an opinion to the Secretary of State, in which is considered this question, as well as others of a similar character. A copy of that opinion has been forwarded to you under separate cover.

Specifically answering the question which you have presented to me, I am of the opinion that where votes are cast for a person for office who has not been regularly nominated therefor, and who has not sought or aspired to such office, such votes should be counted for such person, even though he is a judge or clerk at the election at which said votes are cast.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1297.

APPROVAL, FINAL RESOLUTION ON EXTRA WORK CONTRACT, DEFIANCE COUNTY.

COLUMBUS, OHIO, December 14, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

1298.

PRISONER—SENTENCED BY COURT TO SERVE FOR ROBBERY A MINIMUM TERM THAT IS THE STATUTORY MAXIMUM FOR SUCH CRIME—WHEN ELIGIBLE FOR PAROLE.

SYLLABUS:

Where a person is convicted of the crime of robbery and the court sentences such person to serve a minimum term of twenty-five years in the Ohio Penitentiary, which term is the same as the maximum term provided by statute defining the offense, such prisoner is eligible to parole after he serves ten years which is the minimum term fixed by the statute defining the offense of robbery.

COLUMBUS, OHIO, December 16, 1929.

HON. RAY T. MILLER, *Prosecuting Attorney, Cleveland, Ohio.*

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

> "Will you please give us an official opinion as to the effect of a sentence imposed after conviction of felony, wherein the trial court fixes the minimum sentence in the same term and number of years as provided by the statute for the maximum sentence.
>
> We have a case in this county wherein the defendant was found guilty of robbery and the court sentenced him to serve a minimum term in the Ohio Penitentiary of twenty-five years, which is also the maximum provided by the statute."

Upon my request you informed me that the exact language of the sentence to which you refer in the above letter is as follows:

> "October 9, 1929, Sentenced to the Ohio Penitentiary for not less than twenty-five years at hard labor. ...., Judge."

I was also informed that the offense for which this sentence was imposed was committed February 5, 1929.

Section 12432 of the General Code, provides that the penalty for robbery shall be imprisonment in the penitentiary for not less than ten years and not more than twenty-five years.

Section 2166 of the General Code, in so far as it is pertinent to your inquiry, provides in part as follows:

> "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 than the minimum term fixed by the court for such felony. * * * 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."

The sentence in question as pronounced by the court does not fix the maximum term of imprisonment. The question arises whether or not such a sentence is a general sentence within the meaning of Section 2166, General Code. The Legislature of the State of Ohio, by the terms of Section 2166, General Code, intended to leave it within the discretion of the Ohio Board of Clemency to determine the exact duration of imprisonment for persons sentenced to the Ohio Penitentiary within certain limits prescribed by this section; that is, to determine the duration of imprisonment between the minimum fixed by the court and the maximum term fixed by the statute defining the offense for a violation of which the person is sentenced.

A general sentence is usually called an indeterminate sentence. In the case of *State ex rel. Attorney General* vs. *Peters*, 43 O. S. 644, Judge Johnson in the course of the opinion says as follows:

> "By Section 5 of the original act, passed March 24, 1884 (81 Ohio L. 72-76), it was provided that every sentence to the penitentiary of a person thereafter convicted of a felony, except for murder in the second degree, who had not previously been convicted of a felony and served a term in a penal institution, shall be, if the court thinks it right and proper, a general sentence of imprisonment in a penitentiary. That is what is called an indeterminate sentence."

Indeterminate is defined in Webster's New International Dictionary, as follows:

> "A sentence which fixes the period or amount of punishment only within

certain limits leaving the exact term or amount of punishment to be determined by an executive officer or by the board of managers."

In the case of *Harris* vs. *Commonwealth,* 163 Ky. 781, at page 789, the court says:

> "The brief of counsel also makes complaint of the form of the verdict, it being insisted, that it does not provide indeterminate punishment. The verdict is not open to this criticism. It fixes the punishment of a felony at confinement in the peintentiary not less than one year nor more than one year and one day. In thus indicating two periods of time, a minimum and maximum limit of punishment is given, which makes the verdict and judgment entered indeterminate in the meaning of the statute."

