1028.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND THE WESTINGHOUSE ELECTRIC & MFG. COMPANY, OF COLUMBUS, OHIO, FOR FURNISHING AND DELIVERY OF ONE (1) DUAL DRIVE EXCITER FOR POWER HOUSE AT OHIO STATE UNIVERSITY AT COST OF $2,930.00.

COLUMBUS, OHIO, December 22, 1923.

HON. L. A. BOULAY, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval contract between the State of Ohio, acting by the Department of Highways and Public Works in behalf of the Board of Trustees of Ohio State University and Westinghouse Electric & Mfg. Co., of Columbus, Ohio. This contract covers the furnishing and delivery of one (1) dual drive exciter for power house at Ohio State University and calls for an expenditure of $2,930.00.

You have submitted the certifificate of the director of finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. Evidence has also been submitted indicating that said company has complied with the provisions of the Industrial Compensation Act.

Finding said contract in proper legal form I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
C. C. CRABBE,
Attorney-General.

1029.

CRABBE ACT VIOLATIONS—NO PART OF FINE ASSESSED CAN BE REMITTED OR SUSPENDED—JURISDICTION OF JUSTICE OF PEACE, MAYOR AND COMMON PLEAS COURTS—WHEN COURT ACCEPTS SECURITY FOR FINE DEFENDANT CANNOT THEREAFTER BE CONFINED FOR NON-PAYMENT OF SUCH FINE.

SYLLABUS:—

1. *No part of a fine assessed for violation of the Crabbe Act can be remitted or suspended, and the amendment of section* 6212-17 (110 *O. L.* 49) *takes such cases out of the operation of the probation laws (sections* 13706 *to* 13715, *G. C., inclusive.)*

2. *If defendant has been found guilty and is sentenced and has entered upon the execution of such sentence, a justice of the peace or mayor loses jurisdiction and cannot thereafter open the case. Common pleas, and other courts having terms, may open cases in their respective courts for further action during the term in which such case was heard or tried.*

3. *When a court accepts security for a fine, the defendant cannot thereafter be confined for non-payment of such fine.*

COLUMBUS, OHIO, December 22, 1923.

HON. GEORGE D. NYE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of December 13th, in which you make the following inquiries:

1. Where a defendant is convicted of a liquor violation under the Ohio law, and a fine is assessed, can a magistrate accept a less amount and discharge the prisoner?

2. If, as in the above case after conviction and sentence, another comes in and assumes responsibility and shows the innocence of the first defendant, can magistrate discharge first defendant?

3. If, as in number one above, defendant gives bond for the payment of the fine, can magistrate jail him after bond past due without first looking to the bond?

4. If, as in number three above, defendant is jailed, does that invalidate bond?"

Section 6212-17, General Code, as amended, 110 O. L., 49, reads as follows:

"Except as herein provided, any person who violates the provision of this act (G. C. secs. 6212-13 to 6212-20), for a first offense shall be fined not less than one hundred dollars nor more than one thousand dollars; for a second offense he shall be fined not less than three hundred dollars nor more than two thousand dollars; for a third and each subsequent offense, he shall be fined not less than five hundred dollars nor more than two thousand dollars and be imprisoned in the state penitentiary not less than one year nor more than five years. Any person who in violation of this act (G. C. secs. 6212-13 to 6212-20) manufactures distilled liquor, for a first offense shall be fined not less than five hundred dollars nor more than three thousand dollars and be imprisoned in the state penitentiary not less than one year nor more than five years, and for a second and each subsequent offense shall be fined not less than one thousand dollars nor more than five thousand dollars and be imprisoned in the state penitentiary not less than two years nor more than ten years. The penalties provided in this act shall not apply to a person for manufacturing vinegar, or non-intoxicating cider and fruit juices exclusively for use in his home; but such cider and fruit juices shall not be sold or delivered after they become intoxicating except to persons having permits from the United States government to manufacture vinegar. Nothing herein shall be construed to prevent the sale of vinegar and said penalties shall not apply to any such sale. No fine or part thereof imposed hereunder shall be remitted nor shall any sentence imposed hereunder be suspended in whole or in part thereof."

In Vol. 1, page 579, of the 1921 Opinions of the Attorney General of Ohio, appears the following:

"Where a mayor finds an accused guilty of an offense which he has jurisdiction to determine, it is his duty to pronounce the judgment provided by law.

A mayor is not authorized to suspend or remit the payment of a fine. However, under the probation laws, where the accused has been sentenced to imprisonment until a fine is paid, he may suspend the execution of the sentence, granting the defendant time to pay the fine. This action must be taken before the sentence is carried into execution.

There is no authority whereby a mayor may legally suspend a fine on condition that the defendant pay a stipulated sum to some other party.

A mayor cannot be held financially liable for errors in judgment in rendering his decisions, when acting as a magistrate. However, an unauthorized attempted suspension of a fine cannot operate as a suspension in legal contemplation, and under such circumstances the judgment is still in force and may be collected as provided by law."

