Fund, the Teachers Retirement Board or the Industrial Commission, to be sold to the highest bidder after being advertised once a week for three consecutive weeks as required by Section 2293-28, General Code.

Answering your question specifically, it is my opinion that, for the reasons above set forth, a city may not legally enter into a contract to purchase a building, other than a contract on which payments are to be made from the earnings of a publicly operated water works or public utility, without having sufficient funds in the treasury or in process of collection to pay the purchase price of such building, in accordance with the provisions of Sections 5625-33 and 5625-36 of the General Code. I am further of the opinion that in the case submitted by you the city may not legally agree to purchase a building for the sum of $100,000, $20,000 of which is to be paid at the time of sale and the balance to be paid at some future date, the city agreeing to assume a mortgage on the property in question, which was given to secure a note drawing interest at six per cent.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2657.

SENTENCE—COURT HAS NO JURISDICTION TO VACATE SENTENCE FOR FELONY AFTER PART EXECUTION.

SYLLABUS:

Where a person has been convicted of a felony and sentenced to imprisonment in one of the penal institutions of this state, and such sentence has been executed in part, the trial court is without jurisdiction, either after or during term, to vacate the judgment imposing the sentence and cause the prisoner to be discharged. In such a case, where the prisoner is confined in the Ohio State Reformatory, the superintendent of such institution is justified in refusing to honor the order of the court discharging the prisoner.

COLUMBUS, OHIO, October 1, 1928.

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

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads:

> "Under date of June 21st, Arthur McPharson and Cal Troutman were sentenced to the Ohio State Reformatory from the Common Pleas Court of Huron County for automobile stealing, 1 to 20 years.
>
> On July 11th the committing court issued an order to the Superintendent of the Ohio State Reformatory vacating the judgment under which these boys were sentenced to the Reformatory. The Court stated that it was his wish to suspend the sentences and allow these boys to return to their homes in Pennsylvania. There is apparently no question that they committed the crime for which they were sentenced. The Superintendent of the Reformatory refused to honor the order and advised the Court that in his opinion, based upon the laws applicable in these cases and considering opinions of the Attorney General, no authority of law exists in trial courts of Ohio to order the release of prisoners under such circumstances and that such prisoners could be released only by executive clemency or through action of the Ohio Board of Clemency under the parole laws of the state.

The sentencing court is unwilling to accept the Superintendent's decision and states:

'The action of this Court was merely one taken within the inherent power of the Court itself to control its judgments made during the term and I have made an order vacating the judgment under which these boys were committed to your institution. This was done during the term during which the order was made and in my judgment is within the power of this Court.'

May we have your opinion of this question?

This case differs from the Mike Lorenzo case upon which you rendered your opinion No. 2224, June 11, 1928, only in that the order for release was issued during the term of Court at which the sentence was given."

From the facts stated in your letter, I assume that the two persons mentioned were legally sentenced pursuant to a plea or verdict of guilty of the felony mentioned in your letter, probably on joint indictment, and that they were duly delivered to the superintendent of the Ohio State Reformatory with a copy of their sentence, as provided by Section 13720, General Code, which reads in part as follows:

"A person sentenced for felony to the penitentiary, or a reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or such reformatory by the sheriff of the county in which the conviction was had, within five days after such sentence, and delivered into custody of the warden of the penitentiary, or superintendent of such reformatory, with a copy of such sentence, there to be kept until the term of his imprisonment expires, or he is pardoned. * * *"

It further appears that after the defendants had served several days of their sentence, the committing court "issued an *order* to the superintendent of the reformatory vacating the judgment under which these boys were sentenced to the reformatory." The court also "stated that it was *his wish* to suspend the sentences and allow these boys to return to their homes in Pennsylvania." It does not appear that this "wish" was incorporated in the order.

The question of the release or retention of these prisoners under the above state of facts does not, therefore, necessarily involve the question of their further disposition by the committing court. Apparently no official action has been taken by the court with respect to the suspension of the imposition of the sentence, or the granting of a new trial, or the imposition of another sentence. You are merely advised that the order of the court under which they were committed to your custody has been vacated. If this is within the power of the court, you are without further authority to retain them in your custody.

This raises the question as to whether or not the court did have the power to vacate its judgment during the same term after the sentence imposed by that judgment had been partially executed.

As a general proposition, the power of the courts to vacate, revise or modify their judgments during the same term has been generally recognized throughout the courts of the United States, including those of Ohio. Thus Judge Johnson, of the Ohio Supreme Court, in the case of *Lee* vs. *State*, 32 O. S., 113, on page 114 of his opinion, quotes with approval from Lord Coke, as follows:

"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 durng 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.' "

Also, in the case of Ex-Parte Lang, 18 Wall. 163, the second branch of the headnotes is as follows:

> "2. The general principle asserted as (is) applicable to both civil and criminal cases, that the judgments, orders, and decrees of the courts of this country are under their control during the term at which they are made; so that they may be set aside or modified as law and justice may require."

