run concurrently or consecutively. It is a general rule of law that, where a court in imposing several sentences on a person convicted of several crimes fails to state whether the same are to be served concurrently or cumulatively, there is a presumption that the several sentences are to be served concurrently. See 16 C. J. 1307; *State* vs. *McKeller,* 67 S. E. 314; *United States* vs. *Patterson,* 29 Fed. 775; 8 R. C. L. 242; and 7 L. R. A. (N. S.) 126—Note.

The Supreme Court of Ohio in the case of *Anderson* vs. *Brown,* 117 O. S. 393, did not follow the weight of authority that, when the record is silent as to how several sentences imposed upon the same individual are to be served, there is a presumption that the court intended that the several sentences are to be served concurrently. The court in the second paragraph of the syllabus held that:

> "Where the record is silent as to whether two or more sentences of imprisonment or fines on the same individual are to be executed cumulatively, the presumption obtains that the sentencing court intended that the prisoner should serve the full aggregate of all imprisonments or pay the full aggregate amount of all fines, or that the same should be covered by the credit allowance thereon, as provided in Section 13717, General Code. *(Williams* vs. *State,* 18 Ohio St., 46, approved and followed.)

Under the rule of law announced in the case of *Anderson* vs. *Brown, supra,* the sentences imposed by the trial court in the case referred to by you in your letter must be presumed to run consecutively.

It is therefore my opinion that, where several sentences are imposed for separate and distinct offenses after conviction thereof on several counts in the same indictment, the sentences run consecutively unless a contrary intention is expressed by the trial court in its judgment.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4702.

BANK—OHIO SAVINGS BANK OF TOLEDO—PLAN OF REOPENING APPROVED.

SYLLABUS:

The plan for the reopening of The Ohio Savings Bank and Trust Company, Toledo, Ohio, discussed and approved.

COLUMBUS, OHIO, October 24, 1932.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication which reads as follows:

> "There has been submitted to the undersigned a plan for the reopening of The Ohio Savings Bank and Trust Company, Toledo, Ohio,

which was closed August 17, 1931. Since this date dividends aggregating fifteen percent have been paid to general claimants. An order of assessment has heretofore been issued, as provided in Section 710-75 of the General Code of Ohio, and I am informed that your office has recently instituted action against these stockholders who have not paid their individual liability or satisfactorily secured the payment of same, and that said suit is now pending in the Court of Common Pleas of Lucas County, Ohio.

I wish to call your attention to Provision 1 of the plan and ask your opinion particularly,

1. May the individual liability of stockholders of said bank, when collected, be used in accordance with this provision?

2. Will not any stockholder who has paid or does pay the amount of his individual liability prior to the effective date of said plan and who has not consented thereto, remain a stockholder in the reopened bank without any individual liability attaching to his stock?

2a. If so, may the bank legally reopen?

3. In the event that all depositors and creditors required by the terms of the plan to consent thereto do not so consent, what disposition of that portion of the individual liability collected to which they may be entitled shall be made?

4. Is such a contract as is contemplated in the 3rd paragraph of Provision 2 legal when executed?

5. Should the income derived from and the proceeds realized from the property and assets placed in trust according to the terms of Provision 11 at any time be insufficient to maintain and administer said trust estate, what liability, if any, will attach to the bank?

5a. If any such liability may attach, is it legal to permit said bank to reopen?

6. Will the provision of paragraph 2 of 'Stockholders Agreement,' found on page 11 of the plan, be legal and binding upon a stockholder signing sa d agreement?

7. Is a proxy given as contemplated by the 3rd paragraph of said stockholders agreement effective when the same is executed by stockholders during the time when the assets and property of the bank are in my possession?

8. Your opinion is respectfully requested on each specific inquiry made and in addition thereto as to whether or not this plan is otherwise legal. Copy of said plan is enclosed herewith."

Since the receipt of your request, a number of revisions have been made in the original plan for the reopening of this bank. I am now in receipt of your communication of October 17, 1932, enclosing the latest draft of the proposed plan for the reopening of The Ohio Savings Bank & Trust Company, of Toledo, Ohio, containing additional proposals. You request my opinion on the specific questions contained in your original request as having reference to the redrafted plan bearing the date of October 14, 1932.

1.

May the individual liability of stockholders of said bank, when collected, be used in accordance with this provision?

