pensation in addition to that paid by the health district in the event the board of education delegates the duties and powers of a school physician and nurse to the board of health of the city health district.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1402.

BOARD OF PAROLE—MAY REVOKE PAROLE AND RECOMMIT VIOLATOR THEREOF WHEN.

SYLLABUS:

1. *Whenever by the commission of a crime the terms of a parole are violated, the Board of Parole may revoke such parole and order the recommitment of the parole violator even though at the time of the revocation of the parole the parolee is incarcerated in a penal institution for the commission of a subsequent crime.*

2. *A prisoner who is sentenced to and incarcerated in the Ohio Penitentiary for the commission of a crime while out on parole from the Ohio State Reformatory may be declared a parole violator by the Board of Parole, in which event the board may either revoke the parole of the prisoner and order his recommitment to the Ohio State Reformatory on the expiration of the sentence to the Ohio Penitentiary or re-parole the prisoner or make such other disposition of the parolee as it sees fit, providing the Board of Parole does not exceed its authority.*

3. *The running of the sentence of a parolee who has violated the terms of his parole is not suspended or tolled until the Board of Parole declares such prisoner to be a parole violator. A person who is declared a parole violator by the Board of Parole because while on parole from the Ohio State Reformatory he has been convicted of a felony and sentenced therefor to the Ohio Penitentiary, must be deemed a parole violator on the records of the Ohio State Reformatory as long as he remains without the confines of that institution, even though his return to the Ohio State Reformatory is made impossible by virtue of his incarceration in the Ohio Penitentiary.*

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 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.*

COLUMBUS, OHIO, August 15, 1933.

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

DEAR SIR:—This will acknowledge your letter which reads in part as follows:

> "An inmate of the Ohio State Reformatory is paroled and while on parole commits another felony and is sentenced by the court to the Ohio Penitentiary.

Query: Assuming that the commission of a new crime constitutes in the eyes of the Board of Parole a violation of the conditions of the man's parole from the Ohio State Reformatory, shall such prisoner remain indefinitely on the rolls of the Ohio State Reformatory as a violator regardless of the duration of his Penitentiary sentence for the crime committed while on parole; or may the Board of Parole give him a final release from the Reformatory sentence because of his having been sentenced to a penal institution.

The Board requests also to be advised whether such a prisoner can be considered a parole violator on the records of the Reformatory when he is not returned to the Reformatory but is sent direct to the Penitentiary on a new sentence. This in view of the following provision contained in Section 2211-9:

'In the case of a determination of imprisonment, the prisoner shall be returned to the institution from which he was paroled.' "

Section 2211-9, General Code, provides:

"A paroled prisoner who in the judgment of the board has violated the conditions of his parole or pardon shall be declared a violator. In the case of an escaped prisoner or a prisoner who has been declared a violator, the time from the date of his escape or of his declared violation of parole or pardon to the date of his return shall not be counted as a part of time or sentence served. For violation of the conditions of a parole or pardon, any parole officer may arrest such violator, or, upon the order of any parole officer having custody or charge of such violator, any sheriff, probation officer, constable or police officer shall make the arrest. A person so arrested may be confined in the jail or detention home of the county in which he is arrested, until released, re-paroled or removed to the proper institution as provided by law. In the case of every such arrested parole violator, the board of parole shall determine whether such arrested person shall be released upon the same conditions or shall be imprisoned in a penal or reformatory institution. In the case of a determination of imprisonment, the prisoner shall be returned to the institution from which he was paroled. In the case of release or re-parole, the board of parole shall issue its order accordingly, and the prisoner shall be released or re-paroled in accordance with such order. In the case of every such arrested pardon violator, the board of parole shall transmit to the governor its recommendation concerning the revocation of the pardon or the conditions of a continuation of the pardon, and the governor shall determine whether the pardon shall be revoked and the prisoner returned to the institution in which he had been confined, or whether the pardon shall be renewed upon the original or different conditions, and he shall issue his order accordingly. The procedure for submitting such matters to the board of parole and the hearing and disposition thereof shall be governed by the rules and regulations adopted by such board. The provisions of law governing the prosecution and transportation of convicts shall apply to the apprehension and return of violators."

