221.

PAROLE—MINIMUM TERM OF IMPRISONMENT—PRISONER IN OHIO PENITENTIARY—JURISDICTION, OHIO BOARD OF CLEMENCY—TRIAL COURT.

SYLLABUS:

1. *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.*

2. *Where, therefore, the trial court fails to fix the minimum period of duration of the sentence imposed, as required by Section 2166, General Code, or where the trial court through oversight or otherwise imposes a sentence for a definite term, a prisoner so serving in the Ohio penitentiary is eligible for parole when he shall have served the minimum term provided by the statute defining the crime of which such prisoner was convicted.*

COLUMBUS, OHIO, March 22, 1927.

HON. P. E. THOMAS, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which reads as follows:

"I am asking you for a ruling on the following case as a specific one, which ruling will enable its application to similar cases.

David Earl Siler, serial number 54199, was received at the Ohio Penitentiary April 25, 1925, under a sentence of five to ten years for the crime of embezzlement. Can he be paroled at the present time, and serve the balance of the five years on parole before being *released* by the Ohio Board of Clemency? The sentencing judge makes the following statement:

'David Earl Siler, an insurance agent, was indicted about a year ago, for embezzling insurance premiums totaling about thirteen hundred dollars. He was given an opportunity in May of last year to reimburse the prosecuting witnesses, but failed to keep his promise, hence the sentence to the Ohio Penitentiary.

I believe that the minimum sentence of one year is sufficient.'

Section 2166, General Code, provides that:

'Courts imposing sentence to the Ohio Penitentiary for felonies, * * * shall make them general, but they shall fix, within the limits prescribed by law, a *minimum period of duration of such sentences.* All terms of imprisonment of persons in the Ohio Penitantiary may be *terminated* by the Ohio Board of Administration, as authorized by this chapter, 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 fixed by the Court for such felony.'

Attorney General Denman held that a prisoner on *parole* was in the legal custody of an institution, though not in actual custody. This opinion was based on interpretation of Sections 2169 and 2170.

'*Section* 2169. The Ohio Board of Administration shall establish rules and regulations by which a prisoner * * * having served a *minimum term provided by law for the crime for which he was convicted* * * * may be allowed to go *upon parole* outside the building and inclosure of the penitentiary * * *. 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.'

'*Section* 2170. All prisoners on parole shall remain in the *legal custody* or *under the control of the* board of managers and *subject to be taken back within the inclosure of the penitentiary.*'

Attorney General Price held as follows in an opinion to the Ohio State Reformatory, under date of December 22, 1921:

'Section 2132, General Code, says:

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 imprisonment shall not exceed the maximum term, nor be *less than the minimum* term provided by the law for such felony.

Section 2132, General Code, operates, it will be observed, only to prevent the *termination of the term of imprisonment* sooner than the minimum fixed by law. It does not prevent the granting of a parole sooner than the expiration of the minimum fixed by law, *for a parole does not end the term of imprisonment*; parole merely allows the prisoner to go outside of the prison walls—or as section 2141, General Code, says, to go in *"legal custody"* * * * *subject to be taken back into the inclosure of the reformatory.*

Accordingly, it would appear that persons committed to your institution for the offense in question may be *paroled* before the minimum of five years has been served in the institution, but that they cannot be *finally released* (except by the pardoning power) before the expiration of the five year minimum.'

From the foregoing, it would appear that prisoners who have served three years within the Ohio Penitentiary, and two years on parole, outside the walls, he has served a period of five years as a prisoner. Thus, David Earl Siler could be paroled at the end of two years and serve three years on parole, or, as stated in 'legal custody'. He would have served a total of five years and would then be eligible to be released by the Ohio Board of Clemency as provided by law, and your recent decision.

Under the old Determinate Sentence Law, a prisoner sentenced to five years could be released, by good behavior, at the end of forty months, twenty months being allowed off by the so-called 'good time' statute. He also could have been paroled at the end of the statutory minimum term of one year and would then have to serve the balance of the term of forty months on parole, unless pardoned by the Governor. In other words, he would serve the term fixed by the Court. Judge M. of the * * * Court, once told me that when he was Judge of the * * * Court of * * * county, he made the sentences long, that the prisoner might have the benefit of a longer parole. It seems there are a number of cases in which the sentencing judge expects paroles to be granted. I could cite you a number of them where such recommendations are made, but I will give you what I would call an outstanding case, as follows:

Evan Gillam, serial No. 55527, was received April 10, 1926, from Hamilton county, for the crime of 'Shooting to Kill', and sentenced to fifteen years minimum and twenty years maximum, by the trial judge. On April 29, 1926, judge H. wrote me as follows:

'This defendant should be shown some consideration at the earliest possible moment. He has had no previous record and there was some element of justification in the shooting.'

