Bridge and Iron Works of Cleveland, Ohio, and Chicago, Illinois. This contract covers the construction and completion of one Water Tower complete with Concrete Piers for Massillon State Hospital, Massillon, Ohio, in accordance with the form of proposal, and calls for an expenditure of eight thousand three hundred and forty dollars ($8,340.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a certificate from the Emergency Board showing that said board's consent has been obtained to the expenditure in accordance with section 8 of House Bill 624 of the 89th General Assembly. In addition, you have submitted a contract bond upon which the United States Guarantee Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with. A certificate of the Secretary of State shows that he has been designated as the agent of the contracting foreign co-partnership, for the purpose of accepting service of summons in any action brought under the provisions of the workmen's compensation law, as required by section 2319, General Code.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3806.

APPROVAL, BONDS OF CITY OF MARION, MARION COUNTY, OHIO—$23,700.00.

COLUMBUS, OHIO, December 2, 1931.

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

3807.

EXTRADITION—PERSON ON PROBATION IN THIS STATE CANNOT BE EXTRADITED TILL EXPIRATION OF PROBATIONARY PERIOD.

SYLLABUS:

A person on probation, as provided by section 13452-1, *General Code, can not be extradited until after the expiration of the probationary period.*

COLUMBUS, OHIO, December 2, 1931.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

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

> "The following question has been raised. An accused enters a plea of guilty and the imposition of sentence is suspended and the defendant put on probation under authority of Section 13452-1 of the General Code of Ohio. While said defendant is on probation and under the jurisdiction of the court suspending the sentence and putting him on probation, authorities from another state seek the custody of said person out on probation for a crime committed before his apprehension and plea of guilty and suspension of sentence in our state court.
>
> What is the status of said person as regards his being turned over to the authorities of another state for the previously committed crime? Suppose said party refuses to voluntarily surrender to the authorities from the other state. Is the status of said person the same so far as his being turned over to authorities from other states as if he were incarcerated and serving the sentence?"

The subject of interstate extradition is covered by Article IV, Section 2, of the Constitution of the United States, which reads in part as follows:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

In furtherance of this constitutional provision, Congress enacted section 5278, Revised Statutes (which may also be found in Mason's United States Code, Annotated, Title 18, Section 662), which reads as follows:

> "Whenever the executive of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive

to the State or Territory making such demand, shall be paid by such State or Territory."

As ancillary to and in aid of the constitutional provision and federal statute herein quoted, the legislature of Ohio enacted sections 109 to 118, inclusive, General Code, which sections deal with the extradition of fugitives from or to Ohio.

The first question to decide is whether or not the constitutional requirement and the laws referring to the extradition of fugitives must be observed by the governor of the asylum state when there is a conflict of jurisdiction.

It is generally agreed and recognized by all the courts of this country that Article IV, Section 2 of the Constitution of the United States, and section 5278, Revised Statutes, on the subject of interstate extradition, apply and refer only to fugitives at large and over whom there is no conflict of jurisdiction. It is generally conceded that the governor or executive of the asylum state can refuse to surrender a fugitive from justice, who is detained in the asylum state to answer a criminal charge therein, until the penal laws of the asylum state are satisfied. The Supreme Court of the United States in the case of *Taylor* vs. *Taintor, Treas.*, 16 Wall., 366, expressed that rule of law in the course of its opinion, at page 370, wherein it said that:

> "It is indeed a principle of universal jurisprudence that, where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function.
>
> Where a demand is properly made by the governor of one state upon the governor of another, *the duty to surrender it not absolute and unqualified.* It depends upon the circumstances of the case. If the laws of the latter state have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied." (Italics the writer's).

See also *Cozart* vs. *Wolf, et al.*, (Ind.) 112 N. E. 241; *Ex parte Graves* (Mass.), 128 N. E. 867; *Work* vs. *Corrington,* 34 O. S. 64, at 73 and 77; *Hackney* vs. *Welsh,* 107 Ind. 253; *Matter of Briscoe,* 51 Howard Pr. 422, at 431; *Matter of Trautman,* 24 N. J. L. 634, at 638; *Lacelles* vs. *State,* 90 Ga. 347; *In re Opinion of the Justices,* 201 Mass. 609; *Hobbs* vs. *State* (Tex.) 22 S. W. 1036; *Ex parte McDaniel* (Tex.) 173 S. W. 1018; *Ex parte Middaugh* (Okla.), 268 Pac. 321.

It is apparent from the language used in the case of *Taylor* vs. *Taintor,* supra, that the provisions of Article IV, Section 2 of the Constitution of the United States, and section 5278, Revised Statutes, were never intended to apply to cases where the fugitive is held on a criminal charge (and in some cases on civil process) in the asylum state. Thus, it is not necessary for the governor of the asylum state to recognize the demand of a sister state for the extradition of a fugitive from justice until the expiration of the sentence imposed on the fugitive by the asylum state. See also 25 C. J. 259; 11 R. C. L. 725.

Although the courts have universally agreed on the proposition of law just stated, there is a split of authority as to whether or not the governor or executive of the asylum state can waive the jurisdiction of his state and

extradite a person either confined in a penal institution or on parole or on probation. Thus, in In re the Opinion of the Justices, supra, it was held that:

> "The governor of one state cannot, upon the requisition of the governor of another state, take from prison where he is confined under conviction for violating the laws of the former state a person whom the latter governor demands as a fugitive from the justice of his state."

The court, in the course of its opinion, said that:

> "* * * * Let us consider first the question whether the governor has power so to interfere in the administration of justice here, for any other reason than a demand from another State under this provision of the Constitution. He has the power of pardoning offenses, given by the Constitution of Massachusetts * * *. He has no statutory authority to interfere with the execution of a sentence in a criminal case otherwise than by pardoning the offender. His disability so to interfere lies deeper than in the absence of an empowering statute. The powers of government of Massachusetts are divided into three departments—the legislative, executive and judicial—no one of which shall ever exercise the powers of either of the others. * * * It is within the province of the judicial department to try persons who are charged with crime and to impose punishment upon them if they are found guilty. Except by a pardon of the convict, neither of the other departments can nullify or set aside a sentence of the judicial department which is in the process of execution under a proper warrant from the court."

The holding in that case that a person convicted of a crime in the asylum state could not be extradited until he expiates his crime and that the governor could not waive the jurisdiction of the state was followed in principle in the cases of *Hobbs* vs. *State,* supra and *Ex parte McDaniel,* supra.

A contrary holding was made in the case of *State* vs. *Saunders,* 232 S. W. 976 (Mo.), wherein the court said:

> "* * * the governor of the state upon whom a demand is made by the governor of another state for the surrender of a fugitive, who has been convicted and sentenced in the state of the governor upon whom such demand is made, for a crime committed therein, may waive the right to require the fugitive to complete a sentence and deliver him to the authorities of the other state, the concurrence of the judicial branch of the government being unnecessary.
>
> A waiver of the right to require the prisoner to complete his sentence before surrendering to the other state, *being in the nature of a pardon,* shall notwithstanding the condition stated, become absolute upon his surrender to the authorities of the other state." (Italics the writer's).

The court, in its holding, considered the issuance of the warrant for extradition by the governor of the asylum state as being in effect a pardon of the crime for which the fugitive from justice was confined therein. This is

evident on a reading of that part of the opinion of the court at page 926 wherein it is said

> "The question arises, therefore, as to whether it may not properly be regarded as in the nature of a pardon. It released the appellant from the punishment he was undergoing in Iowa, in order that he might be prosecuted for an offense in Missouri. Notwithstanding the condition of this release, we are of the opinion that it became absolute upon his surrender to the authorities of this state. If so, then it was unquestionably in the nature of a pardon * * *."

The court, in support of its conclusion in that case, cited several other cases, but upon examination it will be found that those cases did not involve the exact question before the court in the Saunders case, supra. Incidentally, the entire court in that case did not agree that the issuance of the warrant of extradition by the governor was in the nature or form of a pardon. A minority of the court held that the governor had no right to suspend the sentence, inasmuch as that was not a matter within his executive power. Not only do we have the courts of this country disagreeing as to whether or not the governor can waive the jurisdiction of a state over a prisoner incarcerated in a penal institution, but we find that there is also a conflict of authority as to whether or not the governor can extradite a person who is on parole or probation in the asylum state. Thus it was held in the case of Ex-parte Middaugh, supra, that:

> "The governor of the asylum state upon whom a demand is made by the governor of a sister state for a fugitive who has been convicted or sentenced in the asylum state for the violation of the laws of such state, but who is at liberty by judicial parole or suspended sentence, may waive the jurisdiction of the state, and in such case a concurrence of the judicial branch of the government is not necessary."

The court in that case held that a person on parole was only constructively in the custody of the law and that the governor of the asylum state could waive the right of the state to compel the completion of his sentence. The court distinguished that situation from one where the fugitive is incarcerated in a penal institution of the asylum state and therefore actually in the custody of the law, in which case the governor could not waive the jurisdiction of the state unless the fugitive was first given a pardon. That case is contrary to the case of *Carpenter* vs. *Board,* 88 Ore. 128, where the court held that a person on parole could not be extradited upon the demand of another state until he had been discharged from custody in the asylum state.

It appears from the other authorities cited herein, especially In re Opinion of Justices *Hobbs* v. *State,* and Ex parte McDaniel, supra, that the weight of authority and reason would seem to uphold the view that the governor of an asylum state cannot honor a requisition made upon him by the governor of another state for a person confined within the walls of a penal institution or on parole or probation in that state. This is so, even though the state can waive its right to punish a fugitive from justice for a violation of its own laws and deliver him to the authorities of a demanding state. However, to accomplish this waiver, it seems to me that the criminal charges

must either be dismissed or after conviction the governor must either pardon or commute the sentence. The governor cannot otherwise interfere in the execution of the sentence imposed by the sentencing court. This is so in Ohio, by reason of Article III, Section 11, of the Constitution of the State of Ohio, wherein the people have granted to the governor the power to issue pardons, commutations or reprieves. If we were to follow the holding of the court in the case of *State* vs. *Saunders,* supra, it would be necessary to hold that the governor of Ohio had the power to suspend the execution of a sentence. Upon examination of the criminal provisions of this state, Sections 13453-1, et seq., we find that the legislature has provided that courts can suspend the execution of a sentence only when error proceedings are to be filed. There is no constitutional or statutory provision in this state giving the governor power to suspend the execution of a criminal sentence.

The next question is whether or not a prisoner on probation in Ohio is considered in the custody of the law. That question, I believe, is answered by Sections 13452-1, 13452-2, 13452-3, 13452-4, 13452-5, 13452-6 and 13452-7, General Code, wherein the legislature has provided that a judge or magistrate may suspend the imposition of sentence and place the defendant on probation upon such terms and conditions as such judge or magistrate may deem advisable. Under the provisions of sections 13452-1, et seq., the court may place the prisoner on probation and permit him to go and remain at large under the supervision of a probation officer or the probation department of the county, of course, subject always to the order of the court until the probation period has been terminated, either by action of the court or completion of the probation period. The court can revoke the probation any time before its expiration and sentence the prisoner to a penal institution. That a person on probation is in the jurisdiction and custody of the law is apparent from section 13452-7, which reads in part as follows:

> "At the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence shall cease and the defendant shall thereupon be discharged."

That sentence clearly indicates that the legislature intended that a person on probation for the violation of a penal statute of this state was to be considered within the custody of the law until the probationary period had been terminated and such person legally discharged from the custody of the court.

My conclusion is further supported by the following in 12 O. Jur. 690, wherein it is stated:

> "In other words, upon the suspension of sentence and parole of the defendant, the jurisdiction of the court continues during the limit of the suspension, which can not be beyond the time fixed by the statute," etc.

In view of that interpretation, it is my conclusion that a person on probation occupies the same position as that of a person who is physically incarcerated in a penal institution as far as the question of interstate extradition is concerned. The issuance of a warrant of extradition by the governor in such a case would be an assumption of judicial and legislative pre-

rogatives which would be in violation of Article II, Section 1 and Article IV, Section 1 of the Constitution of Ohio.

It is therefore my opinion that:

A person on probation, as provided by section 13452-1, General Code, can not be extradited until after the expiration of the probationary period.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3808.

MORTGAGE—MAY BE SECURITY FOR DEPOSITORY ACCOUNT OF CITY OR COUNTY WHERE BALANCE OWING ON SAID MORTGAGE DOES NOT EXCEED 50 PER CENT OF VALUE OF LAND —SECTION 2288-1 GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *When, at the time a mortgage is tendered as security for a depository account, by favor of Section 2288-1, General Code, the balance owing on the said mortgage is more than 50% of the value, at that time, of the real estate covered by the mortgage, it is not of the class of mortgages which the statute provides may be accepted as security for depository accounts, and may not be accepted as security for any amount or for any purpose contemplated by the statute.*

2. *The words "amount loaned" as they appear in Section 2288-1, General Code, should be construed to mean the amount owing on a mortgage at the time it is tendered as security, by favor of the statute.*

COLUMBUS, OHIO, December 3, 1931.

HON. ZELMER G. MORGENTHALER, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "We are respectfully asking your opinion with reference to a construction of the provisions of Section 2288-1 of the General Code of Ohio, relative to the hypothecation of mortgages for the security of funds in depositories.
>
> Question: Suppose a bank holds a 60 per cent mortgage upon property valued today at $10,000.00, can the bank use this 60 per cent security mortgage on a 50 per cent basis or deposit with the city or county officials this $6,000.00 mortgage for $5,000.00 value?"

The pertinent part of Section 2288-1, General Code, reads as follows:

> "In addition to the undertakings or security provided for in sections 2732, 4295, 7605 and 7607, it shall be lawful to accept first mortgages, or bonds secured by first mortgages bearing interest not to exceed six per cent. per annum, upon unincumbered real estate located in Ohio, the value of which is at least double the amount loaned