1479.

TRIAL COURTS OF OHIO—JURISDICTION AND POWERS—NO INHERENT POWER TO INDEFINITELY SUSPEND EXECUTION OF SENTENCE IN CRIMINAL CASE—PROBATION—SECTIONS 13452-1 TO 13452-9 G. C. SHALL PREVAIL—STATUS: MALE PERSON PREVIOUSLY SENTENCED TO PENAL INSTITUTION, ELIGIBLE FOR COMMITMENT TO OHIO STATE REFORMATORY—SECTION 2131 G. C. REQUIRES SUPERINTENDENT TO RECEIVE ALL MALE CRIMINALS BETWEEN AGES SIXTEEN AND THIRTY YEARS, EXCEPT THOSE CONVICTED OF MURDER IN FIRST AND SECOND DEGREES, WHERE COURT DEEMS THEM AMENABLE TO REFORMATORY METHODS—STATUS WHERE SENTENCE SUSPENDED, PROBATION DECREED, PERSON COMMITS ANOTHER FELONY.

SYLLABUS:

1. Trial courts of Ohio do not have inherent power indefinitely to suspend the execution of a sentence in a criminal case and place the person so sentenced on probation, but may only, in proper cases, suspend the imposition of the sentence and place the person convicted upon probation in accordance with the provisions of Sections 13452-1 to 13452-9, inclusive, of the General Code.

2. A male person previously sentenced to a state penal institution, even though otherwise eligible for commitment to the Ohio State Reformatory, cannot legally be committed to such institution by the sentencing court.

3. By the express terms of Section 2131 of the General Code, the Superintendent of the Ohio State Reformatory is required to receive all male criminals between the ages of sixteen and thirty years, except persons convicted of murder in the first and second degree, sentenced to such reformatory, if such persons are not known to have been previously sentenced to a state prison. Persons between the ages of twenty-one and thirty years may only be sentenced to the Ohio State Reformatory if the court passing sentence deems them amenable to reformatory methods.

4. Where a person between sixteen and thirty years, who has been previously convicted of a felony, but who has had the imposition of his sentence suspended and has been placed on probation by the trial court, in accordance with the provisions of Sections 13452-1 to 13452-9, General Code, commits another felony, the trial court may within its discretion terminate the probation at any time within the probationary period and impose any sentence which might originally have been imposed upon the first conviction. Or, the trial court may, in its discretion, permit such

person to continue on probation and upon his indictment for and conviction of the second felony, sentence such person to the Ohio State Reformatory for the commission of the second felony, if the court deems such person amenable to reformatory methods.

5. Whether or not in such a case a trial court may terminate the probation and sentence the defendant to the Ohio State Reformatory upon the first conviction, and upon his conviction of the second crime sentence such person to the Ohio Penitentiary: Quaere.

6. Trial courts of competent jurisdiction are empowered in the first instance to determine their own jurisdiction and powers.

COLUMBUS, OHIO, November 28, 1939.

HONORABLE FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

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

> "On June 25, 1936, the Attorney General of Ohio released opinion No. 5745, concerning prisoners in the Reformatory and Penitentiary.
>
> As we understand this opinion, a person who is convicted and sentenced to the Reformatory and then placed on parole must be sentenced to the Penitentiary in the event that such person is convicted for another felony while on parole or subsequent thereto.
>
> The opinion further holds, as we interpret it, that such person must first serve the subsequent sentence and then be returned or transferred to the institution where incarcerated when the parole was granted. The result of this procedure is that a person 19 years of age who is convicted and sentenced to the Reformatory and then paroled would be sent to the Penitentiary on a subsequent or second conviction and when the latter sentence is served such person would go back to the Reformatory as a parole violator although he might be 25 or 30 years of age after the second sentence is served.
>
> The purpose of this letter is to request an opinion from you on the following facts which occur rather frequently:
>
> A, who is of Reformatory age, commits a burglary and is sentenced to the Reformatory but the execution of sentence is suspended and A is placed on probation. Before the probation period expires, or after its termination, A who is still of Reformatory age commits another felony.
>
> Can A legally be sentenced, upon conviction of this second offense, to the Reformatory?

If the subsequent offense is committed while A is on probation, must A be sentenced to the Penitentiary?

Under syllabus 2 of Opinion No. 5745, as follows:

> 'A person previously *sentenced* to a state penal institution, even though otherwise eligible for commitment to the Ohio State Reformatory, cannot legally be committed to such institution by a sentencing court',

must A, who has been 'previously sentenced to a state penal institution' and 'who has been previously convicted of a penal offense' (p. 4 of opinion), but who actually never served time in any penal institution because of the fact that his first sentence was suspended and he was placed on probation, be sentenced to the Penitentiary upon conviction of a second offense?

The probation regarding sentencing of second offenders to the Reformatory would seem to be on the theory that the defendant, having served time in the Reformatory and having shown no capacity to reform (becoming involved in criminal activity again after his release) should upon conviction of a second felony be sent to the Penitentiary.

In your opinion, is there any distinction between the status of the parole violator and that of A., who, although previously convicted and sentenced, was given probation?"

At the outset, I deem it proper to point out that while the Attorney General is authorized and directed by law to advise state administrative officers and to advise prosecuting attorneys in cases in which the state is or may become a party, he is in nowise empowered to determine the jurisdiction and powers of trial courts of competent jurisdiction, which must, in the first instance, be determined by such courts.

It is somewhat difficult to understand your exact inquiry because of your several references to the suspension of the *execution* of a sentence duly imposed upon one convicted of a felony, and the placing of the defendant so convicted and sentenced on probation. Since the effective date of House Bill No. 197 (111 v. 423), passed by the 86th General Assembly on April 17, 1925, trial courts in Ohio have been without power or jurisdiction to suspend the *execution* of the sentence in cases of the kind referred to in your communication, and have been limited to the suspension of the *imposition* of the sentence.

House Bill No. 197 was entitled "An Act—To provide for probation under suspension of the *imposition* of sentence, and to provide a system of local administration of probation, parole and conditional pardon; and for such purposes *** amending sections ** 13706 ** of the General Code." When our present Criminal Code was enacted in 1929, Sections 13706 and 13707, General Code, were replaced by Section 13452-1, Gen-

eral Code, which, as stated in Page's Ohio General Code, "is substantially the same as former G. C. §§13706, 13707". (Emphasis ours.)

Section 13452-1, which is contained in Chapter 31, Title II, of our Code of Criminal Procedure, entitled "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 judge 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 the public good does not demand or require that he be immediately sentenced, such judge 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 judge or magistrate may determine; provided, that juvenile delinquents shall not be included within this provision."

Section 6212-17, General Code, referred to in the above section, had to do with violations of the State Prohibition Laws and has been repealed (115 v. Pt. II, 118, 164).

Sections 13452-5, 13452-6 and 13452-7, contained in the same chapter, respectively provide as follows:

Sec. 13452-5:

> "The probation provided for in this chapter shall continue for such period as the judge or magistrate shall determine, and may be extended from time to time, the total period, however, not exceeding five years, but if, during such period, the probationer absconds or otherwise absents himself from the jurisdiction of the court without permission from the probation department, or the court, so to do, or if he is confined in any institution for the commission of any offense whatever, the probation period shall cease to run until such time as he is brought before the court for its further action under this act."

Sec. 13452-6:

> "During such probationary period, any field officer or probation officer, may arrest the defendant without a warrant and bring him before the judge or magistrate before whom the cause was pending. Such arrest may also be made by any sheriff or other peace officer upon the written order of the chief probation officer, if the defendant be under the supervision of a county probation department, or on the warrant of the judge or magistrate

if the defendant be under the supervision of a probation officer of or so designated by the judge or magistrate."

Sec. 13452-7:

"When the defendant is brought before the judge or magistrate, such judge or magistrate shall immediately inquire into the conduct of the defendant, and may terminate the probation, and impose *any sentence which might originally have been imposed* or continue the probation and remand the defendant to the custody of the probation authority, at any time during the probationary period fixed as herein provided, when the ends of justice will be served and the good conduct of the person so held shall warrant it, the judge or magistrate may terminate the period of probation. 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; ***" (Emphasis ours.)

It has been definitely decided by the Supreme Court of Ohio that trial courts in this state do not have inherent power to suspend the execution of a sentence in criminal cases and may exercise the power to suspend only as authorized by statute.

In the case of Municipal Court of Toledo, et al., vs. State ex rel. Platter, 126 O. S. 103 (1933), with which you are doubtless familiar, the court held as stated in the first four branches of the syllabus:

"1. Criminal procedure in this state is regulated entirely by statute, and the state has thus created its system of criminal law covering questions of crime and penalties, and has provided its own definitions and procedure.

2. By statute, authority is conferred upon trial judges to suspend imposition of sentence and place the defendant upon probation; also discretionary power is conferred upon trial judges to suspend execution of sentence of one convicted of a bailable offense for such period as will give the accused time to prepare, file or apply for leave to file a petition for review of such conviction. Also provision is made for conditional sentence in misdemeanors.

3. The trial courts of this state do not have the inherent power to suspend execution of a sentence in a criminal case and may order such suspension only as authorized by statute.

4. Where a court has suspended execution of a sentence without lawful authority so to do, its order of suspension may be treated as a nullity and void and the original sentence carried into execution even after the term in which the order suspending

the execution of sentence was made. A court does not lose jurisdiction to enforce a sentence in a criminal case by an unauthorized attempt to suspend it."

In the opinion by Judge Robert H. Day, it was said as follows at pages 108 et seq.:

"As to the second proposition, pertaining to the power of the municipal court to suspend execution of sentence, it should be noted that there is a distinction between suspension of *imposition* of sentence and suspension of *execution* of sentence. We find no statutory authority to suspend the *execution* of the sentences previously imposed by such court on conviction of violating a state law, except to enable defendant to prosecute error or to be placed on probation, as provided by statute; nor did the municipal court have inherent power so to do.

We are cited to the cases of Weber v. State, 58 Ohio St., 616, 51 N. E., 116, 41 L. R. A., 472, and In re Nunley, 102 Ohio St., 332, 131 N. E., 495. Neither of these cases is authoritative, for the reason that the same are no longer controlling, because of legislative enactment. The Legislature has made provision for the suspension of the *imposition* of sentence and the placing of an accused on probation by Section 13452-1 to 13452-11, General Code; second, for suspension of *execution* of sentence pending perfection of error proceedings, by Sections 13453-1 to 13453-6, General Code; and, third, for the conditional sentence of persons convicted of misdemeanors, by Section 13451-8, General Code.

As is said in Madjorous v. State, 113 Ohio St., 427, at page 433, 149 N. E., 393: '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 unius est exclusio alterius,* applies.'

* * * * * * *

The Legislature having made these statutory provisions for suspension of execution of sentences, we find no statutory authority available to the defendants in these cases; and, unless the court had an inherent power to suspend, such suspensions were without authority.

In view of the fact that in this state crimes are defined by statute, and procedure in criminal cases is of statutory provision, we must look to the statute for authority to suspend execution

of sentence. 12 Ohio Jurisprudence, 49; Weaver v. State, 120 Ohio St., 44, 165 N. E. 573; Stockum v. State, 106 Ohio St., 249, 253, 139 N. E., 855.

This court has heretofore, in the case of Madjorous v. State, supra, considered the question of the inherent powers of courts to suspend execution of sentence in criminal cases. The language of the opinion, at page 433, is pertinent: '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.'

In the Madjorous case, a writ of *certiorari* filed in the Supreme Court of the United States was denied, 270 U. S., 662, 46 S. Ct., 471, 70 L. Ed., 787. ***."

See also Ex Parte Steinmetz, 35 Oh. App. 491, 172 N. E. 623 (1930).

It is clear that the Platter case is dispositive of the question as to whether or not trial courts in Ohio may indefinitely suspend the *execution* of a sentence imposed upon one convicted of a felony and place such person upon probation and that the trial courts of this state are, under the existing law, without such power. And it is equally clear that the situation presented by the facts stated in your letter cannot exist under the present law. That is to say, Opinion No. 5745, Opinions, Attorney General, dated June 25, 1936, has to do with a person who had been "previously sentenced to a state penal institution" and paroled by what was then called the Board of Parole, while your request is concerned with one who, while convicted of a felony, has not been sentenced to a penal institution but has been placed on probation. In the one case the convict is a parolee, while in the other the person convicted may be aptly termed a probationer.

As to the character of probation, see the case of State v. Emonds, 11 O. O. 258, 26 Abs. 410 (1938), decided by Judge Hertz of your Cuyahoga County Court of Common Pleas, where it is said at page 412 (Abs.):

"Probation is a form of correctional treatment in which sense, it is punishment fully as much as imprisonment. * * *

In short, the case for probation may be summarized in the words of the late President Calvin Coolidge:

"Justice requires as strongly the saving of that which is good, as it does the destruction of that which is evil. The work that the probation officers are doing is saving of that which is good in the individual, along with the correction of that which is evil. Probation is the right hand in the administration of justice.'

(Quoted as foreword to 'Probation and Delinquency' by Edwin J. Cooley, Thos. Nelson & Sons, N. Y., 1927.)"

In view of what has been said above, I deem it proper to add this suggestion. It will be noted that by the terms of Section 13452-7, supra, when a person, who has been convicted of a felony and has had the *imposition* of a sentence suspended by the trial court and has been placed on probation, commits a second crime, the trial court is required immediately to inquire into the conduct of the defendant and may terminate the probation and impose any sentence which might have originally been imposed. In the kind of case referred to by you, therefore, if A, who is of reformatory age, commits a burglary and the imposition of sentence is suspended and A is placed on probation and before the probation period expires commits another felony, the trial court may terminate the probation and sentence A to the reformatory. Or, if the trial court, in the exercise of its discretion, deems it proper so to do, it may withhold termination of the probation and imposition of the sentence for the first conviction, and upon an indictment and conviction of the second felony may impose sentence therefor. And, if the latter course be adopted, the trial court may sentence A to the reformatory for the reason that A was not *sentenced* to a state prison upon his first conviction of a felony. In this connection you will note the wording of Section 2131, General Code, which reads in part as follows:

"The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory, *if they are not known to have been previously sentenced to a state prison.* Male persons between the ages of sixteen and twenty-one years convicted of a felony shall be sentenced to the reformatory instead of the penitentiary. * * *" (Emphasis ours.)

Whether in a case of the character posed by you the trial court may terminate the probation and sentence the defendant to the Ohio State Reformatory upon the first conviction, and then upon conviction of the second crime commit the convict to the Ohio Penitentiary, has not, in so far as I can find from an examination of the reported cases, been passed upon by the courts of Ohio. And I feel that, in the absence of a decision by a court of competent jurisdiction, it would be presumptuous on my part to attempt to determine the jurisdiction and power of a trial court

which, as above pointed out, is fully empowered to determine in the first instance any question having to do with its own jurisdiction or power.

That a person previously *sentenced* to a state penal institution cannot be legally committed to the Ohio State Reformatory (as was held in syllabus 2 of Opinion No. 5745, referred to in your letter), was also held in Opinion No. 2692, Opinions, Attorney General 1934, Vol. I, p. 712, the syllabus of which reads:

> "A male person twenty years of age who previously had been convicted and sentenced to the Ohio State Reformatory must be sentenced to the Ohio Penitentiary on being convicted and sentenced for a subsequent felony."

See also the case of Russell vs. State, 7 Abs. 5 (1928) (cited in Opinion No. 2692), and which was decided by your Cuyahoga County Court of Appeals.

At page 6 it is said as follows:

> "There is no question that the Ohio State Reformatory at Mansfield is a state prison. Under Section 2131, General Code, the superintendent is required to receive all male criminals between sixteen and thirty years, lawfully sentenced to the reformatory, providing they have not been *'previously sentenced to a state prison,'* and the court pronouncing sentence has no power to impose a sentence to the Ohio State Reformatory where the convicted person has been previously sentenced to the Ohio State Reformatory. If a convicted person between sixteen and twenty-one *has not been previously sentenced to a state prison,* the court shall sentence him to the Ohio State Reformatory but if he is between twenty-one and thirty years and has not previously been sentenced to a state prison, the court may sentence him to the reformatory if amenable to reformatory methods, otherwise to the penitentiary." (Emphasis ours.)

You will note in the above excerpt that it is expressly stated that if a convicted person between sixteen and twenty-one years *has not been previously sentenced to a state prison,* the court *shall* sentence him to the Ohio State Reformatory.

In view of the foregoing, and in specific answer to your question, it is my opinion that there is a distinction between the status of a parole violator and that of a probationer, that is, a person who has been convicted of a crime, but the imposition of whose sentence has been suspended by the trial court and who has been placed on probation in accordance with

the provisions of Sections 13452-1 to 13452-9, inclusive, of the General Code.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1480.

BONDS—CITY OF TOLEDO, LUCAS COUNTY, $35,000.00.

COLUMBUS, OHIO, November 29, 1939.

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

GENTLEMEN:

RE: Bonds of the City of Toledo, Lucas County, Ohio, $35,000.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise all of an issue of refunding bonds in the aggregate amount of $35,000, dated October 1, 1939, and bearing interest at the rate of 2¾% per annum.

From this examination, in the light of the law under authority of which the above bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said city.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1481.

BONDS—CITY OF TOLEDO, LUCAS COUNTY, $56,000.00.

COLUMBUS, OHIO, November 29, 1939.

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

GENTLEMEN:

RE: Bonds of the City of Toledo, Lucas County, Ohio, $56,000.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise all of an issue of refund-