By virtue of the provisions of section 2211-9, the commission of a crime by

a parolee may be made a ground for the revocation of a parole by the Board of Parole. Whether a prisoner is to be deemed a parole violator is a matter to be determined by the Board of Parole. The legislature clearly intended by section 2211-9 to vest the board with power to determine when and for what causes paroles should be revoked. If the Board of Parole declares the parolee to be a violator, it can either order the recommitment of the prisoner to the original place of confinement or it can re-parole such person on the same terms or on any new terms that sees fit to impose. This power to recommit or re-parole exists even though the parole violator may be serving a sentence in a penal institution for an offense committed while out on parole. It must be borne in mind that there is no express statutory inhibition to the commitment of a parolee of the Ohio State Reformatory to a penal institution for an offense committed while out on parole since the repeal of section 2144 in 114 O. L. 593. Section 2144, prior to its repeal, read:

> "The superintendent shall enforce the rules and regulations relating to paroles, and may retake and reimprison a prisoner upon parole. His written order shall be sufficient warrant for officers named therein to arrest and return to actual custody a conditionally released or paroled prisoner. If the paroled prisoner is in the custody of an officer of the law, either under an order of arrest or by virtue of a conviction and sentence for a crime other than murder in the first degree, manslaughter, rape or arson, such order shall be a sufficient warrant to take such paroled prisoner into the custody of an officer of the reformatory. The officers named in such order shall arrest and return to custody a conditionally released or paroled prisoner. The Ohio board of administration may make rules and regulations necessary and proper for the employment, discipline, instruction, education, removal, temporary or conditional release and return of prisoners of the reformatory."

The power of the Board of Parole to revoke a parole and recommit the parolee who has violated his parole by reason of having committed another offense can be made to be effective upon the expiration of the sentence for the subsequent offense, inasmuch as the exercise of that power until asserted will not interfere in any wise with the serving of the subsequent sentence. It has been repeatedly held by the courts that a parole for one offense does not relieve a convict from serving a sentence under another conviction. 46 C. J. 1208; Ex Parte Daniels, 294 Pac. 735 (Cal.); Ex Parte Forbes, 292 Pac. 142 (Cal.), and *Hodge* vs. *Hallowell,* 199 N. W. 252 (Iowa).

No authority need be cited for the proposition that a prisoner on parole who commits a crime may be convicted and sentenced therefor even though such prisoner has not served out his first sentence either by constructive or actual imprisonment. In other words, the fact that a person who commits a crime is constructively serving a sentence while out on parole does not make that person immune from indictment, conviction and sentence for an offense committed while on parole. The Board of Parole is not precluded, upon the expiration of the sentence for the subsequent offense, from taking into custody such a person as a parole violator and ordering the prisoner to serve the balance of the first sentence where the commission of an offense was a violation of the terms of the parole. However, the revocation of the parole must be made before the expiration of the previous sentence.

As stated in Opinion No. 106 of the Opinions of the Attorney General for the year 1933:

> "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.)."

Incidentally, it has been held that the serving of a sentence for a crime committed while on parole is not a serving of the sentence under which the prisoner was paroled. In other words, the first sentence of the parole violator after his parole is revoked is not deemed as running concurrently with the serving of the sentence for the offense committed while out on parole, and the time served on the subsequent sentence is not credited on the previous sentence. *Ex Parte Forbes, supra; People, ex rel. Newton* vs. *Towmbly,* 126 N. E. 255 (N. Y.); *Sutton* vs. *Hallowell,* 199 N. W. 273 (Iowa).

It is also a well established rule of law in Ohio that where a person is sentenced to serve two or more terms of imprisonment upon different indictments or different counts of the same indictment there is a presumption that the sentences are to be served consecutively and not concurrently where the sentencing court fails expressly to state whether the several sentences are to be served concurrently or consecutively. See *Anderson* vs. *Brown,* 117 O. S. 393, and Opinion No. 76, Opinions of the Attorney General for 1933.

Under section 2211-9 the time that a parolee is legally at large counts the same as time served within the inclosure of a prison wall, since the legislature has expressly provided therein that a parole shall not have the effect of suspending the running of the prisoner's sentence except when a parole is revoked. See Opinion No. 106 of the Opinions of the Attorney General for 1933. Courts in other jurisdictions have likewise held that a parole is merely a release from the actual confines of the prison's bounds without the suspension of the running of the sentence of the prisoner. See *Crooks* vs. *Sanders,* 115 N. E. 760 (S. C.); *Ex Parte Prout,* 86 Pac. 275 (Idaho); *Woodward* vs. *Murdock,* 124 Ind. 439, and *Ex Parte Casey,* 115 Pac. 1104. Contra, see *State* vs. *Yeates,* 111 S. E. 337 (N. C.); *Ex Parte Mounce,* 269 S. W. 385 (Mo.), and *Commonwealth, et al.* vs. *Palsgrove,* 22 S. W. 2d, 126 (Ky.).

