Second, that if said agricultural society lease these fairgrounds with the knowledge of their contemplated use by the lessees, for holding automobile races, and the patrons of the races are injured as a direct and proximate result of patent defects in the premises themselves, or by reason of latent defects in said premises, which by the use of reasonable care might have been discovered and guarded against, the agricultural society would be liable in damages for such injuries.

Third, the county of Auglaize would not be liable for injuries received by patrons of fairs conducted by the Auglaize County Agricultural Society or by patrons of the lessees of said Auglaize County Agricultural Society.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2184.

COURT—SUSPENSION OF SENTENCE—NO INHERENT AUTHORITY AFTER TERM—SPECIFIC CASE.

SYLLABUS:

1. *Where a court, in passing sentence in a criminal case, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion, and in furtherance of justice, at the same term, and before the original sentence has gone into operation, or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law.*

2. *Courts do not possess inherent power to suspend the execution of sentences imposed in criminal cases, except to stay the sentences for a time after conviction for the purpose of giving an opportunity for a motion for a new trial or in arrest of judgment, or during the pendency of a proceeding in error, or to afford time for executive clemency.*

3. *In the enactment of statutory provision dealing with the suspension of sentences in criminal cases, it will be presumed that the Legislature has exhausted the legislative intent in that respect and that it has not intended the practice to be followed in such cases to be extended further than the plain import of the statutory provisions.*

4. *The provisions of Section* 1666, *General Code, relating to the power of juvenile courts to grant conditional suspension of sentences in juvenile cases; of Section* 13010, *General Code, relating to conditional suspension of sentences in non-support cases; and of Section* 13706 *and related sections of the General Code, permitting the suspension of the imposition of sentences in criminal cases generally, are exclusive, and trial courts in Ohio are without power to grant suspensions of the execution or imposition of sentences except as may be authorized in one of these sections, or in the several sections, relating to the suspension of the execution of sentences during error proceedings.*

5. *Where a person convicted of operating, while intoxicated, a motor vehicle on the public streets or highways, is sentenced to pay a fine and costs and to be imprisoned in the county jail for a definite period of time, and such sentence has been carried into execution to the extent of committing such person to the county jail, the trial court is without power and jurisdiction to suspend so much of the jail sentence as remains unserved and release the prisoner, upon payment of the fine and costs.*

COLUMBUS, OHIO, June 1, 1928.

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

DEAR SIR:—This will acknowledge receipt of your communication of recent date, which reads in part as follows:

> "A question has arisen on which I desire your opinion. A concrete example of the problem is a case, for instance, wherein the trial court sentences a party—say for operating a motor vehicle while intoxicated—to pay a fine and to be imprisoned in the county jail for a definite period of time. The entry to that effect is made and journalized and after the party starts upon his jail sentence, the court, for good cause shown, desires to suspend the jail sentence and release the prisoner upon payment of fine and costs. Can the trial court, under the present state of law, suspend the jail sentence in part, or the remainder of it, and release the prisoner?
>
> In other words, can a trial court now suspend a sentence as was done under the facts in the case of *Antonio* vs. *Milliken*, 9 Oh. App. 357. This case was decided under Section 13711 of the General Code as it stood before the amendment of 1925. Since Section 13711 has been amended, can a court legally suspend part of a jail sentence after the prisoner once begins serving his time or is a court limited to suspension of the imposition of sentence under Section 13706 and, if the sentence is once imposed, is the court's power to suspend the sentence taken away?"

The sentence having been imposed, I assume from the context of your letter that it was a valid sentence, and that it has been carried into execution to the extent of committing the defendant to the custody of the sheriff of the county, as provided in Section 13716, General Code, which reads as follows:

> "When a person convicted of an offense is sentenced to imprisonment in jail, the court or magistrate shall order him into the custody of the sheriff or constable, who shall deliver him, with the record of his conviction, to the jailer, in whose custody he shall remain, in the jail of the county, until the term of his imprisonment expires or he is otherwise legally discharged."

You say the court now desires to modify that sentence by a suspension of so much of the sentence to imprisonment as remains unserved, on condition that the defendant pay the fine and costs imposed, and you desire to know if the court may do so under the law.

Bishop's New Criminal Procedure, Vol. 2, Section 1298, states the general rule thus:

> "The power of the court to alter its docket entries and records during the term wherein they are made, includes the right within such time to revise, correct, and change its sentences, however, formally pronounced, if nothing has been done under them. But steps taken under a sentence—for example, a substantial part execution thereof—will cut off the right to alter it, even during the term. And with the expiration of the term the power expires."

