in case of default, is a responsible banking institution under the supervision of the Superintendent of Banks of the State of Ohio, cannot change the law that the board of education is responsible for the hypothecated securities, and for the protection of the school funds of the school district must at all times have these hypothecated securities under its exclusive control and dominion.

I am therefore of the opinion that school depository banks which at the instance of the board of education whose funds they receive on deposit, are permitted to furnish security for said funds by the hypothecation of certain securities may not designate another bank as trustee for the holding and disposal in case of default of the securities so hypothecated, but must place them under the complete and exclusive control and dominion of the board of education whose deposits are to be thus secured.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2224.

SENTENCE—PRISONER OF OHIO STATE REFORMATORY—NO SUSPENSION BY TRIAL COURT AFTER TERM OF PRONOUNCEMENT—RELEASE BY EXECUTIVE CLEMENCY OR PAROLE.

SYLLABUS:

1. *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.*

2. *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.*

3. *Where a person convicted of operating a motor vehicle without the owner's consent is sentenced to the Ohio State Reformatory and such sentence has been carried into execution and the defendant has served a substantial portion of such sentence, a trial court is without authority, at a subsequent term of court than at which such prisoner was sentenced, to grant a new trial and order the return of such prisoner in order to permit such trial court to place such prisoner on probation.*

COLUMBUS, OHIO, June 11, 1928.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter dated June 6, 1928, which reads as follows:

> "We are just in receipt of a letter from the Superintendent of the Ohio State Reformatory, which reads in part as follows:
>
> 'Mike Lorenzo, No. 21404, was indicted at the September term, 1927, of the grand jury of Cuyahoga County for auto stealing W. C. He later plead guilty and was sentenced to this institution, being received here November 11,

1927. When received here he admitted that in 1925, in Cleveland, Ohio, he was given a suspended sentence for auto stealing. He also admitted that about ten autos had been stolen by himself and partner, Mastrangelo, our No. 21,402.

Under date of May 16, I received an order which I am enclosing. I immediately wrote the clerk of court asking what section of law gives the judge the right to change a sentence and have a reply okeyed by Stevenson, trial judge and by Deputy Clerk Geidt.

Nothing more was done with this case until order for new trial was received this morning.

I am of the opinion that if a new trial is granted it must be during the term of court in which sentence was passed. The fact that the September, 1927, term has long since ended I am not quite sure whether I should obey this court order.

You may have had a similar case called to your attention and if so please advise what I should do. Would suggest this be referred to the Attorney General for advice. I consulted our local prosecutor and he advised that it be referred to the Attorney General, and I remember distinctly that Honorable Price Russell told me on several occasions that a new trial must be ordered during the term of court in which conviction was had and sentence passed.'

May we have your advice as to the proper procedure in this case?"

You also enclose copies of two Journal Entries, which read:

"The State of Ohio, Cuyahoga County, ss.: — In the Court of Common Pleas. April Term, 1928, Indictment for Automobile Stealing With Count.

State of Ohio,
vs.
Mike Lorenzo.

May 16th, 1928:

It appearing to the Court, upon good and sufficient evidence that the further detention of Mike Lorenzo, a minor, committed to the Ohio State Reformatory on the 11th day of November, 1927, on the charge of auto stealing by the Court of Common Pleas of said county, will no longer subserve the public interest and safety, and it further appearing that the release of said Mike Lorenzo will inure to his future welfare, it is hereby adjudged and ordered that said Mike Lorenzo be released from said Ohio State Reformatory forthwith and placed in charge of the Probation Department of the Court of Common Pleas, Cuyahoga County, Ohio, until further order."

"The State of Ohio, Cuyahoga County, ss.: — In the Court of Common Pleas. April Term, 1928, Indictment for Automobile Stealing With Count.

State of Ohio,
vs.
Mike Lorenzo.

June 1st, 1928:

This cause being heard on the motion for a new trial on the ground of

newly discovered evidence, the court, on consideration, and for good cause shown, grant the same. It is further ordered by the court that said defendant be returned to the jurisdiction of the court forthwith."

and a note which reads as follows:

"Judge Stevenson was cognizant of the absence of any statutory authority for making the order he did, but, in view of the facts that at the time of sentence judge was seriously considering a bench parole, and that since that time additional facts have been brought to his attention which seem to him to justify leniency, he concluded that the board would recognize the so-called professional courtesy of honoring the order.

O. K. STEPHENSON,
Trial Judge."

This office, on June 1, 1928, rendered an opinion to the Prosecuting Attorney of Monroe County, being Opinion No. 2184, the syllabus of which reads:

"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."

An exhaustive discussion appears therein regarding the powers of courts to suspend or modify sentences imposed in criminal cases. I am enclosing herewith a copy of this opinion.

Your attention is directed to Section 13745, General Code, which, in so far as pertinent, provides:

> "A new trial, *after a verdict of conviction,* may be granted on the application of the defendant, for any of the following causes affecting materially his substantial rights:
> * * *
> 5. Newly discovered evidence material for the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial;
> * * *"

Section 13746, General Code, provides,

> "The application for a new trial shall be by motion, upon written grounds, *filed at the term the verdict is rendered,* and, except for the cause of newly discovered evidence material for the person applying, which he could not, with reasonable diligence, have discovered and produced at the trial, *shall be filed within three days after the verdit was rendered,* unless unavoidably prevented." (Italics the writer's.)

By the terms of Section 13747, General Code,

> "The causes enumerated in subdivisions * * * five of Section thirteen thousand seven hundred and forty-five, must be sustained by affidavits, showing their truth, and may be controverted by affidavits."

See the case of *Lisberger* vs. *State of Ohio,* 10 O. C. C. N. S. 66, the headnote to which reads:

> "A trial court is without jurisdiction to hear a motion for a new trial in a criminal prosecution at a term of court subsequent to that at which the verdict was returned."

The following language appears in the opinion of the court:

> "Lisberger was convicted of the crime of murder in the second degree and sentenced to life imprisonment. At the term at which he was convicted he filed a motion for a new trial, setting up, among other grounds for a new trial newly discovered evidence, and in support of that ground affidavits were filed. That motion came on for hearing and was heard at that term of court, and was overruled. And at a subsequent term—I think at the next term of court, although I am not certain of that—another motion for a new trial was filed, and the chief ground of that motion was newly discovered evidence; and in support of that motion a number of affidavits were filed.
> * * *
> But we find no authority for acting upon a motion for a new trial filed after the term in a criminal case. We know of none. We think that is the policy of the law that the matter shall be concluded by the action in the case taken at the term; and it may be readily perceived that if it were otherwise, there would be no certainty about results in criminal cases, and the state

would often be taken at great disadvantage. If a motion might be filed after the term, there is no reason why it might not be filed at any time, no matter how remote from the time of the trial; even after the state's witnesses had disappeared or been scattered, or perhaps died; so that the state might be unable to show the true state of the case on a new trial. We have no doubt but that the statute is founded upon the theory that that should not be permitted; but that if it should turn out that a person is wrongly convicted he should not be without a remedy, and we believe the remedy is with the board or tribunal or officials that may either pardon, or in some way, modify the result.

We think that this is a case that should be presented to the pardon board or the board of managers, who may not only pardon, but reduce or commute the sentence. There the state may be able, by counter affidavits, to put a different face upon the matter. The state here, relying upon the statute, seems to have thought it idle and useless to file counter affidavits. I speak of the matter as it appears here in the record, with these affidavits standing uncontradicted. It may be that when the matter shall be presented to the proper tribunal, these affidavits will be contradicted, and that a different face could be put upon the matter."

In the instant case the defendant entered a plea of guilty and was sentenced according to law. You will note that the sections of the General Code above quoted contemplate and provide for a new trial only "after a verdict of conviction" and have no application to cases in which a plea of guilty was entered.

It is stated in 16 Corpus Juris at page 402:

"A plea of guilty is a confession of guilt and is equivalent to a conviction. The court must pronounce judgment and sentence as upon a verdict of guilty."

That the court had full and complete knowledge not only of the crime for which the defendant was indicted and to which he entered a plea of guilty, but of numerous other offenses that the defendant had committed is indicated by the statement of the trial judge, bearing his signature, which you enclose with the several papers submitted with your letter.

I deem it unnecessary to quote at length herein the sections of the General Code, which provide for the release and parole of prisoners of the Ohio State Reformatory. Suffice it to say no authority in law exists in trial courts of Ohio to order the release of prisoners as is attempted to be done in the instant case.

Specifically answering your question, it is my opinion that the prisoner in question can be released only in accordance with the provisions of the General Code regarding the release and parole of prisoners of the Ohio State Reformatory or by executive clemency. The purported order of the trial court is without force and effect.

Respectfully,
EDWARD C. TURNER,
Attorney General.