I quite agree with your opinion relative to the authority of the Board of

Clemency to release a prisoner under sentence to the Ohio Penitentiary until he shall have served the minimum of such sentence fixed by the court under section 2166 of the General Code; and I know of no case where the release has taken place before that time. But, the question arises, is a parole a release. I am contending that it is not a release, but only a condition of servitude, and that the release comes at the end of a parole, if the same is granted."

The specific question that you present is whether or not an inmate of the Ohio Penitentiary, convicted of the crime of embezzlement and who is serving under a general sentence, the minimum period of duration of which sentence as fixed by the trial court is five years, may, after serving two years of such sentence be allowed by the board of clemency, to go upon parole outside of the building and inclosure of the penitentiary, and serve the balance of his sentence upon parole.

The answer to your question is found in Sections 2166 and 2169 of the General Code, which read as follows:

"Sec. 2166. Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general, *but they shall fix, within the limits prescribed by law, a minimum period of duration of such sentences.* All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration, as authorized by this chapter, but no such terms shall exceed the maximum term provided by law for the felony of which the prisoner was convicted, *nor be less then the minimum term fixed by the court 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 oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter and receive the benefits thereof, as if he had not been sentenced in the manner required by this section." (Italics the writer's).

"Sec. 2169. 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." (Italics the writer's.)

By section 92, General Code, it is provided that the Ohio Board of Clemency

"shall supersede and perform all of the duties now conferred by law upon the Ohio board of administration with relation to the release, parole and probation of persons confined in or under sentence to the penal or reformatory institutions of Ohio; and thereafter the said Ohio board of clemency, shall be vested with and assume and exercise all powers and duties in all matters connected with the release, parole or probation of persons confined in or under

sentence to the penal institutions of Ohio now cast by law upon the said Ohio board of administration."

It is unnecessary here to state that the object of all statutory construction and interpretation is to ascertain the intent and purpose of the law making authority. In the instant case it must be determined what the legislature of Ohio intended when it provided in section 2166, supra, that

"* * * All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration, *as authorized by this chapter*, (General Code, sections 2155 to 2207, inclusive) *but no such terms shall * * * be less than the minimum term fixed by the court for such felony * * *,*"

that is, what is the nature of the *term of imprisonment* that cannot be terminated until the prisoner shall have served the minimum term fixed by the court?

Even if the section under consideration did not expressly refer to the other pertinent sections contained in the same chapter, since sections 2160 and 2169 relate to the same subject and are statutes *in pari materia*, they must be construed together.

Section 2160, General Code, reads as follows:

"The board of managers shall provide for the conditional or absolute release of prisoners under a general sentence of imprisonment, and their arrest and return to custody within the penitentiary. A prisoner shall not be released, conditionally or absolutely, unless, in the judgment of the managers, there are reasonable grounds to believe that his release is not incompatible with the welfare of society. A petition or application for the release of a prisoner shall not be entertained by the board. A prisoner under general sentence to the penitentiary shall not be released therefrom until he has served the minimum term provided by law for the crime of which he was convicted; and he shall not be *kept in the penitentiary* beyond the maximum term provided by law for such offense."

While it might be urged that this section has no application to prisoners sentenced to the penitentiary since the repeal of Revised Statute 7386-6, supra, (see *Francis* vs. *State*, 4 O. A. 465) in view of the fact that it was a part of the General Code at the time of the enactment of Section 2166, supra, and especially since it is contained in the same chapter as that section it may be presumed that the legislature had knowledge of the terms of section 2160 when it passed section 2166 and used the phrase "term of imprisonment" in the latter section to mean the same thing as it does in section 2160. What is meant by this term is clearly shown by the last sentence of such section which reads:

"A prisoner under general sentence to the penitentiary shall not be released therefrom until he has served the minimum *term* provided by law for the crime of which he was convicted; and he shall not be *kept in the penitentiary* beyond the maximum term provided by law for such offense."

From this it is plain that the antithesis of being "released" is being *"kept in the penitentiary,"* and that in so far as the sections under consideration are concerned *"imprisonment"* and being *"kept in the penitentiary"* mean one and the same thing. The same opposing ideas are contained in section 2169, supra, where it is provided that a prisoner "having served a minimum *term* (of imprisonment) provided by law for the crime for which he was convicted * * * may be allowed to go upon *parole outside the building and inclosure of the penitentiary.*" From the plain wording of these

two sections, it is apparent that a prisoner in the Ohio penitentiary may be in one status or another. He may be "kept in the penitentiary" or serving a "term" of imprisonment on the one hand, or he may be "released" or "allowed to go upon parole outside the building and inclosure of the penitentiary," on the other.

It will be observed that when reenacting Section 2166, supra, the legislature employed the phrase "terms of imprisonment" and in this section used the same words as are contained in Sections 2160 and 2169, viz.: "minimum term" and "maximum term."

The legislative history of Section 2166 is of great significance.

It was provided in Section 7388-6 of the Revised Statutes, that:

> "Every sentence to the penitentiary of a person hereafter convicted of a felony * * * may be, if the court having said case thinks it right and proper, a general sentence of imprisonment in the penitentiary. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board of managers, as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted and sentenced; *and no such prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime of which he was convicted.* * * * " (Italics the writer's).

As stated in the opinion of Judge Allread, in the case of *Francis* vs. *State*, 4 Ohio App. 465, at page 466:

> "Section 7388-6 R. S. gave discretionary authority to the court to enter an indeterminate sentence. This statute, however, appears to have been repealed by the General Code."

On March 24, 1884, (81 O. L. 72) the legislature passed an act entitled:

> "An act relating to the imprisonment of convicts in the Ohio penitentiary, and the employment, government and release of such convicts by the board of managers."

Section 5 thereof (Section 2166, General Code) reads as follows:

> "Every sentence to the institution of a person hereafter convicted of a felony * * * shall be, if the court having said case thinks it right and proper to do so, a general sentence of imprisonment in the penitentiary. The term of such imprisonment of any person so convicted and sentenced, may be terminated by the board of managers as authorized by this act, but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which the prisoner was convicted."

On April 14, 1884, (81 O. L. 186) the legislature amended this section to read as follows:

> "Every sentence to the penitentiary of a person hereafter convicted of a felony * * * may be, if the court having said case thinks it right and proper, a general sentence of imprisonment in the penitentiary. The term of such imprisonment of any person so convicted and sentenced may be

terminated by the board of managers, as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted and sentenced; and no such prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime of which he was convicted."

On April 11, 1890, (87 O. L. 164) the legislature again amended this section without changing the wording but adding a provision relative to persons sentenced for two or more separate offenses.

On February 13, 1913, (103 O. L. 29) the legislature passed an act entitled:

"An act to provide for indeterminate penitentiary sentences and to repeal Section 2166 of the General Code."

This act read in part as follows:

"* * * Sec. 2166. Courts imposing sentence 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 by the Ohio Board of Administration as authorized by this chapter, but no such terms shall exceed the maximum, nor be less than the minimum term provided by law for the felony of which the prisoner was convicted. 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 oversight or otherwise, a sentence to the Ohio penitentiary, should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter, and receive the benefits thereof, as if he had been sentenced in the manner required by this section.

Sec. 2. That original section 2166 of the General Code is hereby repealed."

On March 15, 1921, (109 O. L. 64) the legislature again amended section 2166, supra, so as to read as it now appears in the General Code, Section 2 of the act in which it was passed reading:

"That said original Section 2166 of the General Code and all laws or parts of laws inconsistent with this act be, and the same are hereby repealed."

It is a well settled rule of construction that;

"When an existing statute is repealed and a new and different statute upon the same subject is enacted, it is presumed that the legislature intended to change the effect and operation of the law to the extent of the change in the language thereof." *Board of Education* vs. *Boehm, et al.*, 102 O. S. 292.

In view of the drastic changes made in Section 2166 in 1921, it is obvious that the legislature intended to change the effect and operation of such statute. In determining what the legislature intended in effecting the changes made it is entirely proper to look to the mischief sought to be remedied. As stated by Sutherland at page 375 of his work on Statutory Construction:

"Where the meaning of a statute or any statutory provision is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention; and among them are some extraneous facts. *The object sought to be accomplished exercises a potent influence in determining the meaning* of not only the principal but also the minor provisions of a statute. *To ascertain it fully the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment.* * * *"

36 Cyc. 1110, states the rule as follows:

"Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended. * * *"

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

In your letter above set forth you refer to and quote at length "an opinion to the Ohio State Reformatory, under date of December 22, 1921." No such an opinion is reported in the Opinions of the Attorney General for 1921, and your quotation is from a letter of Attorney General Price addressed to the record clerk of the Ohio Reformatory under the date named.

In so far as this letter is concerned it is sufficient to point out that the sections of the General Code cited therein and the interpretation placed thereon relate *exclusively* to the Ohio State Reformatory at Mansfield, and *not* to the Ohio Penitentiary.

Section 2132, quoted in your letter, together with Section 2133, General Code, is analogous to Section 2166, supra. And while Section 2141, General Code, authorizes the parole of prisoners confined in the Ohio State Reformatory, Section 2169, supra, makes provision for the parole of prisoners confined in the Ohio Penitentiary. That the provisions of these two sections are entirely different is obvious.

Section 2141, General Code, 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."

By this section the Ohio Board of Administration, (now the Board of Clemency) is given power to establish rules and regulations under which prisoners in the reformatory may be allowed to go upon parole in legal custody under control of the board and subject to be taken back into the inclosure of the reformatory. *The only limitation* upon the board's power to parole is that "a prisoner shall not be eligible for 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."

Much different are the limitations contained in Section 2169, supra, relating to the Ohio Penitentiary. In this section the board is authorized to establish rules and regulations by which a prisoner not under sentence for treason or first or second degree murder *"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."*

This language is plain and unambiguous. No authority whatever is given to the board to establish rules for allowing the *parole* of prisoners *outside the building and inclosure of the penitentiary*, except those who have *served the minimum term provided by law*, the statute further providing that in the case of prisoners under sentence for murder in the second degree, such prisoners are not eligible for parole until they have served ten full years.

At the time of the enactment of Section 2169, supra, "the minimum term provided by law" was the various minimums fixed by the statutes defining the different crimes. For example, in the case of embezzlement the statute provided that:

> "* * * if the total value of the property embezzled in the same continuous employment or term of office, whether embezzled at one time or at different times within three years prior to the inception of the prosecution is thirty-five dollars or more, shall be imprisoned in the penitentiary *not less than one year* nor more than ten years * * *." (*Section* 12467, General Code).

In such a case by the plain terms of Section 2169, a prisoner under penitentiary sentence for embezzlement would not be eligible for parole outside the building and inclosure of the penitentiary until he had served the minimum period of one year as fixed by the statute above quoted in part.

This was the state of the law when Section 2166 was amended on March 15, 1921. The changes made in Section 2166 so far as pertinent to this discussion were as follows:

That part of the first sentence providing that courts imposing sentences to the Ohio Penitentiary for felonies shall make them general *"and not fixed or limited in their duration"* was omitted, the law as amended providing that *"but they* (the courts) *shall fix within the limits prescribed by law, a minimum period of duration of such sentences."* Before amendment the second sentence of the section provided that all terms of imprisonment might be terminated by the Ohio Board of Administration but that no such term should exceed the maximum *"nor be less than the minimum term provided by law for the felony of which the prisoner was convicted."* The law as amended provides that "no such term 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."*

In opinion Number 149, Opinions of the Attorney General for 1927, to which you also refer in your letter, this department held that:

> "1. Under the provisions of Section 2166, General Code, it is mandatory that the trial court when imposing sentences, except for treason and murder

in the first degree, fix a minimum period of duration of sentence within the limits prescribed by the statute fixing the penalty for such crime."

It being the positive duty of the trial court to fix the minimum period of duration of the sentence to imprisonment imposed upon a prisoner, *that minimum so fixed is "the minimum term provided by law,"* as that phrase is used in section 2169. In order that there might be no doubt upon the question, however, the legislature specifically provided in Section 2166, that no term of imprisonment, to be terminated by the board of administration, under the provisions of Section 2169, should "be *less than the minimum term fixed by the court for such felony.*" That is to say, under the plain and express terms of the two sections in question, which are *in pari materia* and must be construed together, in so far as the Ohio penitentiary is concerned, the board of administration, or its successor, the board of clemency, is utterly without authority to establish rules and regulations by which a prisoner, who has not served the *minimum term* fixed by the trial court, *"may be allowed to go upon parole outside the building and inclosure of the penitentiary."*

In passing it is proper to observe that in making the distinction above pointed out between the Ohio State Reformatory and the Ohio Penitentiary, the legislature probably had in mind the fact that the institution first named is a reform school, where youths of from sixteen to thirty years of age with no known previous convictions of felonies are received, while the penitentiary is a prison for convicts.