In support of the text, supra, the author cites *Lee* vs. *State*, 32 O. S. 113, decided in 1877, the first branch of the syllabus of which reads as follows:

> "Where a court, in passing sentence for a misdemeanor, has acted under a misapprehension of the facts necessary and proper to be known in fixing

the amount of the penalty, it may, in the exercise of judicial discretion and in furtherance of justice, at the same term, and before the original sentence has gone into operation or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law."

In the opinion by Judge Johnson it was said as follows:

"The single question is, had the court the power to revise and increase its judgment, at the same term before any part of the fine and costs had been paid, and before any steps had been taken to execute it?

That this power exists, is settled by a long line of decisions of the highest authority.

It is said by Lord Coke (Co. Litt. 260a) that, 'during the term wherein any judicial act is done, the record remaineth in the breasts of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct; but when that term is past, then the record is in the roll, and admitteth of no alteration, averment or proof to the contrary.'

In 1 Chitty Crim. Law, 722, the rule is stated thus: 'In cases of misdemeanors it is clear that the court may vacate the judgment before it becomes a matter of record, and may mitigate, or pass another, even when the latter is more severe; and the justices at sessions have the same power during the session, because it is regarded only as one day.'

The power has been often exercised both in England and in this country in numerous cases. *Regina* vs. *Fitzgeral*, 1 Salk. 401; *The King* vs. *Price*, 6 East. 327; *The King* vs. *Justices*, 1 M. & S. 444; *Darling* vs. *Gurney*, 2 Dowl. Pr. U. 101; *Commonwealth* vs. *Weymouth*, 2 Allen, 144; *The State* vs. *Harrison*, 10 Yerker, 542; *Miller* vs. *Finkle*, 1 Parker C. 374; Matter of Mason, 8 Mich. 70; *Jobe* vs. *The State*, 28 Geo. 235; *Cheang-Kee* vs. *United States*, 3 Wall. 320; *Basset* vs. *United States*, 9 Wall. 39; Bishop Crim. Procedure, Section 1123.

In *Basset* vs. *United States* the court goes much farther than is required in this case.

It was there held, that after a sentence to jail upon plea of guilty, and after the prisoner was committed and was serving out his sentence, the court might for good cause, at the same term, set the sentence aside.

* * *

The power to revise judgments of the same term, and, before execution has commenced, to correct errors and mistakes is necessary for the protection of the defendant, as well as the public, and may be exercised as well in his favor as against him, when the court has been misled by mistake or fraud."

The syllabus in the case of *Weber* vs. *State*, 58 O. S. 616, decided June 24, 1898, reads:

"In a criminal case the court has the power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute; and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided."

The court in the per curiam opinion, among other things, said:

"The power to stay the execution of a sentence, in whole or in part, in a criminal case, is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute. * * *"

In the case of *Madjorous* vs. *State*, 113 O. S. 427, decided October 20, 1925, the question of the validity of Section 6212-17, General Code, which is the section of the Crabbe Act fixing penalties for violations thereof and specifically prohibiting the remission of any portion of a fine or the suspension in whole or in part of any sentence imposed in a case involving the violation of such act, was presented; and the court held in the syllabus:

> "The prohibition against remission of fines and suspension of sentence provided in Section 6212-17, General Code, is a valid exercise of legislative power and does not invalidate the operative provisions of that section."

While upon the facts presented in the above case, it was unnecessary to hold (and it was not so held in the syllabus), that in the absence of statutory enactments conferring such power, trial courts do not inherently possess the power to suspend the execution of a sentence in a criminal case and place the defendant upon probation, and while the case of *Weber* vs. *State*, supra, was not expressly overruled, in view of the holding of the Supreme Court of the United States in the case of *Ex parte United States*, 242 U. S. 27, and the language of Chief Justice Marshall's opinion with reference to this United States Supreme Court case, it would seem that the law laid down in the Weber case, is no longer the law of Ohio. I especially direct your attention to that part of the opinion in the Madjorous case underscored in the following:

> "* * * in the case of *State* vs. *Whiting*, 83 Ohio St., 447, 94 N. E., 1116, this court overruled exceptions of the prosecuting attorney to the Common Pleas Court of Summit County, and, while it is an unreported case in this court, it is stated in the brief of counsel that a judgment was suspended by the Common Pleas Court of Summit County, and it was clearly stated in the journal entry that the suspension was not under the authority of 'An act to provide for probation of persons convicted of felonies and misdemeanors' (99 Ohio Laws, p. 339), but under the claimed inherent authority on the part of courts to suspend sentences. That case not having been reported, and no reasons having been given for the court's conclusions, we are, of course, not able to determine what was in the mind of this court in rendering that decision.
>
> It is quite certain that there has been a very extended practice prevailing with trial judges in Ohio to place convicted persons upon probation, and there seems to be a general sentiment in the bench and bar that such authority does exist without statutory warrant. We believe, however, that this case is the first one to present a serious issue that such authority is inherent in the court and that such authority is beyond the power of the Legislature to deny. Surely the case of *Weber* vs. *State*, supra, conclusively infers, if it does not directly state, that the Legislature does have power over suspensions.
>
> The Supreme Court of the United States in Ex parte United States, 242 U. S., 27, 37 S. Ct., 72, 61 L. Ed., 129, L. R. A., 1917E, 1178, Ann. Cas., 1917B, 355, had under consideration a case where the judge of the district court for the northern district of Ohio had pronounced a sentence of imprisonment and then suspended the execution of the sentence during good behavior. Thereupon a suit in mandamus was brought to compel the judge to vacate the order of suspension. The writ was allowed, and Chief Justice White, delivering the opinion of the court, made a searching inquiry into the inherent power of courts in the matter of suspensions of criminal sentences. This decision was rendered in 1916, which was long after the time of the decisions of the Weber and Whiting cases by this court, and, while the federal Constitution

and statutes do not define the procedure governing the trial of criminals for violation of state statutes, it must be admitted that the inherent powers of a state court are in no wise different from the inherent powers of a federal court. *Whatever declarations may have been made by this court prior to the time of the decision of the United States Supreme Court in Ex parte United States, supra, it is certainly not desirable that this court should seek to maintain a position concerning the inherent powers of the court different from that declared by the Supreme Court of the United States. In the trial of offenses against criminal laws the federal courts have such powers only as exist under the Constitution and the laws of Congress, and the state courts have such powers only as exist under the state Constitutions and the laws enacted by the state Legislatures.* The Constitution of Ohio creates courts of common pleas, but does not define their jurisdiction. * * * *It should require no argument to show that if the jurisdiction can be either conferred or withheld by the Legislature, that jurisdiction can also be limited or controlled by conditions at the will of the legislative power. It seems clear enough that in conferring upon the Legislature the power to fix the jurisdiction of courts of common pleas such power included the further power to establish the practice and procedure, and to make such limitations and impose such conditions upon the jurisdiction as the Legislature might see fit. It is apparent that many mistaken notions have prevailed in the past concerning the so-called inherent powers of courts. All power is inherent in the people, and the courts have such power as has been conferred by the Constitution and statutes.* Chief Justice White, at page 41 (37 S. Ct., 74) of the case above referred to, has used some very pertinent language:

'Indisputably under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department.'

This reasoning applies with conclusive force to the case at bar. Much more appears in the opinion of Chief Justice White to the same effect. In a complete review of the authorities he has not overlooked the case of *Weber* vs. *State*, supra, and it is referred to as the declaration of a power existing 'because of a practice long prevailing.' It is apparent, however, that no practice, however long continued in the trial of criminal offenses, can have the binding force of law. The Legislature of Ohio has made a limited provision in such matters, which provision will be found in Sections 13706 to 13715, inclusive, General Code. In those sections certain provision is made for placing prisoners upon probation, and certain exceptions are made thereto in the same chapter. Section 6212–17, General Code, is merely an additional exception to the general provisions of Section 13706, General Code. The Legislature has the power to fix the jurisdiction of the trial courts. It has

the power to define crimes and misdemeanors. It has the power to provide the procedure, and the unlimited power to fix conditions and limitations upon definitions of crimes and upon provisions for practice and procedure. In short, it has the power to give and the power to take away. It has given power in the matter of probation of prisoners in Section 13706, and it has made exceptions thereto in Sections 13707, 13708, and 6212–17.

It would be unprofitable to discuss the many cases cited in the briefs of counsel, as we think the best authority upon this subject is the very well-considered opinion of Chief Justice White, in which he reviews and discusses the leading cases at length and reaches the conclusion that the courts do not possess the inherent power to suspend a sentence in a criminal prosecution, except to stay the sentence for a time after conviction, for the purpose of giving an opportunity for a motion for a new trial or in arrest of judgment or during the pendency of a proceeding in error. *The Ohio Legislature having dealt with the subject, and having made certain provisions and certain exceptions thereto, it will be presumed that the Legislature has exhausted the legislative intent, and that it has not intended the practice to be extended further than the plain import of the statutes already enacted.* The well-known maxim, expressio unis est exclusio alterius, applies." (Italics the writer's.)

In the case of *Ex parte United States*, 242 U. S. 27, 61 L. Ed. 129, 37 Sup. Ct. Rep. 72, L. R. A. 1917E, 1178, the third paragraph of the headnotes reads:

"A Federal district court exceeds its power by ordering that the execution of a sentence to imprisonment imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon consideration wholly extraneous to the legality of the conviction."

