Further, in the case of *State ex rel Schmidt* vs. *Colson,* 1 Ohio App. 438, it was held:

> "The repeal of an ordinance, passed pursuant to the provisions of section 4404, General Code, establishing a board of health, abolishes all appointive positions under such board."

In this case the board of health was created under the provisions of section 4404, and a clerk appointed; afterward the council repealed the ordinance, and the clerk contended that in spite of such repeal, he was entitled to his salary from the time of the repeal of the ordinance to the end of his appointed term.

From an analysis of the foregoing cases, it is believed that when the action of an authority which creates a board, in effect abolishes it by removal of all the duties to be performed, the effect is to abolish the board.

You are therefore advised that if the action of the council, and the further action of the board of public affairs are such as to render unnecessary any service by such officers, and no functions now exist to be performed by them, under the authorities heretofore cited, such board should cease to exist.

Respectfully,
C. C. CRABBE,
Attorney General.

3825.

SENTENCES OF INMATES OF OHIO PENITENTIARY MAY NOT BE SUBSEQUENTLY SUSPENDED BY THE SENTENCING COURT.

SYLLABUS:

Sentences of persons sentenced to the Ohio Penitentiary may not be subsequently suspended by the sentencing court.

COLUMBUS, OHIO, November 19, 1926.

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

DEAR SIR:—I am in receipt of your communication as follows:

> "I am asking your guidance in the case of Charles Summers No. 55327, now confined in this institution, admitted from Wayne County, July 1st, 1926, serving one to three years on three sentences of Drawing Check without Credit, case numbers 4611—12—13.
>
> The journal entries in these cases state that they are to run concurrently.
>
> Under a ruling of Attorney General Hogan, dated February 9th, 1914, I am obliged to enter this man on our records as serving the minimum of each sentence and the maximum which would mean that he is now serving a minimum sentence of three years and a maximum of nine years.
>
> I have this day received journal entries in this case requesting suspension of sentence in cases number 4612-13, which I am enclosing for your guidance."

Your communication raises two questions. The first one is whether prisoners sentenced to the penitentiary for two or more separate felonies can be sentenced so that the sentences run concurrently. The second question raised is whether after sentence by the court the court may change such order and suspend the operation of the sentences?

The first question has been answered by an opinion of the Attorney General found in the Opinions of the Attorney General for 1914, Vol. 1, page 160, the syllabus of which is as follows:

> "Under the indeterminate sentence law, it was the intention of the legislature to treat prisoners serving concurrent sentences as serving one term. The only way this can be done is to add the minimum and maximum terms for the different felonies and treat the prisoner as serving one term for the different felonies of which he was convicted, with such combined minimums and maximums as the limiting one which the board may act."

Section 2166 of the General Code, relating to sentences to the Ohio Penitentiary, has been amended since the opinion referred to above, but in so far as it relates to the sentencing for two or more separate felonies has not been changed. The opinion referred to above is therefore approved and followed.

Your second question relates to the right of a court to suspend the operation of a sentence.

Section 13706 of the General Code provides when and how sentences may be suspended and is 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."

It will be noticed that the above section does not authorize the court to suspend the sentence but authorizes the court to suspend the imposition of the sentence and place the defendant on probation in the manner provided by law.

The manner provided by law for placing persons under probation is by virtue of section 13709.

The journal entries in the instant case, which are dated June 28th, 1926, provide as follows:

> "And having nothing to say why sentence should not be pronounced against him except what he hath already said, it is the sentence, order and judgment of the court that he be imprisoned in the penitentiary at Columbus, Ohio, not less than one nor more than three years at hard labor, but without any solitary confinement, and that he pay the costs of this prosecution."

The journal entry forwarded to you under date of September 16th, which purports to have been made on the 28th day of June, 1926, provides as follows:

> "It is ordered that the execution of the sentence heretofore made and entered by the court be, and is hereby suspended, and after the expiration of the aforesaid sentence now being served, that the defendant be placed on parole according to the statutes governing paroles under the control of William Caskey, Wayne County parole officer."

From the papers submitted it is evident that in all three cases the defendant was found guilty and in each case sentenced to from one to three years in the Ohio Penitentiary. It is also evident that subsequent to such sentence and subsequent to the entering of such convict into the Ohio Penitentiary the court attempted in two of the cases to suspend the operation of such sentence and place the defendant on parole after the expiration of the sentence in the first case.

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 has otherwise provided. On page 433 of the Opinion of Marshall, C. J., may be found the following:

> "It would be unprofitable to discuss the many cases cited in the briefs of counsel, and 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 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."

If as has been said in the above case that the legislative intent has been exhausted by the enactment of sections 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.

You are therefore advised that the sentence of a person to the Ohio Penitentiary may not during the same term or at any other time be suspended by the court imposing the sentence.

Respectfully,
C. C. CRABBE,
Attorney General.