A general sentence within the meaning of Section 2166 of the General Code, may therefore be defined as a sentence imposed by a court wherein the minimum term of imprisonment pronounced by the court is shorter in duration than the maximum fixed by law, so that the exact term or amount of punishment may be determined by the Ohio Board of Clemency.

A sentence imposed by a court which fixes the minimum period of duration of such sentence the same as the maximum fixed by a statute defining the offense under which a defendant is sentenced, deprives the Ohio Board of Clemency of any authority to terminate such sentence under the terms of Section 2166 of the General Code of Ohio, and therefore is not a general sentence within the meaning of that section.

I am not unmindful that a former Attorney General rendered an opinion which may be found in the Opinions of the Attorney General for 1924 at page 222, in which the then Attorney General as shown by the syllabus of this opinion, 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 2163."

From a reading of the opinion, apparently Section 2163, as cited in the syllabus, should be 2166, as Section 2166 of the General Code is discussed therein. In the course of this opinion the then Attorney General said:

> "Webster's Dictionary defines the word 'general' as:
>
> 'Not restrained or limited to a precise or detailed import; lax in signification; as a loose and general expression.'
>
> It cannot be said that the sentence of the court, 'not less than seven years,' is limited to a precise import. As far as the sentence in itself is concerned, it is for not less than so many years and may be for more than the specified length of time.
>
> By Section 2166, supra, it is made mandatory that the court, when imposing sentences, except for certain crimes, fix a minimum period of duration of sentence as fixed within the limits prescribed by law.
>
> While it is conceded that if a person is sentenced for not less than a certain term and another law fixes the maximum term which is coincident with the minimum term fixed by the court, such a term is definite, yet it is not made so by the sentence of the court, but by virtue of another law. It is evident that the Legislature meant to place in the hands of the court the power to fix the minimum term of imprisonment. This is shown by the use of the words in Section 2166, '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 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.*

> It is therefore my opinion that a sentence of 'not less than seven years,' when such term is the maximum permitted by law, is a general sentence within the contemplation of Section 2166, G. C."

With this view I cannot agree. The maximum term of every indeterminate sentence imposed by the courts of Ohio must be the maximum term provided by statutes defining the offense for a violation of which the defendant is sentenced, and such maximum term is as much a part of the sentence of the court as the minimum term pronounced by the court. If this were not so, the sentence would not be valid.

In the case of *Hamilton* vs. *State*, 78 O. S. 76, at page 85, the court says:

> "The answer to this is, that a sentence of imprisonment in a criminal case, to be a valid sentence, must in and of itself be definite and complete in all its material terms, and so certain and accurate as to the time of its commencement and proper termination, as that it shall not be necessary for either the prisoner, or the officer charged with its execution to apply to a court to ascertain its meaning." See also *Picket* vs. *State*, 22, O. S. 405.

Whether or not such a sentence as is here in question is definite or general may be passed at this point for there can be no doubt that a sentence in which the court fixes the minimum of duration of imprisonment the same as the maximum term provided by law, is a sentence for a definite term. This being so, the last paragraph of Section 2166, General Code, is applicable. "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." The question now arises as to what is meant by the following language: "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."

In order to ascertain the meaning of the language quoted above, it is necessary to examine into the history of the legislation upon this subject. In 1890 the Legislature of the State of Ohio enacted the following legislation which is to be found in 87 Ohio Laws, page 164:

> "Every sentence to the penitentiary of a person hereafter convicted of a felony, except for murder in the second degree, who has not previously been convicted of a felony and served a term in a penal institution, 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. Provided, that any person now serving a sentence in the penitentiary, or that may hereafter be sentenced to the penitentiary for two or more separate offenses, where the term of imprisonment for a second or further term is ordered by the court to begin at the expiration of the first and each succeeding term of sentence named in the warrant of commitment, shall be entitled to have his succeeding term or terms of imprisonment terminated by the board of managers, as provided by law, at the expiration of the first term of sentence named in said warrant of commitment, without serving the minimum term as herein provided under more than one of said sentences."

