection of society. The spirit of vengeance has departed from criminal procedure. In other words, the great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind."

It is, of course, obvious that these views are consistent with the third and fourth branches of the syllabus of Opinion No. 5745, rendered June 25, 1936, to the Director of Public Welfare referred to in your letter, which read:

"3. A parolee, who while out on parole has been convicted and sentenced for the commission of another penal offense and sentenced to the Ohio Reformatory should be transferred to the Ohio Penitentiary by the Department of Public Welfare as provided by Sections 2140 and 2210-2, General Code.

4. Where the Board of Parole, for the violation of a parole, orders the recommitment of the parole violator to the institution from which the prisoner was paroled, such order of the board cannot interfere with or suspend the execution of a sentence imposed by a court on the parole violator for an offense committed by him while on parole even though by virtue of Section 2211-9, General Code, the Board of Parole has the power on the revocation of a parole to recommit the prisoner to the institution from which he was paroled. (Fourth paragraph of the syllabus of Opinions of the Attorney General for 1933, Vol. II, p. 1273, approved and followed.)"

Manifestly a parolee has not only received such aid as can be given at the Ohio State Reformatory, but has in addition obtained whatever advantages our parole system confers. I concur with my predecessor in Opinion 5745.

In passing, it might be pointed out that the conclusions herein reached can offer no serious problem in so far as the operation of the Ohio State Reformatory is concerned, because under the terms of Section 2140, supra, the Department of Public Welfare is authorized to "transfer an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well being of the institution."

In view of the foregoing and for the reasons stated, it is my opinion that:

1. Where a parolee from a state penal or reformatory institution is convicted of a second or subsequent felony committed while out on parole and is sentenced to the Ohio State Reformatory, such prisoner

should be transferred to the Ohio Penitentiary by the Department of Public Welfare, under authority of and in accordance with the provisions of Sections 2140 and 2210-2 of the General Code. (Opinion No. 5745, Opinions, Attorney General, 1936, approved and followed.)

2. Where a prisoner is simultaneously convicted of and sentenced on two or more felonies, such person is in the eyes of the law a first offender and is not a prisoner who has been previously convicted of crime. Under the statutes of Ohio, including Sections 2131, 2140 and 2210-2, such a convict should, therefore, if otherwise eligible, be sentenced to the Ohio State Reformatory to serve both or all the sentences imposed upon him, regardless of whether or not the trial court orders that such sentences shall be served concurrently or shall run consecutively and regardless of whether or not the sentences, if they are to be served concurrently, are for the same length of time. (Branches 1 and 3 of the syllabus of Opinion 1317, Opinions Attorney General, 1937, Volume III, p. 2249, overruled.)

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1578.

WATERWORKS — MUNICIPALITY — CHARTER CITY OR OTHERWISE—UNDER SECTION 3982-1, G. C., MUNICIPALLY OWNED WATER PLANT MAY PROVIDE WATER FOR MUNICIPAL PURPOSES WITHOUT MAKING CHARGE—EXCEPTION, PROVISION IN BOND OR NOTE INDENTURE WHICH WOULD VIOLATE VESTED PROPERTY RIGHT—OPINIONS ATTORNEY GENERAL 1938, VOLUME III, PAGE 2263, OVERRULED—SECTIONS 2302-18, 82, ORDINANCES, CITY OF CLEVELAND—COMMISSIONER OF WATER—AUTHORITY TO MAKE ADJUSTMENT OF CHARGES TO CUSTOMERS, IN CASE OF LEAKAGE—DEPARTMENT OF LAW NOT AUTHORIZED TO COMPROMISE CHARGES.

SYLLABUS:

1. A municipality, whether a charter city or otherwise, may, under authority of Section 3982-1, General Code, in the operation of its municipally owned water plant, provide water for the municipal purposes of such municipality without making any charge to the respective department therefor, unless there is some provision in a bond or note indenture which would cause such method of conduct to violate a vested property right. (Opinions Attorney General, 1938, Volume III, page 2263, overruled.)