inheritance tax fund has been reimbursed from the general fund in the treasurer's possession he is then authorized to reimburse the deficiency thus caused in the general fund by such reimbursement by applying the proceeds of levies for the general revenue fund of the municipality receiving a portion of the taxes so ordered refunded, first collected by the county treasurer, and if such deficiency is in excess of the amount for which the county treasurer is obligated to account to the village at the semi-annual settlement next following the payment of such warrant, the county treasurer should deduct from subsequent settlements until such deficiency is reimbursed.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4537.

CRIMINAL LAW—COURT MAY REQUIRE SEPARATE INDETERMINATE SENTENCES TO BE SERVED CUMULATIVELY—SUCH SENTENCES NOT VOID AS BEING INDEFINITE AND UNCERTAIN.

SYLLABUS:

A court in a criminal case has the power to sentence a person convicted of four separate felonies to serve four separate indeterminate sentences and to require that the sentences be served cumulatively.

Indeterminate sentences that are to be served cumulatively are not void for being indefinite or uncertain when the judgment of the court imposing such sentences provides that one sentence is to commence when another terminates.

COLUMBUS, OHIO, August 1, 1932.

HON. CHARLES S. LEASURE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads as follows:

"I am asking for an opinion and interpretation of General Code No. 2166 as passed by the legislature on April 10, 1931, pertaining to the sentencing of persons to the Ohio Penitentiary.

I had a criminal case in which the defendant was sentenced by the Common Pleas Court on four indictments for four separate and distinct felonies. In his first sentence, the Court made the same an indeterminate period to the Ohio Penitentiary. In his second sentence the Court also made a sentence for an indeterminate period of time but such sentence to be consecutive to and cumulative with the sentence in the first case. The Court's sentence in the third case was also for an indeterminate period of time and was consecutive to and cumulative with the first two sentences. The sentence in the fourth case was similar to the others.

Part of Section 2166 reads as follows:

'If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced, and for the purpose of this chapter, he shall be held to be serving one continuous term of imprisonment.'

My query is whether the sentencing Court, since the passage of

Section 2166, can fix the minimum or maximum period of time in cases where the prisoner is sentenced on more than one charge. And further, whether the Court's sentences as set out above were proper. And further, whether or not the prisoner would be incarcerated as long as he would be had he only been sentenced on each for an indeterminate period of time without the Court adding the words 'consecutive to and cumulative with'."

The provision of section 2166, quoted in your letter, was originally enacted in 103 O. L. 29 (1913) in substantially its present form and wording and was not changed in any wise on the amendment of section 2166 in 114 Ohio Laws.

It is generally held, even in the absence of statutory authority, that a court has the power to impose cumulative sentences upon a person convicted of several offenses charged either in separate indictments or in separate counts in one indictment. See *Howard* vs. *United States,* 75 Fed. 986; 27 L. R. A. 509; 8 R. C. L. 240, 241; and *Williams* vs. *State,* 18 O. S. 46.

The rule of law that cumulative sentences are authorized without express legislative enactment, was also stated in the case of *Henderson* vs. *James,* 52 O. S. 242, at page 254, decided in 1895. The court, in the course of its opinion, said:

> "As we have no statute authorizing cumulative sentences for crime, it would seem at first blush, that such sentences should not be permitted in this state; but this court, with the courts of most of the other states, as well as England, has sustained cumulative sentences without the aid of a statute."

It is also a general rule of law that whenever 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. In other words, when the record is silent as to how the several sentences for separate crimes are to be served, they are presumed to be served concurrently. The rule is stated as follows in 16 C. J. 1307:

> "Where defendant is found guilty of more than one offense, if the court desires to have imprisonment under one sentence commenced on the expiration of another, the sentence must so state, or else the two terms of imprisonment will run concurrently."

To the same effect is the case of *State* vs. *McKellar,* 67 S. E. 314, wherein the court held in the seventh paragraph of the syllabus that:

> "Where several sentences are imposed for separate and distinct offenses after conviction thereof on separate indictments, or on several counts in the same indictment, the sentences run concurrently, unless the intention that one should begin at the expiration of the other is expressed."

See 8 R. C. L. 242; *United States* vs. *Patterson,* 29 Fed. 775; and 7 L. R. A. (N. S.) 126—Note.

Although the Supreme Court, in the recent case of *Anderson* vs. *Brown,* 117

O S. 393, at page 395, recognized the general rule of law stated herein, nevertheless the court held in the second paragraph of the syllabus that:

> "Where the record is silent as to whether two or more sentences of imprisonment * * * 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" etc.

Thus, the court, by its holding, apparently refused to 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 sentences are to be served concurrently. Regardless of the split of authority on that point, neither the majority rule nor the rule of law as laid down in the Anderson case, supra, would be applicable to your inquiry, inasmuch as the trial court in your case clearly indicated in its judgment that the sentences imposed by the court were to run consecutively and not concurrently.

In addition to the rules of law stated herein, it must also be remembered that every criminal sentence must be definite and certain so that the prisoner and the officer responsible for his custody may know when his time of imprisonment begins and ends w'thout consulting the records of the courts, except the commitment papers. This rule of law was announced in the case of *Picket* vs. *State,* 22 O. S. 405, the third paragraph of the syllabus reading as follows:

> "The terms of a sentence of imprisonment ought to be so definite and certain, as to advise the prisoner and the officer charged with the execution of the sentence of the time of its commencement and termination, without being required to inspect the records of any other court, or the record of any other case."