You will observe from a reading of this section that it was discretionary with the court whether or not to impose a general or definite sentence of imprisonment to the penitentiary.

In 1891 the Legislature of the State of Ohio enacted the following legislation which may be found in 88 Ohio Laws, page 556:

> "* * * In order that good behavior, fidelity and diligence in the performance of duty may be properly rewarded, each convict now confined in any penal institution within the state, or who may hereafter be sentenced for a definite term other than for life, and who shall pass 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 diminish the period of sentence under the following rules and regulations:
>
> 1a. A prisoner sentenced for a term of one year who has conducted himself as above provided, shall be allowed a deduction of five days from each of the twelve months of his sentence.
>
> * * *"

By virtue of the provisions of this legislation as quoted above, a person who was sentenced to the Ohio Penitentiary for a definite term, other than life, and having passed the entire period of his imprisonment without violation of the rules and discipline, was entitled to a diminution of his sentence.

In 1892 the Legislature of the State of Ohio enacted the following legislation which is to be found in 89 Ohio Laws, page 361:

> "That said board of managers shall have power to establish rules and regulations under which any prisoner who is now or hereafter may be imprisoned under a sentence other than for murder in the first or second degree, who may have served a minimum term provided by law for the crime for which he was convicted (and who has not previously been convicted) of felony, and served a term in a penal institution, and any prisoner who is now or hereafter may be imprisoned under a sentence for murder in the first or second degree, and who has now or hereafter (shall have served under said sentence twenty-five full years), may be allowed to go upon parole outside the building and inclosures, but to remain, while on parole, in the legal custody and under the control of the board and subject at any time to be taken back within the inclosure of said institution; and full power to enforce such rules and regulations, and to retake and reimprison any convict so upon parole, is hereby conferred upon said board, whose written order, certified by its secretary, shall be a sufficient warrant for all officers named therein, to authorize such officer to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process; but the concurrence of every member of the board of managers shall be necessary for the parole of any prisoner as herein provided."

Up to this point in the history of the legislation upon this subject, a person convicted of a felony except for murder in the second degree who had not previously been convicted of a felony could be given a general sentence and the Ohio Board of Clemency had authority to parole such prisoner. Persons who had been previously convicted of a felony could not be given a general sentence nor did the Board of Clemency have authority to parole such prisoner. Prisoners who had been previously convicted of a felony and received a definite sentence were entitled to the benefits of Section 2163, General Code, that is, a diminution of sentence for good behavior.

Section 2169 of the General Code, which related to the authority of the Board of Clemency to parole prisoners was amended in 1913, 103 O. L. 477, and again amended in 1917, 107 O. L. 52, by virtue of the last amendment to Section 2169 of the General Code, the Ohio Board of Clemency was authorized to establish rules and regulations by which all prisoners under sentence other than for treason or murder in the first or second degree, who had served the minimum term provided by law for the crime for which they were convicted, or prisoners under sentence for murder in the second degree having served under such sentence ten full years, could be allowed to go upon parole.

In 1913 the Legislature amended Section 2166 of the General Code (103 O. L. 29) to read as follows:

> "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 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."

By virtue of the provisions of this amendment all sentences to the Ohio Penitentiary for felonies except treason and murder in the first degree were to be general sentences and if a person was sentenced for a definite term through oversight or otherwise he was to receive the same benefits as if he had received a general sentence. However, this section had no application to prisoners who had been sentenced to the Ohio Penitentiary for a definite term prior to the date that it became effective nor to persons who were sentenced after it became effective for offenses comitted prior to such date. In the case of *Francis* vs. *State of Ohio*, 25 O. C. C. (N. S.) 281, the headnote of this case is as follows:

> "The indeterminate sentence statute passed February 13, 1913, 103 O. L. 29, does not apply to prior offenses."

In an opinion rendered by the Attorney General, found in Opinions of the Attorney General, Vol. I, 1914, at p. 745, the then Attorney General held as follows:

> "The indeterminate sentence law passed February 13, 1913, is ex post facto and void as to prisoners sentenced after it became effective for crimes committed prior to that date. When the courts impose definite sentences after that date upon such prisoners such sentences should stand regardless of the indeterminate sentence law and such prisoners should be released upon the expiration of such definite term."

Section 2163 of the General Code which was in effect after the passage of the indeterminate sentence law passed February 13, 1913, was rendered nugatory by the indeterminate sentence law in so far as it affected prisoners sentenced for offenses

committed after the effective date of the indeterminate law. However, it was applicable to prisoners who were confined for a definite term at the time of the passage of the indeterminate law and also to prisoners sentenced for a definite term after the passage of the indeterminate law for offenses committed prior to the passage of the indeterminate law.

In an opinion rendered by the Attorney General, found in Opinions of the Attorney General, 1914, Vol. I, p. 749, the then Attorney General said in referring to Section 2163, General Code, as follows:

> "This statute was rendered nugatory by the indeterminate sentence law of February 13, 1913, since definite terms in the penitentiary were dispensed with by that act and the persons sentenced to the penitentiary under the new indeterminate law received no deductions of time for such good behavior by force of the provisions of any statute such as Section 2163 above quoted."

In the case of In re Lynch, No. 77978, decided in the Court of Common Pleas of Franklin County, Ohio, September 20, 1918, Lynch sought to be released on a writ of habeas corpus. He was sentenced for an offense committed after the indeterminate sentence law became effective and he claimed the benefits of Section 2163, General Code. Judge Rogers, in the course of his opinion in this case, said as follows:

> "It will be seen therefore that at the time of the passage of the general sentence law under which the applicant was sentenced, there were the two classes of prisoners that were to be governed by the laws respectively in force with respect to the classes at the time that they were convicted and sentenced. In the one class were those who had a fixed and determinate term, and in the other class were those who had a general term, not fixed, but according to the title of the bill in question, had an indeterminate sentence imposed upon them.
>
> By reason of the change in the statute there were two classes or kinds of sentences which it was the duty of the warden to carry out or execute, the one the sentence of the prisoner having a limited term, and the other the sentence of a prisoner having an indeterminate term, and two schemes for executing those sentences respectively were provided by the statute. Where the term was fixed and limited by the sentence of the court prior to the enactment of Section 2166 (103 Ohio Laws, 29) Section 2163 applied to such prisoners, as follows: 'A prisoner 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: * * * Then follows the right of deduction of good time by reason of the non-violation of the prison rules.
>
> On the other hand, when the prisoner is sentenced subsequent to the enactment of the general sentence law the scheme there provided shall govern the conduct of the warden in the matter of the prisoner's incarceration, and the length of time which he shall serve. These two classes of prisoners so far as the execution of sentence with respect to them, is concerned, are governed by the two different schemes under the statute. The provision, therefore, relative to the applicant, and the service of his sentence, under the general sentence law, is not limited or in any wise controlled by the provisions of the statute relative to the execution of the sentence of a prisoner under the fixed and limited sentence statute."

It is, therefore, apparent that where a person was given a sentence under Section

2166 of the General Code, as it read when enacted February 13, 1913, for a definite term for an offense committed after the effective date of said act, the prisoner was to "receive the benefits of the chapter" relating to paroles as if he had been given a general sentence and the benefits were that he was eligible to parole when he had served the mimimum term provided by the statute defining the crime for which such prisoner was convicted but such prisoner was not entitled to any diminution of his sentence under the provisions of Section 2163, General Code.

Section 2166 of the General Code was amended in 109 Ohio Laws, 527, on March 15, 1921, to read in its present form. It is to be presumed that the Legislature had knowledge of existing statutes and the state of the law relating to the subject with which it dealt. It is, therefore, to be presumed that at the time the Legislature amended Section 2166, General Code, on March 15, 1921, it knew that Section 2163 of the General Code was only applicable to such prisoners who were given sentence for a definite term prior to February 13, 1913, or who were sentenced for a definite term after that date, for offenses committed prior to that date, and that prisoners who were sentenced for a definite term for offenses committed after February 13, 1913, were not entitled to a diminution of sentence under the provisions of Section 2163 of the General Code.