The question here decided has never been squarely passed upon by any of the courts of Ohio. However, in at least two reported cases it is clearly indicated that the conclusions herein reached are correct. The first case is the recent case of *Luff* vs. *State,* 113 O. S. 379 (1925). Luff was tried and found guilty of embezzlement in October, 1923. The offense was committed between January 1, 1919, and May 5, 1919. At that time Section 2166 provided that all terms of imprisonment of persons in the Ohio Penitentiary might be terminated by the Ohio board of administration, but no such terms should be less than the minimum term provided by law for the felony of which the prisoner was convicted. The section as above pointed out, was repealed and amended in 1921, almost two years after the offense was committed. The question arose as to the right of one convicted of a criminal offense to be sentenced under the law as it existed at the time of the commission of the alleged offense or as subsequently amended but before sentence. The court held in the second part of the syllabus:

"A sentence under an indeterminate sentence law, *which may have the effect of increasing the minimum punishment* beyond what might have been inflicted under the original statute, which the amended statute supersedes, should be set aside, and the accused resentenced under the statute as it existed at the time of the commission of the offense."

In the case of *Dennison* vs. *State of Ohio,* 32 O. C. A. 317 (1922), the court in holding:

"The amendment of Section 2166, General Code, giving to courts sitting in criminal cases authority to fix, within the limits prescribed by law, a minimum period of duration of the sentence pronounced, does not apply to pending prosecutions or to offenses committed prior to adoption of the amendment, which went into effect July 3, 1921."

said as follows at page 318:

"Prior to this amendment, the section provided that sentence could only be imposed for an indeterminate period of not less than the minimum, nor

more than the maximum limit provided by law. If the amendment applies to offenses committed and proceedings thereon pending at the time it went into effect, *then the court was authorized to fix a minimum period of imprisonment in imposing sentence.* If an amendment does not apply to offenses committed before the amendment became effective and pending cases, then he had no such authority." (Italics the writer's).

I note that in your letter you state that "Attorney General Denman held that a prisoner on parole was in the legal custody of an institution, though not in actual custody." There is no question as to the soundness of this statement of the law, but I am unable to see that it in any way affects the question herein decided.

I also note that in the letter above set forth and in your letter of March 10th, 1927, you cite cases of trial judges publicly imposing minimum terms of imprisonment of long duration, and by private correspondence recommending parole before the expiration of such minimum term. Such a course seems to me to be indefensible. It is unnecessary to point out that a court speaks by its record, and not by private correspondence.

In conclusion, since Sections 2160, 2166 and 2169, supra, are *in pari materia* and must be construed together; since from the plain import of Sections 2160 and 2169, the antithesis of release or parole is confinement in the penitentiary; since the legislature used the same words in enacting Section 2166 as are contained in Sections 2160 and 2169, viz.: "minimum term" and "maximum term"; in view of the legislative history of Section 2166 and the mischief sought to be remedied by the amendment in 1921; in view of the obvious differences of the analogous sections of the General Code relating to the Ohio Reformatory and lastly, because of the plain and unambiguous language of the statutes under consideration, having due regard for the opinions of the courts above cited, I am of the opinion that 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.

In the specific case that you present, David Siler may not be released or allowed to go upon parole outside the building and inclosure of the penitentiary until and after he shall have served therein the minimum term of imprisonment fixed by the trial court, to wit: five years.

It is pointed out that this opinion innowise disagrees with or departs from the holding of my predecessor in the opinion rendered to you under date of May 7, 1924, (Opinions of the Attorney General for 1924, page 222) in which it was held as follows:

"A sentence of 'not less than seven years', when such term is the maximum provided by law, is a general sentence as provided by Section 2165.

A prisoner under a general sentence is eligible to parole when he has served the minimum term provided by statute."

Where, therefore, the trial court fails to fix the minimum period of duration of the sentence imposed, as required by Section 2166, General Code, or where the trial court through oversight or otherwise imposes a sentence for a definite term, a prisoner so serving in the Ohio penitentiary is eligible for parole when he shall have served the minimum term provided by the statute defining the crime for which such prisoner was convicted.

Respectfully,
EDWARD C. TURNER,
Attorney General.