It must be borne in mind that the double liability of stockholders in a bank is not an asset of the bank. *Wright et al.* vs. *McCormack et al.*, 17 O. S., 86; *Umsted* vs. *Buskirk et al.*, 17 O. S., 113. It is a trust fund to be collected by the Superintendent of Banks, as trustee, and distributed pro rata among the depositors and creditors. *Andrews* vs. *State ex rel.* 124 O. S., 348; *Giltrite Building Company* vs. *Elliott*, 165 S. E. (S. C.) 340 (Adv. Shs. Oct. 6, 1932).

It necessarily follows that the stockholders, depositors and creditors are entitled to insist that the proceeds of stockholders' double liability shall be applied ratably on the claims of the depositors and creditors of the bank. This right, however, may be waived. The validity of such a waiver by the depositors and creditors of a bank is supported by several cases in this state. *Marfield* vs. *Traction Company*, 111 O. S. 139; *Hull* vs. *Standard Coal and Iron Company*, 20 C. C. 533; *Hardman et al.* vs. *Cincinnati & Eastern Railway Company et al.*, 18 Bull., 264; *contra, Kreisser* vs. *Ashtabula Gas Light Company et al.*, 2 C. C. (n. s.), 597. This right having been waived by the depositors and creditors of the bank, an assignment of the proceeds of the double liability given by the stockholders would undoubtedly authorize the Superintendent of Banks to turn this fund over to the reopened bank to enable it to resume business. *Jones* vs. *Turney and Jones Company*, 91 O. S., 122.

In specific answer to your first question, I am of the opinion that with the waiver and consent of the stockholders, depositors and creditors of this bank, the Superintendent of Banks is authorized to turn over the proceeds of the collection of the double liability of stockholders to The Ohio Savings Bank & Trust Company, reopened under the plan submitted for the purpose of conducting its business.

2.

> Will not any stockholder who has paid or does pay the amount of his individual liability prior to the effective date of said plan and who has not consented thereto, remain a stockholder in the reopened bank without any individual liability attaching to his stock?

In connection with this question you will note that the revised plan for the reopening of The Ohio Savings Bank and Trust Company, dated October 14, 1932, contains a very important addition to the plan originally submitted on July 14, 1932. It is provided in part by Provision 1, Paragraph 3, of the Plan dated October 14, 1932:

> "At or before the time this Plan is declared to be operative, it is contemplated that steps will be taken to terminate the respective interests in the corporation of stockholders who have failed or refused to sign consents, by proceedings under the statutes of Ohio, or by obtaining the voluntary surrender for cancellation of their stock, or otherwise."

The plan as now formulated accordingly provides that the interests of all stockholders who do not become stockholders in the new bank will be eliminated, or, in other words, that there will be no stockholders of the new bank whose stock is not liable to a double assessment, as required by the Constitution and laws of Ohio.

Three steps to cancel the shares of stockholders who do not affirmatively

qualify themselves to be such in the reopened bank are contemplated: First, voluntary agreement by non-consenting shareholders to cancellation of their stock, to be executed in form of Exhibit C, attached to Plan. Second, involuntary cancellation by statutory proceedings. Section 8623-72, General Code; 10 Ohio Jurisprudence, 138, section 70. Third, by any other method which may accomplish this purpose. I am not advised as to the method or methods to be used, but assume the validity and effectiveness of the same will be subject to the approval of the Superintendent of Banks. It therefore becomes apparent that if the plan is consummated according to its provisions, your second question becomes moot and cannot be categorically answered at this time.

The application of the provisions of section 8623-72, General Code, to this plan immediately suggests a constitutional question, to-wit, whether stockholders who acquired their stock before the enactment of section 8623-72, General Code, can be bound in violation of any vested rights which the operation of this statute purports to destroy. However, that question is not now before me, nor do I believe it within my authority to pass on it. It is, however, necessary to determine that section 8623-72, General Code, is consistent with the banking laws of Ohio and therefore available in the consummation of the plan. Section 710-52, General Code.

It might be said that sections 710-114 and 710-140 of the General Code, forbidding the purchase by a bank of its own stock, conflict with the powers granted in section 8623-72, supra, authorizing the payment of the appraised value of stock of dissenting stockholders; and because of this conflict, section 8623-72, General Code, cannot apply to banks. A reasonable construction of sections 710-114 and 710-140, supra, indicates that this prohibition exists only against the purchase by a bank of its own stock in the ordinary course of business and that the purchase of stock, if it be such, from dissenting stockholders, pursuant to a plan for reorganization, as authorized by section 8623-72, supra, does not create such an inconsistency between the authority granted by the provisions of the General Corporation Act and the special act governing banks as to make section 8623-72, supra, inapplicable.