This was the state of the law when Section 2166 of the General Code was amended March 15, 1921. Section 2166 as amended, in so far as it is pertinent herein reads as follows:

> "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."

The only change from the old section, in this paragraph, is the insertion of the word "not" so that it now reads, "as if he had not been sentenced in the manner required by this section," instead of as it previously read, "as if he had been sentenced in the manner required by this section."

It must be borne in mind that the Legislature by the amendment of Section 2166 of the General Vode, March 15, 1921, provided that the court should fix the minimum period of duration of sentences. Before this section was amended in this manner it merely provided that the court should impose a general sentence and so when the Legislature provided in the section before the amendment that if a court imposed a sentence for a definite term, the defendant should receive the benefits of the chapter as if he had been sentenced in the manner provided in the section, it was clear that he was to receive the benefits of a general sentence: that is, the same benefits as a sentence in which the minimum and maximum terms of imprisonment were fixed by the statutes defining the offenses. However, when the Legislature amended this section and provided that the court should impose a general sentence, and fix the minimum period of duration, it also provided that the defendant should receive the benefits of the chapter as if he had *not* been sentenced in the manner provided in the section.

The manner of sentencing a person provided in the statute as amended is that the court impose a general sentence wherein the minimum period of duration is fied by the court. Therefore, if a person received a sentence for a definite term he was to receive the benefits of the chapter as if he had not received a general sentence wherein the court fixed the minimum period of duration.

The change that the Legislature intended to effect by the amendment of Section 2166 of the General Code was merely to give the courts authority to fix the minimum term of a sentence. The Legislature did not intend that sentences imposed by the

court should be anything but general sentences and therefore when the Legislature provided that the defendant should receive the benefits of the chapter as if he had not been sentenced in the manner provided by the section, it meant that he should receive the benefits of a general sentence where the court had not fixed the minimum period of duration. In other words, he should receive the benefits of a general sentence where the minimum and maximum term of imprisonment is fixed by the statute defining the offense.

It may be urged that "as if he had not been sentenced in the manner required by Section 2166" means as if he had received a definite sentence and therefore a prisoner would be entitled to the beneficial provisions relating to definite sentences such as the benefits of Section 2163, General Code, relating to diminution of sentences for good behavior. If such a construction were given it, a prisoner who received a definite sentence would not only be entitled to the benefits of the parole section, that is, 2169 of the General Code, but would also receive the benefits of Section 2163 of the Code. In other words, he would receive greater benefits than prisoners who received general sentences. He would be eligible to parole at the minimum period fixed by the statute defining the crime for which he was convicted and also a diminution of sentence for good behavior, whereas prisoners who received general sentences would not be eligible for parole until they had served the minimum period of duration fixed by the court and would not be entitled to a diminution of sentence. Such a construction would also mean that the Legislature intended that the courts were again empowered to impose definite sentences. This, I believe, was not the intention of the Legislature. The Legislature intended that all sentences to the Ohio Penitentiary should be general and even if the court failed to make them general, the statute should bring about such a result.

I am therefore of the view that where a court imposes a sentence on a person to the Ohio Penitentiary and fixes the minimum period of such sentence the same as the maximum fixed by the statute defining the crime for which such person was convicted, such person is eligible for parole when he has served the minimum term provided by the statute defining the offense, but he is not entitled to a diminution of sentence under the provisions of Section 2163 of the General Code.

In an opinion rendered by the Attorney General, found in Opinions of the Attorney General for 1927, Vol. I, page 371, the then Attorney General held as follows:

> "Where, therefore, a trial court fails to fix the minimum period of duration of 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."

This conclusion is in accord with the conclusion reached by me in this opinion.

Specifically answering your inquiry, I am of the opinion that where a person is convicted of the crime of robbery and the court sentences such person to serve a minimum term in the Ohio Penitentiary of twenty-five years, which term is the same as the maximum term provided by statute defining the offense, such prisoner is eligible to parole after he serves ten years which is the minimum term fixed by the statute defining the offense of robbery.

Respectfully,
GILBERT BETTMAN,
Attorney General.