(2) The language of Section 7882, General Code, providing that, in city school districts where a custodians' pension fund has been established, the board of education shall appropriate for the uses of said pension fund "a sum equal to not less than one-tenth nor more than one-fifth of one per cent of the amount levied and collected by said school board for all purposes," does not include levies made after a vote of the people authorizing such levies for bond retirement purposes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1830.

COURTS—POWER TO CORRECT MISTAKES IN JUDGMENT ENTRIES —NUNC PRO TUNC ENTRY DISCUSSED.

SYLLABUS:

1. *It is the duty of a court and it has power at any time to make an order correcting a mistake in the record of a judgment. A court has power to amend its records so as to make them conform to the truth even after the term has expired.*

2. *The purpose of a nunc pro tunc entry is to correct the record of the court in a cause so as to make it set forth an act of the court, which although actually done at a former term thereof, was not entered upon the journal.*

COLUMBUS, OHIO, March 9, 1928.

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

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads:

> "We have confined in the Ohio Penitentiary one, Charles Sanders, our Serial Number 56946, admitted to this institution from Hamilton County on March 31, 1927, for the crime of 'Pointing Firearms'.
>
> The indictment in this case shows that Sanders was indicted for 'pointing firearms' and the Journal Entry provides that 'Charles Sanders be imprisoned and confined in the Ohio State Penitentiary, Columbus, Ohio, and kept at hard labor, but without any solitary confinement for one (1) year', etc. The Certificate of Sentence states that Sanders plead guilty to 'pointing firearms'.
>
> We have requested the authorities of Hamilton County to state what section of the General Code this man was sentenced under, but as you will note from the letters and replies shown in Sanders' file, herewith attached, we have not received proper authority to enable us to enter this man properly on our records.
>
> Therefore, we ask your kindly guidance in this case."

From information furnished me it appears that there were two cases in the Court of Common Pleas of Hamilton County, styled the *State of Ohio* vs. *Charles Sanders,* and that the following action was taken with reference thereto:

1. Charles Sanders was indicted by the Grand Jury of Hamilton County, Ohio, for the crimes of "Pointing Firearms" and "Carrying Concealed Weapons".

2. The indictment charging "Pointing Firearms" was docketed as Case No. 29250. The indictment charging "Carrying Concealed Weapons" was docketed as Case No. 29251.

3. On March 5, 1927, the following entry was made in the records of the Common Pleas Court of Hamilton County, in Case No. 29250, viz.:

> "This day came the Prosecuting Attorney on behalf of the State, the defendant being brought into court in the custody of the Sheriff, for plea, and being arraigned upon the indictment herein, for plea thereto says that he waives the reading of the indictment and enters a plea of guilty to pointing firearms.
>
> Whereupon, the defendant being inquired of if he had anything to say why judgment should not be pronounced against him, and having nothing further to say than he hath already said,
>
> It is therefore ordered and adjudged by the court that the defendant, Charles Sanders, be imprisoned and confined in the Ohio State Penitentiary, Columbus, Ohio, and kept at hard labor, but without any solitary confinement, for one (1) year and that he pay the costs of this prosecution, for which execution is awarded."

4. On March 31, 1927, Charles Sanders was admitted to the Ohio Penitentiary, the Certificate of Sentence reading as follows:

> "The said Charles Sanders having plead guilty to pointing firearms it is therefore the sentence of the Court that he be imprisoned in the Penittentiary of this State and be kept at hard labor for the term of one (1) year and that he pay the cost of this prosecution * * * ."

5. On February 13, 1928, the following journal entry was placed upon the record in Case No. 29250, viz.:

> "This cause coming on to be heard and it appearing that by inadvertence sentence of the court was recorded as committing defendant herein to the Ohio Penitentiary for the term of one year, on the fifth day of March, 1927, being in the March term of this court, it is now ordered nunc pro tunc that the sentence of Charles Sanders, so inadvertently entered, be, and hereby is, suspended."