Whether the sentences imposed by the court in the case referred to by you in your letter comply with that rule of law, is a question of fact to be determined from the journal entry made in that case and for that reason I cannot render an opinion as to the legality of the sentences in that respect. However, it has been held by numerous courts that a judgment in a criminal case is not void as being indefinite and uncertain when one sentence of imprisonment is made to commence when another sentence of imprisonment terminates. Thus, in the case of *Williams* vs. *State,* 18 O. S. 46, it was held that:

> "Where a party is convicted at the same term of several crimes, each punishable by imprisonment in the penitentiary, it is not error, in sentencing the defendant, to make one term of imprisonment commence when another terminates."

As previously stated herein, the judgment of the court imposing such sentences must indicate in the record the previous sentence or sentences which are referred to by the court. See *Larney* vs. *Cleveland,* 34 O. S. 599. The same rule of law is expressed as follows in 16 C. J. 1306:

> " * * * a judgment on a conviction of two or more offenses, involving imprisonment for two or more terms in succession, should not fix the date on which each term shall begin, but should direct it to com-

> mence at the expiration of the term prior thereto, which may be shortened by good conduct or otherwise."

The judgment of the trial court in your case sentenced the convicted person to imprisonment for four indeterminate terms, with a proviso that the sentences imposed on the second, third and fourth felonies shall run consecutively. Consequently, by virtue of said judgment, the term of imprisonment imposed for the second felony commences to run at the expiration of the term of imprisonment imposed on the first felony and so on as to the third and fourth indeterminate sentences of imprisonment. The court, in pronouncing judgment in that case, properly inserted in its judgment a direction that the second, third and fourth terms of imprisonment should commence at the expiration of the preceding term of imprisonment. The court, in imposing sentence in the manner that it did, complied with the better practice of expressly imposing the punishment on each separate felony for which the prisoner was convicted and directing that his terms of imprisonment be served consecutively or cumulatively. The fact that the second, third and fourth indeterminate sentences imposed by the court are to commence at the termination of a previous sentence cannot, in view of the authorities, be considered as being indefinite or uncertain, since the sentences are as certain as the law will permit. There is no other way in which a person convicted of several separate felonies can be sentenced in Ohio, when the court desires to punish such offender for each separate offense. Though the second, third and fourth indeterminate sentences are uncertain as to the date of their commencement, nevertheless said sentences become certain by the occurrence or in the event of the expiration of the previous sentence. In other words, the sentences imposed by the court in the case referred to in your letter are not void for uncertainty or indefiniteness, since the sentences of the court are as certain as the indeterminate sentence law of Ohio will permit. See section 2166.

The manner in which the court imposed the several sentences finds approval in the cases of *People* vs. *Elliott,* 112 N. E. 300 (Ill.), and *Eldredge* vs. *State,* 37 O. S. 193, at page 197. The court, in imposing the several indeterminate sentences, did not violate that part of section 2166 which requires that courts, in imposing sentences to the Ohio penitentiary "for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration". The four indeterminate sentences imposed by the court complied with the indeterminate sentence provision of that section. The court, by its judgment in that case, merely fixed the time and the order in which the four indeterminate sentences were to be served and it did not fix the minimum or maximum term of imprisonment for each indeterminate sentence imposed on the prisoner. The judgment of the court did not make definite sentences out of the second, third and fourth indeterminate sentences by specifying when the terms of imprisonment imposed by those sentences were to commence, since the successive indeterminate sentences imposed by the court did not fix a term of imprisonment for each felony. Thus, the sentences of the court were made in conformity with the provision of section 2166.

The ultimate result of the sentences imposed by the court was that the person so sentenced would serve four indeterminate sentences instead of serving all of his sentences concurrently. If the sentences were to be served concurrently, the prisoner, for all practical effects, would serve all four sentences at one time instead of each sentence separately, as would be the case where a court, in its judgment, requires that separate sentences be served consecutively. It is therefore apparent that the prisoner, in the case you refer to in your letter, will be

imprisoned a longer time under the cumulative sentences imposed by the court than under a judgment which would have provided that the sentences be served concurrently.

The same result occurs when the good time statutes are applied to sentences that are to be served cumulatively and those that are to be served concurrently. The provision of section 2166 quoted in your letter was construed by me in the Opinions of the Attorney General for 1930, at page 1924. The syllabus reads as follows:

> "Where one is convicted of two or more separate felonies and the court orders said sentences to be served cumulatively, by the terms of Section 2166 of the General Code, the prisoner shall be held to be serving one continuous term and will not be eligible to parole until he has served the aggregate of the minimum terms."

Thus, a prisoner serving successive or cumulative sentences is not eligible for parole until he has served the aggregate of the minimum terms of his separate sentences, which is not the case when a prisoner is serving several sentences concurrently.

Incidentally, I call your attention to the statement of Kinkade, J., in his opinion in the case of *Anderson* vs. *Brown, supra,* decided in 1927, where he said, at page 397, that:

> "There is no statute in Ohio directing whether sentences shall be cumulative or concurrent," etc.

It is not necessary to decide in this opinion whether the provision of section 2166 quoted in your letter authorizes cumulative sentences, inasmuch as the Supreme Court has repeatedly held that such authority exists without legislative enactment. See *Henderson* vs. *James,* 52 O. S. 242, at page 254.

I am therefore of the opinion that a court in a criminal case has the power to sentence a person convicted of four separate felonies to serve four separate indeterminate sentences and to require that the sentences be served consecutively. Indeterminate sentences that are to be served cumulatively are not void for being indefinite or uncertain when the judgment of the court imposing such sentences provides that one sentence is to commence when another terminates.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4538.

APPROVAL, BONDS OF CITY OF GIRARD, TRUMBULL COUNTY, OHIO —$4,630.00.

COLUMBUS, OHIO, August 2, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.