In the opinion Mr. Chief Justice White, after laying down the proposition stated in the excerpt from his opinion, quoted with approval by Chief Justice Marshall in that part of the opinion in the Madjorous case above set forth, continued in part as follows:

"The proposition might well be left with the demonstration which results from these considerations, but the disregard of the Constitution which would result from sustaining the proposition is made, if possible, plainer by considering that, if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments, and hence leave no law to be enforced.

* * *

While it may not be doubted under the common law as thus stated that courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured, or that a violation of law in other respects might be prevented, we are unable to perceive any ground for sustaining the proposition that, at common law, the courts possessed or claimed the right which is here insisted

upon. No elaboration could make this plainer than does the text of the passages quoted. It is true that, owing to the want of power in common-law courts to grant new trials, and to the absence of a right to review convictions in a higher court, it is, we think, to be conceded (a) that both suspensions of sentence and suspensions of the enforcement of sentences temporary in character were often resorted to on grounds of error or miscarriage of justice which, under our system, would be corrected either by new trials or by the exercise of the power to review; (b) that not infrequently where the suspension either of the imposition of a sentence or of its execution was made for the purpose of enabling a pardon to be sought or bestowed, by a failure to further proceed in the criminal cause in the future, although no pardon had been sought or obtained, the punishment fixed by law was escaped. But neither of these conditions serve to convert the mere exercise of a judicial discretion to temporarily suspend for the accomplishment of a purpose contemplated by law into the existence of an arbitrary judicial power to permanently refuse to enforce the law."

The Chief Justice then considered the contentions in favor of the inherent power of the court to suspend, to the effect that the power claimed had been recognized by decisions of state courts and of United States courts of original jurisdiction to such an extent that the doctrine was to be considered as not open to controversy, and that, in both the State and Federal courts, over a very long period of time, the power there asserted had been exercised, often with the express, and constantly with the tacit, approval of the administrative officers of the State and Federal governments, and had been also tacitly recognized by the inaction of the legislative department during the long time the practice had prevailed, to such an extent that the authority claimed had in practice become a part of the administration of criminal law, both State and Federal, not subject to be questioned or overthrown because of mere doubts of the theoretical accuracy of the conception upon which it is founded, and said in part as follows:

"Coming first to the state courts, undoubtedly there is conflict in the decisions. The area, however, of conflict, will be narrowed by briefly stating and contrasting the cases. * * *

* * *

Leaving aside the question of the asserted duty to sustain the doctrine because of the long-established practice, which we shall hereafter consider, we think it clear that the long and settled line of authority to which we have previously referred, denying the existence of the power, is in no way weakened by the rulings which lie at the basis of the cases relied upon to the contrary. * * *

* * *

So far as the courts of the United States are concerned, it suffices to say that we have been referred to no opinion maintaining the asserted power, and, on the contrary, in the opinion in the only case in which the subject was considered, it was expressly decided the power was wanting. *United States* vs. *Wilson*, 46 Fed. 748 (1891). It is true that in the District of Columbia the existence of the power was maintained. *Miller* vs. *United States*, 41 App. D. C. 52 (1913). But the unsoundness of the grounds upon which the conclusion was based is demonstrated by what we have previously said; * * *.

* * *

* * * we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. * * *"

Before leaving the question as to whether or not trial courts in Ohio inherently possess the power to suspend sentences in criminal cases, it might be profitable to review the opinions of the lower courts of this state on this question.

In the case of *In re Clara Lee*, 3 O. N. P. (N. S.) 533, 16 Ohio S. & C. P. Dec. 259, decided October 6, 1905, Judge Dillon, of the Court of Common Pleas of Franklin County, Ohio, held as follows:

> "In the absence of a statutory enactment to the contrary, the power of a court to suspend execution of sentence during good behavior, or to revoke such suspension, is not impaired or limited by the passing of the term in which the suspension was made."

This opinion was not followed by Judge Kinkead of the same court, who, in the case of *State of Ohio* vs. *John Radcliffe*, 18 O. N. P. (N. S.) 273, 26 O. D. 87, decided October 9, 1915, held as follows:

> "The court has no inherent power to suspend sentence in a criminal case. That doctrine belongs to the common law which was never in force in Ohio on the subject of crimes and procedure. The power now given by statute to suspend sentences in certain cases is to be construed as a limitation of power as well as the conferring of power."

In the opinion, after referring to the cases of *Weber* vs. *State* and *State* vs. *Whiting*, supra, Judge Kinkead said in part as follows:

> "Decisions of courts derive their value as controlling authority from the reason and logic of the conclusion. In the per curiam report and the unreported decision there is nothing but the bare conclusion unsupported by any statement of the reason or grounds therefor. It is merely held that the court has inherent power to suspend a sentence unless otherwise provided."

After reviewing a number of cases touching the question presented, he continued:

> "We have reviewed some of the authorities bearing on the question. The suggestions contained in views expressed shows that the trend of opinion and better reason is against the exercise of such power. It seems entirely clear that basic reasons underlying the common law rule are inapplicable to the conditions under the Constitution and statutes touching judicial jurisdiction and power in criminal cases. Common law doctrines may be adopted and applied only when conditions so warrant, and not where the whole plan of criminal procedure, jurisdiction and judicial power has been constructed on a wholly new basis. Courts must be cautious as well as zealous in the exercise of power. The function of mercy, clemency, parole, probation or suspension has been carefully designed to be placed in hands of other officials than the courts. It is true that nothing specially is said about the question of inherent power. Nothing, it seems, can more effectually demonstrate the want of such power than our Constitution and statutes.
>
> This brings us to the precise point of distinction between the common law jurisdiction over crimes and the constitutional and statutory jurisdiction of our state.
>
> The Constitution creates judicial power, but does not prescribe any jurisdiction in criminal matters. There can be no judicial power without jurisdiction. If the jurisdiction prescribed by statute excludes all judicial power exercised by the judiciary in criminal cases, how can any inherent

power be exercised in disregard of statutory penalty, and regulations concerning the assessment thereof? Article IV, Section 1, of the Constitution, vests judicial power in the several courts, embracing the court of common pleas, the one possessing original jurisdiction in criminal cases. * * *
* * *

In deciding the question whether the court has inherent power to suspend sentence, the distinction between the judicial power and jurisdiction should be kept in mind. Judicial power of necessity can be exercised within the scope of jurisdiction and not beyond it.

A comparison of judicial power as exercised within the scope of the statutory jurisdiction in criminal cases with that exercised in civil cases will clearly illustrate the distinction sought to be made. It will show how such power in civil matters is exercised according to the course of the common law, whereas in criminal cases it is to be exercised without regard to the common law, but strictly in accord with the provisions of the statutes. Having no judicial power in the latter class of statutes except as derived by statutes, courts can not exercise any power derived from any other source. Common law crimes and procedure have been abrogated, which takes away all judicial power heretofore existing at common law, not specially provided for by statute. Judicial power in civil cases is largely dependent upon the common law, while in criminal cases it is not governed by the common law at all.
* * *

In criminal jurisdiction we have never had any common law crimes nor any common law jurisdiction. This everybody knows to be axiomatic. The judgment of the court, in each case of conviction by verdict or plea of guilty, is fixed by positive and irrevocable provisions of statute. The so-called inherent power of the common law courts has nothing whatever to do with it. The court has no will or wish, and no discretion in respect to whether a sentence shall or shall not be pronounced, or whether it shall or shall not be enforced.

When the judicial sentence is pronounced by the court, the judicial power becomes functus officio, and all that must thereafter be done or that may be done is prescribed by positive provision of statute. Strict construction of criminal statutes excludes the exercise of any power not therein expressly provided for. When the sentence is entered the prisoner must be disposed of as the statutes provide. To permit the court to qualify its order of sentence by conditions not authorized by statute, would result in disregard of the acts of the Legislature. When a sentence is pronounced jurisdiction ceases, unless the case be one within the statute authorizing a suspension.

To permit the judicial power to suspend a judgment required to be rendered by the mandatory provision of the statute would be to override the power of a co-ordinate branch of government which is vested with exclusive power to fix the jurisdiction and power of courts. It will permit a judge to substitute its judgment or caprice for the legislative function.

To sustain an inherent power of courts to suspend a sentence mandatorily required by statute would be an assumption of power, pure and simple. Criminal penalties as prescribed by statute represent the preponderant public opinion, as expressed by the Legislature, which can not be disregarded or modified by the judiciary, no matter how high and lofty its motive may be in any particular case where there is an inclination to suspend a sentence.
* * *

But the judgment and sentence in the criminal case is not the individual opinion or judgment of the judge or court, but is that of the Legislature.

Before the indeterminate and probation or suspension statutes, the judge or court had no discretion whatever, and was required to impose a sentence between the minimum or maximum penalty. Before the indeterminate statute, the court was bound to pronounce sentence within the statutes, the minimum or maximum term, or a term between the two. The enactment of the indeterminate law furnishes conclusive evidence that it was never intended that the court was to exercise clemency. Under these statutes the duty of sentencing according to their provisions is mandatory, the only discretion the court has being to suspend a sentence when conditions warrant it according to conditions fixed by statute.

Under Section 13706, General Code, the court has discretionary power to suspend the execution of a sentence, and to place the defendant on probation when 'the defendant has never before been imprisoned for crime.'

What would be the use of enacting such a statute if it was settled that courts had inherent power to suspend a sentence, the terms of which are prescribed by statute. If a court could prescribe the conditions of the order of suspension, why the necessity of detailed provision as to the conditions of suspension and of the regulation of those so placed on probation?

All these statutes and the whole criminal code, as well as the difference between judicial power in criminal and civil cases, in no uncertain language expressly and inferentially, demonstrate, in my judgment, the utter want of the inherent power of suspension.

* * *

My conclusion is that the court has no statutory or inherent power to suspend the sentence in this case."

It is interesting to note that the reasons given by Judge Kinkead for his holding are in substantial accord with those of Chief Justice White in the case of Ex parte United States, supra.

In the case of *State of Ohio* vs. *Vourron*, 28 O. D. 600, decided May 4, 1916, Judge May of Hamilton County, sitting by designation on the Court of Common Pleas of Stark County, held as follows:

"A court is without jurisdiction to suspend a sentence after the term has passed at which the sentence was imposed."

From the review of the cases above quoted, while I appreciate that the discussion of Chief Justice Marshall in the opinion in the Madjorous case was not necessary to a decision in that case, and while, as above pointed out, the Weber case was not expressly overruled by the Madjorous case, upon the principles laid down by Chief Justice White in the case of Ex parte United States, supra, quoted with approval in the opinion by Chief Justice Marshall in the Madjorous case, and for the reasons given by Judge Kinkead in the Radcliffe case, it is my opinion that trial courts in Ohio are not vested with inherent power to suspend a sentence passed on defendants in criminal cases and place such defendants upon probation. It follows, therefore, that in this state the power of trial courts to suspend sentences imposed upon defendants in criminal cases extends only where there is some statute granting such power and that the extent of such power is limited by the terms of the statute making the grant.

Other than the sections of the General Code permitting the suspension of the execution of sentences imposed in criminal cases when proceedings in error are perfected, or are intended to be perfected (Sections 13698 to 13702 and Sections 13757 to 13759, General Code), the sections of the General Code here pertinent are Sections 1666, 2148-9, 13698 et seq., and Section 13010.

Section 1666, General Code, found in the chapter entitled "Juvenile Court" and relating to the jurisdiction and procedure in that court, reads as follows:

> "In every case of conviction and where imprisonment is imposed as part of the punishment, such judge may suspend sentence upon such conditions as he imposes."

Section 2148-9, contained in the chapter entitled "Ohio Reformatory for Women," provides in part that:

> "All provisions of law relating to suspension of sentences of persons sentenced to confinement in the Ohio penitentiary and the Ohio State Reformatory shall be applicable to persons sentenced to the Ohio reformatory for women.
> * * *"

Section 13010, which was enacted as a part of Section 1 of the act entitled "An Act—To compel parents to maintain their children" and refers to the offenses of neglecting to provide for a child or pregnant woman and abandoning a child or pregnant woman, respectively defined in Sections 13008 and 13009, provides:

> "If a person, after conviction under either of the next two preceding sections and before sentence thereunder, appears before the court in which such conviction took place and enters into bond to the State of Ohio in a sum fixed by the court at not less than five hundred dollars nor more than one thousand dollars, with sureties approved by such court, conditioned that such person will furnish such child or woman with necessary and proper home, care, food and clothing, or will pay promptly each week for such purpose to a trustee named by such court, a sum to be fixed by it, sentence may be suspended."

Section 13706, General Code, which contains general provisions for the suspension of the imposition of the sentence in criminal cases and the placing of the defendant on probation, reads as follows:

> "In prosecutions for crime, except as mentioned in Section 6212-17 of the General Code, and as hereinafter provided, where the defendant has pleaded or been found guilty and it appears to the satisfaction of the court or magistrate that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall be immediately sentenced, such court or magistrate may suspend the imposition of the sentence and place the defendant on probation in the manner provided by law, and upon such terms and conditions as such court or magistrate shall determine."

This section should be read in connection with Sections 13696 and 13708, respectively reading in part:

> Section 13696. "When a person is convicted of an offense punishable, either in whole or in part, by a fine, the court, by motion, may hear testimony in mitigation of sentence. The court shall hear such testimony at the term at which the motion is made, or may continue the case to the next term on like terms as the case might have been continued before verdict

or confession. The prosecuting attorney shall attend such proceedings on behalf of the state, and offer testimony necessary to give the court a true understanding of such case. * * *

* * *"

Section 13708. "No person convicted of murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape without consent, assault with intent to rape, or administering poison shall have the benefit of probation."

In your letter you refer to the case of *Antonio* vs. *Milliken, Sheriff*, 9 Oh. App. 357, 29 O. C. A. 305, decided by the Court of Appeals for Mahoning County on March 12, 1918, and point out that this case was decided prior to the amendment of Sections 13706 and 13711, General Code, on April 17, 1925 (111 v. 423), and you inquire if, under these sections as amended, trial courts may suspend sentences imposed in criminal cases, after sentence has been imposed and has been carried into execution to the extent of committing the defendant to jail.

The headnote in the Antonio case reads as follows:

"In misdemeanor cases the trial court has power under favor of Section 13711, General Code, to suspend in whole or in part the execution of a sentence at any time during the term at which sentence was passed, even though the defendant had entered upon the imprisonment ordered by the sentence."

In that case Antonio, after having been found guilty of torture under Section 12428, General Code, and sentenced by the Municipal Court of the City of Youngstown to pay a fine of twenty-five dollars and the costs of prosecution, and to be imprisoned in the jail of Mahoning County for a period of thirty days and until his fine and costs were paid, was committed to the county jail on February 13, 1918. Two days later he paid the fine and costs imposed, whereupon the court suspended the sentence as to further imprisonment and issued an order for his release from jail, which order the sheriff declined to honor.

Upon an application for a writ of habeas corpus, the court ordered the release of Antonio.

In the opinion the court referred to Section 13706, General Code, and quoted in part Section 13711, General Code, which read as follows:

"When the sentence of the court or magistrate is that the defendant be imprisoned in a workhouse, jail, or other institution, except the penitentiary or reformatory, or that the defendant be fined and committed until such fine be paid, the court or magistrate may suspend the execution of said sentence and place the defendant on probation, and in charge of a probation officer named in such order, in the following manner:"

At the time of that decision Section 13706 provided:

"In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that

the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence and place the defendant on probation in the manner provided by law."

The court quoted from the case of *Lee* vs. *State*, supra, and cited the cases of *Tracy et al.* vs. *State*, 8 O. C. C. (N. S.) 357, and *Ammon* vs. *Johnson, Gdn.*, 3 O. C. C. 263, and continued as follows:

"However, the case of *Weber* vs. *State*, 58 Ohio St., 616, is practically decisive of the issue here. * * *

* * *

In accord with the foregoing is the case of *Lee Ex parte*, 16 O. D. 259, 3 N. P., N. S., 533.

* * *

* * * the court passing sentence and entering judgment, as in the instant case, should have the power, within a reasonable time, to so alter the same as to meet the demands of justice. If for any reason, either by mistake or fraud, the court, in passing sentence, acted under a misapprehension of the facts; then the opportunity to exercise sound judicial discretion has been denied, and by every principle of right should be exercised by way of revision of sentence to secure the furtherance of justice and the due administration of the law. It is urged that this is a dangerous power; if so, the same may be said of all judicial discretion, which, if shorn of the right to modify or suspend a judgment within a reasonable time limit, would be much more dangerous. The 'time limit has been held to be the term at which judgment is entered,' and this for the chief reason that after term time a record is presumed to have been made of all orders and judgments of the preceding term; that such record is complete, and the term having been adjourned formally, or by operation of law, the record imports absolute verity and is unalterable except as specifically provided by law. The power to revise judgments during term in such cases as under discussion here and to correct errors and mistakes, is for the protection of the defendant and the public alike; the principles which support it rest in reason and it comes easily within the spirit of the statute under discussion here.

It will be observed that the judge of the municipal court in issuing said order states in it, 'for good cause shown.' *It was a modification of the original sentence*, or a suspension of a part of the same, and not the exercise of the pardoning power as urged in argument; because the defendant had complied with a part of the terms of said sentence. Therefore, for the reasons above given, and upon the theory that a court has control over its judgments and orders during the term at which they are made, the judge of the municipal court had a right in the case at bar to direct the release of the prisoner."

You will note from that part of the opinion above italicized that the court held that the action of the Munucipal Court of Youngstown suspending the unserved portion of the sentence to imprisonment was a modification of the original sentence. And while the court said that the case of *Weber* vs. *State* was decisive of the question there presented, yet at the beginning of the opinion the court expressly referred to Section 13706, General Code, and quoted a part of Section 13711 as then in force, and said that it was "plainly indicated in this order (suspending the sentence) that it was given under said Section 13711, General Code, so that the only question to be determined" was "whether or not the judge of the Municipal Court had such control

over the judgment in said cause as he sought to exercise by said order." That is to say, since the Municipal Court of Youngstown, when suspending the sentence in question, acted under authority granted by the Legislature in Sections 13706 and 13711, the Antonio case bears upon the power of trial courts to modify their judgments in criminal cases during term, rather than the *inherent* powers of such courts to suspend sentences in criminal cases.

I do not question the power and jurisdiction of trial courts, in the exercise of judicial discretion and in furtherance of justice, in proper cases, at the same term and before the original sentence has gone into operation, or any action has been had upon it, to revise and increase or diminish sentences imposed in criminal cases within the limits authorized by law. This was expressly held in the case of *Lee* vs. *State*, supra, which case has not been reversed or modified. In this connection, your attention is directed to the cases of *Tracy* vs. *State*, 8 O. C. C. (N. S.) 357, decided July 21, 1906, and *Santo* vs. *State*, 17 O. C. C. (N. S.) 110, 32 O. C. D. 50, decided June 28, 1910, in which the Lee case was cited with approval and followed, and to the case of *Case of Habeas Corpus*, 7 O. N. P. 604.

While the control of trial courts over their judgments in criminal cases during term is necessarily involved in your question, the real question presented is, may trial courts in Ohio suspend the execution of sentences imposed in cases such as the one described in your letter, in view of the fact that there is no statute expressly granting such power, Section 13706, as amended, only providing for the suspension of the *imposition* of sentences.

The offense of operating, while in a state of intoxication, a motor vehicle upon a public highway or street is a misdemeanor and upon conviction thereof the defendant is subject to the punishment provided for in Section 12628–1, which reads:

> "That it shall be a misdemeanor for any person to operate a motorcycle or motor vehicle of any kind upon any public highway or street while in a state of intoxication, and upon conviction he shall be subject to punishment by a fine not less than twenty-five dollars nor more than one hundred dollars, or imprisonment in the county jail for not more than six months, or both."

Under the provisions of Sections 13706 and related sections the trial court might have elected to suspend the *imposition* of the sentence and place the accused on probation, but the court elected to do otherwise; and while the court may, in a proper case, during the term, and before the original sentence has gone into operation, modify the sentence imposed by increasing or diminishing the same, in view of the discussion above set forth, it is my opinion that the trial court is without power or jurisdiction to suspend the *execution* of such sentence. This conclusion accords with that of my predecessor in office in an opinion reported in Opinions, Attorney General, 1926, page 488, in which it was said as follows:

> "Ever since the decision in the case of *Weber* vs. *State*, 58 Ohio St. 616, it has been the position of the courts that they have inherent power to suspend all sentences. This rule has been followed since the opinion in that case until the present time. However, in view of the case of Madjorous vs. *State*, 113 Ohio St., page 427, the position taken by the courts is rather doubtful and while the decision therein relates only to Section 6212-17, the reasoning found in the opinion, which is concurred in by all the judges participating therein, leads to the conclusion that the courts have the power to suspend sentence unless otherwise provided by statute.
>
> In the above case it is pointed out by the court that by the enactment of Sections 13706 et seq. that the Legislatures have otherwise provided.
> * * *

* * *

If as has been said in the above case that the legislative intent has been exhausted by the enactment of Section 13706 et seq., then the only manner of suspending a sentence is under the above section. And as the above sections provide for the suspension of the imposition of a sentence and the placing on parole at that time, that is the only method open to the courts. As in this case the court has not seen fit to proceed under these sections but has sentenced the defendant to serve a term in the penitentiary and then has subsequently during the same term attempted to suspend the operation of the sentence, it is believed that the second order of the court is a nullity."

From the above discussion, I conclude that:

1. Where a court, in passing sentence in a criminal case, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion, and in furtherance of justice, at the same term, and before the original sentence has gone into operation, or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law.

2. Courts do not possess inherent power to suspend the execution of sentences imposed in criminal cases, except to stay such sentences for a time after conviction, for the purpose of giving an opportunity for a motion for a new trial or in arrest of judgment, or during the pendency of a proceeding in error, or to afford time for executive clemency.

3. In the enactment of statutory provisions dealing with the suspension of sentences in criminal cases, it will be presumed that the Legislature has exhausted the legislative intent in that respect, and that it has not intended the practice to be followed in such cases to be extended further than the plain import of the statutory provisions.

4. The provisions of Section 1666, General Code, relating to the power of juvenile courts to grant conditional suspension of sentences in juvenile cases; of Section 13010, General Code, relating to conditional suspension of sentences in non-support cases; and of Section 13706 and related sections of the General Code, permitting the suspension of the *imposition* of sentences in criminal cases generally, are exclusive, and trial courts in Ohio are without power to grant suspensions of the execution or imposition of sentences except as may be authorized in one of these sections, or in the several sections, relating to the suspension of the execution of sentences during error proceedings.

In view of the foregoing, and in specific answer to your question, it is my opinion that, where a person, convicted of operating, while intoxicated, a motor vehicle on the public streets or highways, is sentenced to pay a fine and costs and to be imprisoned in the county jail for a definite period of time, and such sentence has been carried into execution to the extent of committing such person to the county jail, the trial court is without power and jurisdiction to suspend so much of the jail sentence as remains unserved and release the prisoner, upon payment of the fine and costs.

Respectfully,
EDWARD C. TURNER,
Attorney General.