Section 2211-9 does not require the Board of Parole to revoke a parole upon the commission of an offense by the parolee, but it may do so in its discretion. In other words, a parole does not automatically become inoperative when its terms are violated, and it requires affirmative action on the part of the Board of Parole to toll or suspend the running of the sentence being served by constructive imprisonment; and until such action is taken, that is, the parole is revoked, the running of the parolee's sentence is not suspended. In other words, to toll the running of a sentence of a parole violator it is necessary for a Board of Parole to revoke the parole, since it is expressly provided in section 2211-9 that "in the case of * * * a prisoner who has been *declared a violator,* the time from the date of * * * his declared violation of a parole * * * to the date of his return *shall not be counted* as a part of the time or sentence served." To the same effect is the case of *Ex Parte Daniels* wherein it was held that:

"Prisoner remaining without walls after parole is revoked is, in effect, an escaped prisoner or fugitive and may not, during such period, claim benefit of running sentence."

Thus, whenever the Board of Parole revokes the parole of a prisoner he can no longer be considered as being lawfully on parole and the running of his sentence is tolled until such time as the prisoner is recommitted to the institution from which he was paroled, or re-paroled, since the right to be without the prison confines ceases upon the revocation of a parole. It is also a well established rule of law that a sentence of imprisonment in a criminal case must be served either by actual or constructive imprisonment, unless otherwise provided by law. The rule is stated in *Ex Parte Forbes, supra,* as follows:

"When person is under legal compulsion to serve sentence, execution of sentence can only be had by submission thereto."

See also *Ex Parte Rice,* 289 Pac. 360 (Okla.).

For a discussion as to how and when a prisoner in the Ohio State Reformatory may be granted a final release, see Opinion 106 of the Opinions of the Attorney General for 1933. See also section 2211-6.

In view of the fact that the Board of Parole can revoke the parole of one who violates the terms of his parole by the commission of an offense while outside the prison walls, and since there is no statute which prohibits or prevents a parolee from serving in a penal institution another sentence for another crime, it follows that the serving of the second sentence by such a person will not, and need not, interfere with the execution of such sentence even though the parole of the prisoner for his first sentence is revoked by the Board of Parole.

Specifically answering your inquiry, I am of the opinion that:

1. Whenever by the commission of a crime the terms of a parole are violated, the Board of Parole may revoke such parole and order the recommitment of the parole violator even though at the time of the revocation of the parole the parolee is incarcerated in a penal institution for the commission of a subsequent crime.

2. A prisoner who is sentenced to and incarcerated in the Ohio Penitentiary for the commission of a crime while out on parole from the Ohio State Reformatory may be declared a parole violator by the Board of Parole, in which event the board may either revoke the parole of the prisoner and order his recommitment to the Ohio State Reformatory on the expiration of the sentence to the Ohio Penitentiary or re-parole the prisoner or make such other disposition of the parolee as it sees fit, providing the Board of Parole does not exceed its authority.

3. The running of the sentence of a parolee who has violated the terms of his parole is not suspended or tolled until the Board of Parole declares such prisoner to be a parole violator. A person who is declared a parole violator by the Board of Parole because while on parole from the Ohio State Reformatory he has been convicted of a felony and sentenced therefor to the Ohio Penitentiary, must be deemed a parole violator on the records of the Ohio State Reformatory as long as he remains without the confines of that institution, even though his return to the Ohio State Reformatory is made impossible by virtue of his incarceration in the Ohio Penitentiary.

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 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.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1403.

APPROVAL, BONDS OF ELYRIA CITY SCHOOL DISTRICT, LORAIN COUNTY, OHIO—$91,000.00.

COLUMBUS, OHIO, August 15, 1933.

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

1404.

BONDS—ISSUED UNDER HOME OWNERS LOAN ACT OF 1933 LEGAL INVESTMENT FOR BANKS ORGANIZED UNDER OHIO LAWS.

SYLLABUS:

Section 710-111 *of the General Code, as amended by Amended Senate Bill No.* 371, 90th *General Assembly, provides that bonds issued under the Home Owners' Loan Act of* 1933 *(H. B. No.* 5240, 73d *Congress,* 1st *Session) shall be a legal investment for banks organized under the laws of Ohio.*

COLUMBUS, OHIO, August 15, 1933.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

> "Section 710-111 of the General Code has been amended by an Act (Amended Senate Bill No. 371) filed in the office of the Secretary of State on July 6, 1933. The purpose of said amendment, as I take it, was to make bonds to be issued by the Home Owners' Loan Corporation eligible for investment by banks organized under the laws of this state.
>
> The exact wording of this amendment is to be found in subdivision (a) of Section 710-111 as amended, said wording being as follows: 'and bonds issued under the home owners' act of 1933.'
>
> The act to which the legislature evidently had reference is known as the 'Home Owners' Loan Act of 1933', being House of Representatives' Bill (73d Congress) No. 5240 approved June 13, 1933.
>
> Before the amendment to Section 710-111 G. C. becomes effective, I feel that I should have your opinion as to whether or not the mistake by