The exercise of this power in criminal cases, *after execution* of the *judgment has commenced,* has certain restrictions conditioned upon the proposed further disposition of the defendants. Thus, "it seems to be well established that the trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. See note, 44 A. L. R. 1203; 16 C. J. 1314. However, in many jurisdictions a court may set aside a sentence for the purpose of mitigating punishment (same note, Section III), or for the purpose of granting a new trial (Section IV). A court is, therefore, not precluded from vacating its judgment, even after partial execution of the sentence, if the same is not done for an unauthorized purpose, which should appear in the terms of the vacating order. In the instant case, according to the facts stated in your letter, the court simply vacated its former judgment imposing sentence; and in so far as this office is advised, it does not appear from the order in question, or other writ, that the judgment was vacated in order that a lesser punishment might be imposed, or for the purpose of granting a new trial.

Moreover, the order of the court, described in your letter, appears to be defective in another particular, in that it contains no instruction as to further disposition of the prisoners other than their unconditional release. Such an order is beyond the power of a court for the reason that under the statutes he has no discretion other than either by appropriate order to suspend the imposition of sentence or impose a sentence, after a plea of guilty or conviction. As I pointed out in Opinion No. 282, Opinions of the Attorney General, 1927, Vol. 1, p. 496:

> "Where a person has been tried and convicted and is in the penitentiary pursuant to sentence, upon a subsequent reversal of such conviction and the case being remanded to the trial court for a new trial, the warden of the penitentiary, upon receipt of a certified copy of the mandate of the reversing court, must forthwith cause such person to be conveyed to the jail of the county in which he was convicted and committed to the custody of the sheriff thereof."

However, the duty of the warden in that case was dependent upon a specific requirement prescribed in General Code Sections 13760 and 13762. There are no corresponding sections providing for the return of prisoners to the custody of the sheriff of the county of the committing judge upon the vacation of a sentence. The order in this case is, therefore, illegal and insufficient to authorize the release of your prisoners for the reason that it does not provide for their return into proper custody for further action by the court, but, on the contrary, provides for their unconditional and final release.

Because of the fact that cases will undoubtedly arise in the future involving the validity of orders similar to this, in which the committing judge seeks in the vacating order to suspend a sentence or to impose another sentence, and since my advice to you in this regard has been based partly upon an assumption as to the form and contents of the judgment entered in this case, it may be well to discuss further the scope of the power of a court to revise, modify or vacate its judgments after commitment and partial execution of the judgment.

The greater weight of authority and, in my opinion, the better line of reasoning, is to the effect that in criminal cases the trial court is divested of jurisdiction when the defendant has commenced serving a sentence under a valid judgment entered by that court. See Corpus Juris, Vol. 16, p. 1314; Am. & Eng. Ann. Cas., Vol. II, 2nd Ed. p. 315; Ruling Case Law, Vol. 15, p. 677; and 44 Am. Law Reports, Ann., 1210.

In the case of *Emerson* vs. *Boyles*, 44 A. L. R. 93 (Ark. 1926), it was held as follows:

> "Thus it will be seen that while the general power of the court over its judgments both in civil and criminal cases during the term in which they are first rendered is undoubted, still there are well-known exceptions to the general rule. If the trial court loses jurisdiction over the case when the statutory requirements for an appeal are complied with and a transcript of the record is filed with the clerk of this court, *it would seem that for a similar reason the trial court would lose jurisdiction of the case when it had issued its commitment of the defendant to the state penitentiary and the defendant had been transported there and was serving his sentence.*" (Italics the writer's.)

See also Ex Parte Strader, 257 Pac. 1112 (Okla., 1927), in which it was held:

> "Even if the general rule applicable to judgments, that they may be revised or changed during the term of court at which they are assessed, applies to judgments in criminal cases, yet it is well settled that where a defendant has executed or entered upon execution of a valid sentence, the court cannot, even during the term in which the sentence was rendered, set aside and render a new sentence." (Italics the writer's.)

However, since the case of *Ammon* vs. *Johnson*, 3 O. C. C. 263, 2 O. C. D. 149, decided by the Circuit Court of Cuyahoga County in 1888, Ohio has been recognized, together with the states of Minnesota, North Carolina and North Dakota, as permitting the vacation of judgments during term and after partial execution by imprisonment for the purpose of mitigating punishment. In that case the plaintiff sought release upon habeas corpus from an imprisonment imposed by a judgment which modified a former judgment imposing a fine and imprisonment for contempt. The latter judgment reduced the fine and imprisonment relating to it. The court in denying the writ held:

> ' Where the court has imposed a fine upon a witness refusing to answer, and ordered her to be imprisoned until she answers and pays the fine—it is within the power of the court during the same term of court, and while the action in which she refused to answer is still pending, and after her imprisonment has commenced, to remit the fine and that part of the sentence of imprisonment relating to it."

In the opinion the court said as follows at page 154:

> "The ordinary doctrine that the court has power to set aside or modify its judgment during the same term is well settled and familiar. *Longworth*

vs. *Sturgis*, 2 O. S. 105; *Ash* vs. *Marlow*, 20 O. 119. The want of power in this instance is placed on the ground that the imprisonment of Mrs. Ammon had commenced, and we are cited to the case of *Lee* vs. *The State*, 32 O. S. 113, where the guarded syllabus lends some color to the claim. It reads: '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 taken upon it, revise and increase or diminish such sentence within the limits authorized by law.'

There is at least one case (57 Me. 57) which decides that after the execution of a sentence has commenced, it cannot be increased, though none that we have say that it may not be diminished. In the case of *Lee* vs. *State*, *supra*, the sentence was increased. In none of the cases cited in *Lee* vs. *State*, *supra*, is any reason given why there should be any difference in the extent of power of the court during the same term over a civil case or one criminal or quasi criminal. The authorities on which the case of *Lee* vs. *State*, *supra*, is based sustain generally the power to what was done in the case before us. In *Basset* vs. *United States*, 9 Wall. (U. S. Supreme Court), 39, the judgment was set aside after imprisonment had commenced, and the court say: 'The control of the court over its own judgment is of every day practice.' "

That case has since been cited with approval by Ohio Courts of Appeals upon two occasions. See In re George, 3 O. C. D. 104, and *Antonio* vs. *Milliken*, 9 Ohio App. 357. The headnote in this later case reads:

"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 view of the conflict of authority on the question last above discussed, since in the instant case the court has not vacated its former judgment for the purpose of imposing a lesser sentence, and could not do so for the obvious reason that the sentence imposed is the minimum fixed by law, until there shall have been an authoritative pronouncement by the court of last resort of this state, I do not feel justified in attempting to determine whether or not trial courts in Ohio may, during term, vacate a judgment imposing a sentence upon a person convicted of crime after such sentence shall have been executed in part, for the purpose of imposing a sentence of lesser degree.

It is generally held that a court may at the same term at which it is rendered vacate a *void* judgment and substitute a valid one.

"Where a court has imposed a sentence which is void, either because of lack of jurisdiction, or because it was not warranted by statute for the particular offense, this can be set aside and a valid sentence substituted." (Note: 44 A. L. R. 1212; and cases cited thereunder.)

"Where the execution of a sentence to imprisonment in the Detroit House of Correction had commenced, when the warden refused to carry out the sentence because not allowed to receive federal prisoners for such term under the state law, the court, at the same term at which the sentence was imposed, had authority to recall the prisoner, set aside the sentence and impose one

for a shorter term in another house of correction."(In re Graves, 117 Fed. 798; District Court of Wisc. 1902.)

In a recent decision the Supreme Court of Louisiana held that a judge who had made the mistake of imposing a sentence for manslaughter, which was void under a certain statute, did not lose authority to impose a valid sentence, because the void sentence had been partially executed. (*State ex rel.* vs. *Pitcher*, 115 So. 187 (La. 1927).)

In view of the foregoing, it is my opinion that in Ohio a court may vacate its judgment during the same term and after partial execution thereof in a criminal case for certain purposes.

The specific purpose which the court in the present case indicates his desire to accomplish is to "suspend the sentence."

Under date of June 11, 1928, I advised you in Opinion No. 2224 that the courts of Ohio now have no inherent or statutory power to suspend the *execution* of a sentence, except to afford opportunity for a motion for a new trial, or in arrest of judgment, or during proceedings in error, or to afford time for executive clemency, that suspension of the imposition of sentence must be exercised in the manner prescribed by statute; and that a court is without authority to grant a new trial at a subsequent term of court where the sentence has been carried into execution in order to permit such trial court to place such prisoner on probation.

In my Opinion No. 2184 to the Prosecuting Attorney of Monroe County, under date of June 1, 1928, I advised that:

> "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 the payment of the fine and costs."

In the case of *Antonio* vs. *Milliken*, above referred to, the Court of Appeals for Mahoning County held that in misdemeanor cases a 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.

Section 13706 at that time read as follows:

> "In all prosecutions for crime except as hereinafter provided, where the defendant has pleaded or been found guilty, and where the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the Ohio State Reformatory, any jail, workhouse, or a correctional institution, and it appears that the defendant has never before been imprisoned for crime, either in this state or elsewhere, (but detention in an institution for juvenile delinquents shall not be considered as imprisonment) and where 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 where it may appear that the public good does not demand or require that the defendant shall suffer the penalty imposed by law, said court or magistrate may suspend the *execution* of the sentence and place the defendant on pro-

bation in the manner hereinafter provided. Nothing in this act contained shall in any manner affect the laws providing the method of dealing with juvenile delinquents."

This statute has been amended three times since the decision of that case: See 108 v. 144, 110 v. 110, and 111 v. 428, where it appears in its present form. By the last amendment the power to suspend imposition of a sentence was substituted for power to suspend its *execution*. As amended, soon after the decision of the case of *Antonio* vs. *Milliken*, supra, viz., April 17, 1919, it provided that:

"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, *at any time before such sentence is carried into execution*, and place the defendant on probation in the manner provided by law." (Italics the writer's.)

This amendment immediately following the decision permitting suspension of sentence after imprisonment thereunder had commenced, indicates a very clear legislative intent to limit the power of the court to suspend to the period prior to imprisonment. The fact that the section as it now stands does not contain the specific prohibition above italicized, is explained by the fact that the court's power is therein limited to suspension of the "imposition" of the sentence, and imprisonment before imposition of sentence naturally was not anticipated.

While it might appear at first that where a judgment imposing a sentence is vacated and the entering of a judgment suspending the imposition of a sentence would constitute a mitigation of the penalty, and would, therefore, come within the principle established by the case of *Ammon* vs. *Johnson*, *supra*, Mr. Chief Justice Taft, of the Supreme Court of the United States, has clearly defined the distinction in a recent opinion, holding that the United States Courts, under similar statutory provisions relating to the suspension of criminal sentences, have no power to enter judgments suspending sentences after imprisonment has commenced. This was decided in the decision of the combined cases of *United States* vs. *Murray and Cook* vs. *United States*, appearing in U. S. Supreme Court Advanced Opinions of January 16, 1928 (72 L. Ed. 201).

Writs of error were prosecuted to the United States Supreme Court from judgments suspending sentences of Murray and Cook after their imprisonment. Murray had been imprisoned only one day after sentence, when the judgment of suspension was entered, this being, of course, at the same term. Cook had been imprisoned for two years, so the judgment of suspension was entered at a subsequent term. The federal statutes relating to the suspension of sentences in criminal cases are similar to Sections 13706, et seq., of the General Code of Ohio, in all respects except that they provide for a suspension of the *execution* of sentences as well as their *imposition*.

I quote from the opinion of the Chief Justice as follows:

"The first question which we must consider, and which, if we decide in favor of the government, controls both cases and disposes of them, is whether

there is any power in the Federal courts of first instance to grant probation under the Probation Act, after the defendant has served any part of his sentence.

* * * * * * * *

Executive clemency must of course cover every form of relief from punishment. The parole statute provides a board to be invested with full opportunity to watch the conduct of penitentiary convicts during their incarceration and to shorten it not only by the regular monthly reduction of days but by a larger diminution by parole.

What was lacking in these provisions was an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance before actual imprisonment should stain the life of the convict. This amelioration had been largely furnished by a power which trial courts, many of them, had exercised to suspend sentences.

* * * * * * * *

The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience has shown that there was a real locus poenitentiae between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. *Probation was not sought to shorten the term.* Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence. *The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it.* Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872. *Such a limit for probation is a natural one to achieve its end.*" (Italics the writer's.)

From the foregoing discussion, and in specific answer to your question, it is my opinion that, where a person has been convicted of a felony and sentenced to imprisonment in one of the penal institutions of this state, and such sentence has been executed in part, the trial court is without jurisdiction, either after or during term, to vacate the judgment imposing the sentence and cause the prisoner to be discharged. In view of this conclusion, I am further of the opinion that the Superintendent of the Ohio State Reformatory in the case to which this opinion relates, is justified in refusing to honor the order of the court discharging the prisoners concerned.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2658.

FERTILIZER—MANUFACTURERS CERTIFICATE—REQUIREMENTS AS TO AMMONIA AND NITROGEN DISCUSSED.

SYLLABUS:

The chemical analysis to be printed on the certificate, which must be attached to each package of commercial fertilizer manufactured, sold, or offered for sale in the State of Ohio,