6. On February 13, 1928, the following journal entry was placed upon the record in Case No. 29251, viz.:

> "This cause coming on to be heard, and it appearing that by inadvertence the sentence given in this case on March 5th, 1927, was not entered, it is now ordered nunc pro tunc that the said Charles Sanders, having plead guilty to carrying concealed weapons, be imprisoned in the Penitentiary of this State and be kept at hard labor for the term of one year, and that he pay the costs of this prosecution."

It is the duty of the court, and it has power at any time, to make an order correcting a mistake in the record of a judgment. See *State* vs. *Johnson*, 136 Pac.

(Kans.) 940, (1913). There can be no doubt of the power of the court to amend its record so as to make it conform to the truth even after the term has expired. To this effect see *Commonwealth* vs. *Rusic,* 79 Atl. (Pa.) 140, (1911) and *Pullian* vs. *Jenkins,* 121 S. E. (Ga.) 679, (1923). The fourth paragraph of the headnote of the case of *Quinton* vs. *State,* 200 N. W. (Neb.) 880, (1924) reads:

> "4. A court may on its own motion, when the facts are within the knowledge of the presiding judge, enter of record a nunc pro tunc judgment, even at a subsequent term."

To the same effect is the case of *Parenti* vs. *District Court,* 199 N. W. (Ia.) 259 (1924.)

The first paragraph of the syllabus in the case of *The Cleveland Leader Printing Co.* vs. *Green,* 52 O. S. 487, reads:

> "1. The province of a nunc pro tunc entry is to correct the record of the court in a cause so as to make it set forth an act of the court, which though actually done at a former term thereof, was not entered upon the journal; and it cannot lawfully be employed to amend the record so as to make it show that some act was done at a former term, which might or should have been, but was not, then performed."

As stated by Judge Bradbury on page 493:

> "The office of a nunc pro tunc entry, of the class under consideration, is to record some act of the court done at a former term, which was not then carried into the record, but it should not be employed to secure at a subsequent term, a performance by the court, of some act which the applicant failed to have the court do at the term in which a final judgment had been rendered and entered. Doubtless a court retains jurisdiction of its records, and may correct them so as to make them set forth whatever act the court performed in a cause, at a prior term; but in the absence of some statutory provision its jurisdiction of the cause terminates with the term at which a final judgment is entered. Were the rule otherwise, the stability of judgments would be destroyed; they would be found, not alone in the records of the court, but in those records and the memory of the judge combined. The authorities which support this view of the office of a nunc pro tunc order, of the class under consideration, are numerous. 'After the close of the term, it is holden, that the court can enter no order nunc pro tunc, unless one was actually made, and omitted to be entered.' *Lorbet* vs. *Coffin,* 6 Ohio, 33, *Long* vs. *Long,* 85 N. C., 417; (and other cases)."

The first and second paragraphs of the headnote of the case of *Gardner* vs *State,* 108 So. (Ala.) 635, (1926) read:

> "1. Object of judgment 'nunc pro tunc' is not rendering a new judgment and ascertainment of new rights but is one placing in proper form on record judgment previously rendered, to make it speak the truth.
>
> 2. Power to amend nunc pro tunc is not revisory in its nature, and is not intended to correct judicial errors."

As stated on page 636:

> "Such amendment ought never to be the means of modifying or enlarging the judgment, or the judgment record, so that it will express something which the court did not pronounce, even though the proposed amendment embraces matter which ought clearly to have been pronounced. However erroneous, the express judgment of the court cannot be corrected at a subsequent term of the court nor a judgment entered where none had been rendered."

However, where a judgment *is pronounced,* but the clerk fails to enter it on the minutes, a nunc pro tunc order can be entered at a subsequent term. See *Payne* vs. *State,* 289 S. W. (Tenn.) 526, (1926). Stated somewhat differently but to the same effect is the headnote to the case of *Dunn* vs. *State,* 196 Pac. (Okla.) 739, (1921), viz.:

> "Where through the negligence or omission of the clerk, the judgment record is defective or incomplete, the court may at any time, upon a proper showing, require the clerk to make the record conform to the facts nunc pro tunc."

The first paragraph of the case of *State* vs. *Linderholm,* 135 Pac. (Kans.) 564, (1913), reads:

> "1. It is the duty of the clerk of the district court to keep a journal and to record thereon all judgments, decrees and orders of the court. All that is necessary is that the journal recite correctly the judgment of the court, no matter how or from what source the clerk may have obtained the form used in making the entry. If a dispute arise between counsel as to what was decided or adjudged, the court is the final arbiter, and if for any reason the record fail to speak the truth, it is the duty of the court, and it has power at any time, to order the record changed or corrected."

Where the clerk omits to enter the judgment in a criminal case when it is pronounced, defendant being then present, an order to enter the judgment nunc pro tunc may afterwards be made, though defendant be not in court. To this effect see *People* vs. *Lenon,* 21 Pac. 967, *Ex parte Mitts,* 278 U. S. 1047 and *State* vs. *Damron,* 100 S. E. (W. Va.) 494. The trial court's discretion in amending the record in a criminal case will not be reviewed in absence of abuse thereof. *Wentzel* vs. *People,* 133 Pac. (Col.) 415.

From an examination of the facts that appear in the two cases of *State of Ohio* vs. *Charles Sanders,* it is apparent that from March 5, 1927, (when the entry in Case No. 29250 was entered), to February 13, 1928, (when the nunc pro tunc entries were made), through negligence or omission the judgment record in said cases was defective and incomplete. On February 13, 1928, the court, at a term subsequent to that when the first judgment was entered, on its own motion, with knowledge of all the facts, entered a nunc pro tunc judgment to correct the record of the court in said cases so as to make it set forth an act of the court, which though actually done at a former term thereof, was not entered upon the judgment record. From the foregoing authorities I have no hesitancy in arriving at the conclusion that the trial court had authority so to do.

I do not desire to be understood that it is my opinion that a court, at a subsequent term, has power to modify, amend or revise a valid judgment and sentence.

A judgment, of course, may be corrected by proper order nunc pro tunc, but a new and different judgment cannot be entered. In other words, a nunc pro tunc entry may not lawfully be employed to amend the record so as to make it show that some act was done at a former term, which might or should have been done, but was not then performed.

I have been informed by the Prosecuting Attorney of Hamilton County that Sanders, when arraigned on the two indictments above referred to, did in fact plead guilty to each of said indictments. However, when sentence was imposed it was for unlawfully carrying concealed weapons but the record of such sentence was inadvertently entered in the wrong case.

The use of the word "suspended" in the nunc pro tunc entry in Case No. 29250 standing alone would be misleading, but when taken in connection with the recital that "it appearing that by *inadvertence* sentence of the court was recorded as committing defendant herein to the Ohio Penitentiary * * * it is now ordered nunc pro tunc that the sentence of Charles Sanders, *so inadvertently entered,* be, and hereby is suspended," it will be readily understood that the word "suspended," as therein used, means vacated. In other words, there was no attempt at suspension of sentence under the statute. On the other hand, it was a wiping out of a record of sentence in Case No. 29250.

As provided by Section 13720, General Code,

> "A person sentenced for felony to the penitentiary * * * shall be * * * delivered into the custody of the warden of the penitentiary * * * with a copy of such sentence, and to be kept until the term of his imprisonment expires, or he is pardoned. * * * "

It is my opinion that it will be necessary for a new and proper certificate of sentence to be forwarded to you in order that the prisoner may be properly entered upon your records and your records be made to conform to the sentence actually imposed. Such certificate of sentence should be immediately obtained from the Clerk of the Court of Hamilton County, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1831.

ANNUAL FINANCIAL REPORT OF MUNICIPALITY—MUST BE PUBLISHED IN NEWSPAPER—SECTION 291, GENERAL CODE, CONSTRUED—MUNICIPALITY MAY PUBLISH REPORT IN ADDITIONAL WAYS.

SYLLABUS:

1. *The annual financial report made by the fiscal officer of a municipality in accordance with Section* 291, *General Code, should be published in a newspaper as provided in Section* 291, *General Code.*

2. *A municipality, by virtue of the home rule provisions of the Constitution, may provide for the publication of financial reports in any manner it sees fit in*