Sections 13706, to 13715, inclusive, General Code, contain the statutory provisions for suspension of fines by all courts.

Section 12382, General Code, reads:

"The county commissioners of a county not having a workhouse may release on parole an indigent prisoner confined in the jail of such county for fine and costs alone. The parole in such case shall be in writing, signed by the prisoner so released, and conditioned for the payment of the fine and costs by him in labor or money in installments or otherwise, and shall be approved by the prosecuting attorney of such county."

Section 12383 reads:

"When a person so released fails to comply with the conditions of his parole the county commissioners of the county in which he was released shall give notice thereof in writing to the sheriff thereof, who shall thereupon arrest such person and recommit him to the jail of the county therein to be confined until the fine and costs are paid or he is otherwise legally discharged."

Section 13717, General Code, is as follows:

"When a fine is the whole or a part of sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, *or secured to be paid,* or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of sixty cents per day for each day's imprisonment."

Section 13718, General Code, is as follows:

"When a magistrate or court renders judgment for a fine, an execution may issue for such judgment and the costs of prosecution, to be levied on the property, or in default thereof, upon the body of the defendant. The officer holding such writ may arrest such defendant in any county and commit him to the jail of the county in which such writ issued, until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged."

None of these sections provide for the remittance or suspension of a fine indefinitely, but to suspend under conditions set forth in such probation statutes, to give defendant time to pay such fine in full, which probation statutes do not apply in liquor cases since the amendment to Section 6212-17, General Code.

In no statute do we find authority given the courts to release a defendant from finally paying a fine imposed, but Section 6212-17 is a direct prohibition against a final suspension or a remittance of such a fine. A suspension of a fine under the probation laws is, in fact, a suspension within the meaning of said Section 6212-17. Suspend means to cause to cease for a time, and is not a remitting.

In answer to your first question, therefore, it is my opinion that a magistrate cannot suspend any part of a fine assessed.

The syllabus of an opinion of the Attorney General of Ohio, at page 1542, Vol. II, Opinions for 1919, reads as follows:

"A mayor or magistrate may legally suspend or modify a sentence, including the power to grant time to the defendant for the payment of a

fine, if the same is done before said sentence is carried into execution and in the manner as provided by law."

Section 6212-17, General Code, was passed since above opinion, and mayor cannot now suspend or remit a fine in liquor cases.

Section 13706, General Code, reads:

"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."

A mayor or justice of the peace cannot again assume jurisdiction in a liquor case after the execution of valid sentence has been begun, and a defendant later found innocent would have to resort to an appeal to the Governor for pardon.

Courts having terms have jurisdiction over their judgments and orders during term time, and could open up a case for rehearing during such time.

32 Ohio St. 113.
29 O. C. A. 5305:

"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."

(Syllabus)

In the case of Huber Mfg. Co. v. Sweny, 57 Ohio St., 169, the first paragraph of the syllabus says:

"The control of a court of common pleas over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify the same at discretion, is not affected by the incidents that a motion for a new trial has been heard and overruled, and that a bill of exceptions has been taken. And where an order vacating and setting aside such order overruling the motion, has in fact been made at the term at which it was entered, but by inadvertence no entry of the same has been made upon the journal, such omission may be supplied by an order *nunc pro tunc* at the succeeding term."

And this is followed in 58 O. S. 616, and 83 O. S. 447. Before a court has lost jurisdiction in a liquor case it can modify its judgment but not suspend the sentence.

Your second question, in view of the above, must be answered in the negative, as to justice's and mayor's courts, they not having terms, if the case is closed and the defendant has entered upon his sentence, and in the affirmative, as to courts having

terms, if after opening up the case the defendant is found innccent instead of guilty and the case was opened up during same term judgment was rendered.

Section 13717, General Code, provides in part that a fine may be "secured to be paid, etc."

132 Amer. State Rep., 628:

> "When a judgment of imprisonment is imposed by a court on plea of guilty or conviction in a criminal case, and the same is not stayed as provided by law, the defendant should forthwith be committed to the proper officer for incarceration; and where this is not done, and the court makes an order under which the defendant is discharged from custody, it has no power or jurisdiction, after the lapse of the time involved in the sentence and after the term, to issue commitment on such judgment."

44 Oklahoma, 655, says courts cannot again imprison after taking security, but suit and judgment on security bond is upheld.