In view of the additional provisions of the present plan for the reopening of the Ohio Savings Bank and Trust Company, which purports to dispose of the situation presented by your inquiry, I deem it unnecessary to specifically answer your second question.

2a.

If so, may the bank legally reopen?

The new provisions of the plan for the reopening of The Ohio Savings Bank & Trust Company, dated October 14, 1932, also eliminates the necessity for an answer to this question.

3.

In the event that all depositors and creditors required by the terms of the plan to consent thereto do not so consent, what disposition of that portion of the individual liability collected to which they may be entitled shall be made?

Provision 16 of the plan for the reopening of The Ohio Savings Bank & Trust Company, dated October 14, 1932, contemplates the necessity of obtaining

the consents of substantially all the depositors and creditors of the bank, or such number as is considered necessary by the Superintendent of Banks and the depositors' committee. I assume, therefore, that your question refers to a relatively small number of depositors whose consents to the plan may not be obtained. For the reasons heretofore pointed out, the non-consenting depositors and creditors would be entitled to proportionate shares respectively of the proceeds of the present stockholders' liability. *Ryan & Malloy* vs. *the Miami R. R.,* 16 C. C. (Hamilton Co.) 530.

In specific answer to your third question, I am of the opinion that the depositors and creditors of The Ohio Savings Bank and Trust Company, who do not consent to the plan for the reopening of said bank, are entitled to proportionate shares, respectively, of the double liability of the present stockholders of said bank.

4.

Is such a contract as is contemplated in the third paragraph of Provision 2 legal when executed?

The provision referred to in your fourth question has been omitted from the revised plan of October 14, 1932, for the reopening of The Ohio Savings Bank & Trust Company. Its substantial equivalent has been included in the agreements to be signed in the alternative by stockholders in forms as shown by Exhibits A and B, attached to said plan. The pertinent provision contained in Exhibit A, attached to the plan dated October 14, 1932, reads as follows:

"(c) The undersigned expressly consents and agrees to the reduction of the par value of his stock to one-sixth (1/6) of the present par value thereof, and agrees that said reduced amount of stock to be retained by him under said Plan shall carry with it all liability to present and future depositors and creditors of said bank fixed by the constitution and statutes of the State of Ohio, and that any payment which he may have made as for double liability on any stock in said bank, including that so to be retained by him under this Plan shall be by the Superintendent of Banks, acting as the agent of such stockholder, paid into said bank as provided in said Plan, and any such payment of double liability on said stock so retained by him shall not in any way relieve him from liability to future assessments on said retained stock. On the contrary, the liability of the undersigned on all stock retained by him in pursuance of this Plan shall be the same as if no assessments had ever been paid thereon."

The analogous provision in Exhibit B reads as follows:

"(c) The undersigned expressly consents and agrees to the reduction of the par value of his stock to one-sixth (1/6) of the present par value thereof, and agrees that said reduced amount of stock to be retained by him under said Plan shall carry with it all liability to present and future depositors and creditors of said bank fixed by the Constitution and statues of the State of Ohio, and that any payment which he may have made as for double liability on any stock in said bank, including that so to be retained by him under this Plan, shall be by the Superintendent of Banks, acting as his agent, paid in to said bank, as provided in said Plan, and any such payment of double liability on said stock so retained by him shall not in any way affect his liability to future assess-

ments on said retained stock as to present and future depositors and creditors of said bank."

Regardless of whether this agreement be interpreted as an acceptance by the stockholders in the reopened bank of the contingent double liability imposed by the constitution and statutes of Ohio, or a strictly contractual agreement that they may be assessed an amount equal to the par value of the stock, to discharge the obligations of the reopened bank at any future date, such an agreement, when properly executed, is undoubtedly valid and enforcible. *Sterling Wrench Co., et al.* vs. *Amstutz,* 50 O. S., 484; *Bank* vs. *Hannon,* 14 Fed. (Ohio), 593, *Bank vs. Hannon,* 4 Fed., 612; *Thompson* vs. *Gross, et al.,* 106 Wisc. 34.

While these agreements are undoubtedly binding on the stockholders signing the same, additional provision must be made to bind transferees of such stock. This can be practically accomplished by an appropriate amendment to the articles of incorporation of the bank, together with a reference thereto in the new certificates of stock issued to the stockholders of the reopened bank. *Good* vs. *Starker* (1932), 242 N. W. (Wisc.) 204.

I am of the opinion, therefore, in answer to your fourth question, that the agreement of the stockholders of the reopened bank, attached as Exhibit A and Exhibit B of the proposed plan for the reopening of The Ohio Savings Bank & Trust Company, relative to a contingent double liability of such stockholders, is, when properly executed, valid and binding.

5.

Should the income derived from and the proceeds realized from the property and assets placed in trust according to the terms of Provision 11 at any time be insufficient to maintain and administer said trust estate, what liability, if any, will attach to the bank?

I am advised that there are certain leases, mortgages, etc., under which the assets of the bank are definitely or contingently obligated. Certain of these are referred to in the plan. Provision 10. It is proposed, as a condition precedent to the consummation of this plan, that such obligations of the reopened bank will be liquidated and to a large extent discharged before or concurrently with the reopening of the bank.

The plan contemplates that the primary obligation to discharge the liabilities above referred to will rest upon cash and certain slow assets which will be transferred to the reopened bank as trustee. I am advised that the actual value of such assets is such that the possibility that the reopened bank will be compelled to respond for any part of the obligations referred to is very remote.

For the maintenance of the trust, including the discharge of obligations incurred in conserving the same pending final liquidation, and for the discharge of the obligations encumbering certain of these assets when trusteed, there will be three sources of revenue. These are as follows: Income from the trusteed assets, current realization, and extraordinary realization. If the first two sources are insufficient temporarily to conserve certain of the assets pending liquidation on favorable terms, a creditor might force an extraordinaary realization on a portion of the corpus of the trust to take care of the defaulted liability. A trustee, in the performance of a trust, may, when necessary to conserve the trust estate or any portion thereof, obtain authority of the court to dispose of a part of the corpus to preserve the remainder. The provisions of the proposed plan for the

reopening of this bank, in my opinion, cover this situation. As heretofore observed, considering the extent of the assets which will be transferred to the trustee, the possibility that any residual obligation will fall on the bank seems too remote to require discussion.

I assume, of course, that the agreement creating the trust will contain the customary provisions under which the trustee will, in making contracts affecting the trust, specifically exempt the trustee, the bank, and the beneficiaries of the trust, from any personal liability under such contracts and that the assets in the trust estate will be the sole and exclusive security for the discharge of any obligation created by such contracts.

In view of the foregoing, and in specific answer to your question, I am of the opinion that if the provisions of the plan are carried out, the reopened Ohio Savings Bank and Trust Company will incur no obligations in the current maintenance and discharge of its function as trustee, of certain assets of the present bank, and assume that under the plan the trusteed assets will be sufficient to render any residual present liability of the bank, primarily assumed by the trust, too remote to be of practical consequence.

5a.

If any such liability may attach, is it legal to permit said bank to reopen?

The answer to your fifth question disposes of this inquiry.

6.

Will the provision of paragraph 2 of 'Stockholders Agreement,' found on page 11 of the plan, be legal and binding upon a stockholder signing said agreement?

You will note, of course, that the revised plan for the reopening of this bank provides for three distinct stockholders' agreements, differing in their terms, to which the stockholders may agree in the alternative. Exhibit A is a form available to consenting stockholders resident of the State of Ohio. Exhibit B is an agreement to be signed by consenting stockholders residing outside of the state. and Exhibit C is a form of agreement for those stockholders who refuse to consent to the plan but agree to the cancellation of their present stock. Consequently, the executed consents will require your scrutiny to determine the status of the liability of the stockholders of the reopened bank before your final consent to the reopening of this bank is given.

Specific answer to your sixth question is covered in part by my answer to your first question. Unless the stockholders are under a legal disability, there can be little doubt but that the stockholders of a bank can waive any personal defense which they may have to the enforcement of the assessment of double liability. In this and in all respects the provisions of the three proposed agreements to be signed in the alternative by stockholders in the present bank are undoubtedly of a binding character.

In answer to your sixth question, I am of the opinion that the provisions of the stockholders' agreement attached to the proposed plan as Exhibits A, B and C, to be signed in the alternative by the stockholders of the present bank, are valid, legal and binding upon stockholders signing the same.

7.

Is a proxy given as contemplated by the 3rd paragraph of said stockholders agreement effective when the same is executed by stockholders during the time when the assets and property of the bank are in my possession?

The proxy referred to is contained in paragraph (f) of Exhibit A, attached to said plan, and in paragraph (g) of Exhibit B, attached thereto.

It was held by the then Attorney General, in 1 O. A. G., 1914, page 1065, that the existence of the corporate organization of the bank is not automatically terminated at the time when the Superintendent of Banks takes charge of its assets and business for the purpose of liquidation. He further held that, if after all debts of the bank have been paid there is a residue, his action in calling a stockholder's meeting, as provided by section 710-102, results in the life of the corporation being automatically terminated when the stockholders by their votes, have determined the method of distribution of the remaining assets. At the time the above opinion was rendered, section 710-102 bore the code number 742-2, General Code, and was also in part included in the provisions of then section 742-12. My honorable predecessor also held that in the event the assets of the bank were insufficient to pay all its debts, it must be concluded that at some time in the liquidation the corporate existence of the bank ceased to exist and suggested that in order that this time be made definite, the Superintendent of Banks, when the fact that its liability exceeded its assets became apparent, should make an application to the Common Pleas Court, as provided by statute, for the dissolution of the corporation. So far as pertinent to the instant question, it is clear from the reasoning and conclusion of the then Attorney General, which I approve, that the corporation still exists and may take such action as is consistent with the control and power vested in the Superintendent of Banks to liquidate its assets.

The last sentence of section 710-89, General Code, reads as follows:

"Such bank may with the consent of the superintendent of banks, resume business upon such conditions as may be approved by the court of common pleas in and for the county in which such bank was located."

Referring to this provision, which at the time the opinion was rendered was contained in substantially the same language in section 742-1, General Code, the then Attorney General said (1 O. A. G., 1914, p. 1066):

"The last sentence of this section makes it clear that after the property and business of the corporation has been taken possession of by the Superintendent of Banks, the corporation, as such, continues to exist and to have the corporate power to resume business with the consent of the superintendent of banks, and upon the conditions approved by him. This last point is of special importance. From this provision it becomes clear that you are in error when you assume that the corporate powers of the company are cut off when you, as superintendent of banks, assume charge of its assets for the purpose of liquidation. So long as the corporation continues to have the power to resume business with your consent, it is an existing corporation. Furthermore, it must exist with its corporate organization as such, unimpaired, for the implication of the section is that

> the corporation is to enter into an agreement of a contractual nature with the superintendent of banks, and that being the case its officers must continue to act as such because a corporation can only act through its officers."

It follows that the stockholders are entitled to vote and thereby determine the corporate action as to the proposed plan for reopening.

In specific answer to your seventh question, I am of the opinion that the proxy contained in the stockholder's agreements attached to the plan for the reopening of The Ohio Savings Bank and Trust Company, marked Exhibits A and B, when properly executed is valid and binding, although executed during the time when the assets and property of the bank are in the possession of the Superintendent of Banks.

8.

In your eighth question you request my opinion generally as to the legality of the proposed plan for the reopening of this bank in the respects which have not been discussed in answer to your specific questions.

It is unnecessary to quote the plan in full or to restate its provisions in more detail than has been heretofore indicated. It contemplates that the present existing corporation shall continue and that the bank shall resume business, which, of course, necessitates the surrender by you of the assets of the corporation. Section 710-89 of the General Code authorizes such action on your part, the last paragraph of the section providing as follows:

> "Such bank may with the consent of the superintendent of banks, resume business upon such conditions as may be approved by the court of common pleas in and for the county in which such bank was located."

I have carefully examined the provisions of the plan and am of the opinion that the various steps therein enumerated may be legally carried out. It is noted that certain of the details with respect to the status of existing liabilities and assets are yet to be determined, but I assume that these details will be made definite before the reopening receives your consent and the approval of the Common Pleas Court. At that time it may be that, in determining whether you should consent to the reopening of the bank, you will have some doubt as to the status of certain of the liabilities or assets of the bank. If this be so, I trust that you will not hesitate to make further inquiries on any points which may occur to you. The determination of your course can necessarily only be reached upon an examination of the assets and liabilities as they exist at the time the bank is to be reopened.

The plan, if carried out, will effect the release in full of the deposits of many thousands of the depositors of The Ohio Savings Bank & Trust Company, and, consequently, I sincerely hope, with such modifications as you may require from a business standpoint, it may be effectuated. Needless to say, I stand ready to appear in court in your behalf whenever the campaign among the stockholders, depositors and creditors has reached a point where you feel justified in giving your consent to the reopening of the bank.

Respectfully,
GILBERT BETTMAN,
Attorney General.