100 Maine, 123:

> "The ordinary mittimus directs the officer to commit the convict then in custody, to the jail or prison according to the sentence. It contains no order to arrest, and does not authorize an arrest of one at large, and not an escaped prisoner. The sentence takes effect and is in force the day it is pronounced, and if the magistrate voluntarily discharges the convict from that custody without day, he cannot be afterwards taken in execution; certainly not after the time named for his imprisonment has elapsed.
>
> A permanent court of jurisdiction, having stated terms for the trial of criminal cases, may, for good cause, place an indictment on file, or continue the case to a subsequent term for sentence. In such case jurisdicton of the person and cause is retained. But after sentence and adjournment of the term, or the end of the session, if before a magistrate, all jurisdiction of the cause and the person has ceased.
>
> If after conviction and sentence any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person.
>
> The Municipal Court of Skowhegan has regular terms for civil business, but none for criminal. In the class of offenses charged against the petitioner that court has the same jurisdiction as trial justices, and no more. In criminal cases it is always open. Upon a criminal charge within its jurisdiction, if upon trial the respondent is found guilty, or if he plead guilty, it becomes the duty of the Judge at that session to impose sentence. When that is done, the cause is determined, the Judge's duty is at an end, and nothing remains but to carry the judgment into effect. If to do this, a commitment is necessary, he should issue a mittimus at or before the end of the session at which the conviction was had, to convey the prisoner then present in custody to jail."

80 North Carolina, 398:

> "Where a defendant, after conviction for an assault, confessed judgment with sureties to secure the fine and costs imposed, and execution issued

and was returned unsatisfied, it was held that the original judgment was discharged, and that a motion to order the defendant again into custody until the fine and costs were paid, was properly refused."

58 O. S., 616:

"In a criminal case the court has the power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute; and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided."

78 O. S., 24:

"S. was tried and convicted by the mayor of an incorporated village, who had jurisdiction over the offense, for violating Section 7033-1, Revised Statutes, which prohibits the business of barbering on Sunday. He was sentenced to pay a fine of fifteen dollars and the cost of prosecution, and upon his refusal to pay the same, the mayor issued to the marshal of said village a mittimus, therein commanding that the prisoner be committed to the county jail until said fine and costs be paid, without including the words, 'or secured to be paid,' as provided in Section 1536-793, Revised Statutes. Thereupon, S. applied to a judge of the court of common pleas of the proper county for a writ of habeas corpus, and one was issued. As the authority for holding S. the said mittimus was submitted to the judge, who, being of opinion that the mittimus was defective because of the absence of said words, on application for that purpose, gave leave to the mayor to amend the writ so as to include said omitted words. The amendment was made accordingly, whereupon the petition for the writ of habeas corpus was dismissed."

89 Wisc. 354:

"1. After sentence has been pronounced in a criminal case the court cannot, as a matter of leniency to the defendant, suspend indefinitely its execution.

"2. A defendant was sentenced to pay a fine and the costs and to stand committed to jail until payment, the period of imprisonment being limited to six months; and the court directed that if the costs were paid at once the sentence of imprisonment be suspended until further order. The defendant paid the costs accordingly, but failed to pay the fine. HELD, That an order, made more than six months later, that defendant pay the fine and stand committed to jail until payment in accordance with said sentence, was without authority."

This case differs from 102 Ohio St. 332, in that Wisconsin has no statute like the Ohio probation statutes.

72 Ga. 129:

"A prisoner was arrested for simple larceny, and, in default of bail, was committed to jail to answer for such offense before the superior court; before he was actually incarcerated under the warrant of commitment, he was carried before the county court, charged with the same offenses, plead guilty and was fined; an outside party agreed to pay the fine, and the prisoner was

discharged by the sheriff; afterwards the person who assumed the payment of the fine imposed in the county court failed to pay it, and the sheriff re-arrested the defendant and placed him in jail; he sued out a writ of habeas corpus the judge of the superior court, on the hearing, refused to discharge the prisoner, and committed him to answer before the superior court for the same charge on which he had been tried, convicted and sentenced in the county court.

HELD, That this was error. When the sheriff discharged the prisoner, taking the promise of another to pay the fine, he could not afterward hold the defendant or arrest him for not paying it. By making this arrangement, the sheriff became liable for the amount of the fine, and must look to the person on whose promise he acted. The defendant was not liable to arrest and imprisonment for a failure to pay."

104 Ga. 333;
30 S. E. 812;
8 Bush. Ky. 131.

Lambert vs. Sheriff, Pike County Common Pleas, Waverly, Ohio.

Defendant released. Court holding after security is given for a fine, defendant cannot be again imprisoned.

When such fine and costs are "secured to be paid," defendant is released and cannot be again imprisoned at any time thereafter for the offense for which he was sentenced. The bond is a payment as far as the fine is concerned, and a new obligation is created. The state must thereafter look to the bond for payment, such bond not being like one for the appearance of the defendant. The taking of such a bond would not be a suspension of the fine secured by a payment thereof.

This answers both your third and fourth questions.

Respectfully,
C. C. CRABBE,
Attorney-General.

1030.

TAX LEVY—LIBRARY PURPOSES—WHAT CERTIFICATION TO BOARD OF EDUCATION BY LIBRARY TRUSTEES SHOULD INCLUDE—SECTION 7639 G. C. CONSTRUED.

SYLLABUS:

In the certification to the board of education by the board of library trustees, of the amount of money needed for library purposes as authorized and required by section 7639 General Code, it is not intended that such certification include the amount necessary to pay the interest and principal of the library debt.

COLUMBUS, OHIO, December 24, 1923.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Yours of recent date received, in which you submit for an opinion the following inquiry: