says. The mittimus recites the sentence. It alone advises the keeper of the jail or penitentiary for what term or terms and for what length of time he may lawfully detain the convict. His authority for detention is the writ of commitment. He cannot indulge in surmise in attempting to determine what in his judgment the sentence may mean as to the term of imprisonment.

I am unable to agree with a former opinion of this office which is found in Annual Report of the Attorney General for 1914, Vol. I, page 160, the syllabus of which reads 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."

Nor can I agree with that part of Opinion No. 3825, Opinions of the Attorney General for 1926, the conclusion of which is based solely upon the 1914 opinion, supra.

Answering your question specifically, it is my opinion that the prisoner sentenced on the same day by the same court for from three to twenty years on three indictments of forgery where the journal of the court shows that the sentences are to run concurrently, must serve not less than three years, nor more than twenty years and that the prisoner who was sentenced on the same day by the same court for from one to twenty years on a charge of forgery and from one to three years on a charge of giving a check with intent to defraud, where the journal of the court shows that the sentences are to run concurrently, must serve not less than one nor more than twenty years. I am further of the opinion that Section 2166, General Code, does not abrogate the power of courts of this state to impose concurrent sentences, and that the term of imprisonment of an inmate of the Ohio penitentiary, sentenced on the same day by the same court, upon two or more indictments, the sentences being ordered to run concurrently, may be terminated by the Board of Clemency upon and after the expiration of the longest minimum period of duration of sentence imposed in any one of the several cases.

Respectfully,
EDWARD C. TURNER,
Attorney General.

346.

DISAPPROVAL ABSTRACT OF TITLE TO LAND IN THE CITY OF MANSFIELD, RICHLAND COUNTY, OHIO, TO BE USED FOR ARMORY PURPOSES.

COLUMBUS, OHIO, April 19, 1927.

In re: Re-examination of deed and abstract of title to lands in Mansfield for armory purposes.

HON. FRANK D. HENDERSON, *Adjutant General, Columbus, Ohio.*

DEAR SIR—The deed and abstract covering a tract of land of 5.64 acres located in the city of Mansfield, which it is proposed to convey to the state of Ohio for armory purposes, have been re-submitted for examination. Said deed and abstract were returned to you on March 3, 1927, for certain corrections.

My examination of the deed as re-submitted discloses that the same is now in proper form to convey a fee simple title to the State of Ohio.

The abstract as originally submitted was prepared by the Guarantee Title Company, and is certified by such company by Wilbur O. Weir, President, under date of January 4, 1927. Said abstract has now been returned with certain addenda furnished by George W. Tooill, and my examination thereof discloses the following:

On October 23, 1919, The Roderick Lean Manufacturing Company acquired title to a tract of 23.98 acres, more or less, of which the property which it is now proposed to convey to the State of Ohio is a part (Abstract, page 42), and on April 1, 1921, said The Roderick Lean Manufacturing Company mortgaged said real estate, together with other real estate to the Union Trust Company, trustee, the recited consideration being $50,000 (page 47). On June 12, 1925, said The Union Trust Company filed a bill of complaint in the United States District Court for the Northern District of Ohio, Eastern Division, asking for the appointment of a receiver for said The Roderick Lean Manufacturing Company, being case No. 1447 in equity in said court (Addenda), and on August 3rd said Union Trust Company as trustee, pursuant to leave to intervene, filed a cross-bill asking for foreclosure of the mortgage above referred to. On September 28, 1925, the judge of said District Court approved an entry finding the allegations of the bill of complant and the cross-bill to be true, and ordering the receiver to accept an offer made by said The Roderick Lean Manufacturing Company, the terms of which offer do not appear in the abstract, authorizing and directing said receiver to sell the property of said defendant, The Roderick Lean Manufacturing Company to said The Roderick Lean Manufacturing Company and to make and deliver proper deeds necessary to effect said sale, and further ordering the clerk of the court to cause a minute of the proceeding to be entered as a cancellation and release upon the record of the aforesaid indenture of mortgage (Addenda).

From the above it is clear that the sale by said receiver to said The Roderick Lean Manufacturing Company was a private sale and not a public sale.

Section 1640 U. S. Comp. Stat. of 1916 (27 Stat. 751; Act March 3, 1893 c225, Sec. 1), provides as follows:

> "All real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the court house of the county, parish or city in which the property or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct."

Section 1642 U. S. Comp. Stat. of 1916 (27 Stat. 751; Act March 3, 1893 c225, Sec. 3), provides as follows:

> "Hereafter no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication or notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where such property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper."

The provisions of the above quoted sections were clearly not complied with. The

property was not sold at public sale as required in Section 1640, supra, nor was publication made as provided in Section 1642, supra. On the contrary the order of the court was for a sale at private sale which is in direct conflict with the provisions of Section 1640, supra.

It has been held by the United States courts, in construing Sections 1640 and 1642, supra, that certain defects in judicial sales under orders or decrees of United States courts, such as failure to advertise or defective advertisements, or failure to make sales at the door of the courthouse of the county or parish where the greater portion of the real estate is located or on the premises, may be waived by failure to object to confirmation of the sale where the person who thereafter seeks to object had proper notice of such confirmation and opportunity to object thereto, and that such failure to object operates as an estoppel after confirmation. However, in the case of *Cumberland Lumber Co. vs. Tunis Lumber Co.*, 171 Fed. 252 (Petition for writ of certiorari denied, 215 U. S. 603) the court entered a decree directing the two receivers to advertise the property for sale in certain newspapers for ten days and to receive sealed bids for the same, to be opened at a time fixed in the advertisement and fixing the method of payment of the purchase price. A sale was made pursuant to such decree and the sale was confirmed by the court. The purchaser then filed a petition for a rehearing of the motion to confirm the sale on the ground, among others, that the sale was not made in accordance with the Act of Congress of March 3, 1893. (See Sections 1640 and 1642, supra). The headnote of the case reads as follows:

> "Act March 3, 1893, c. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710), prescribing the manner in which 'all real estate or any interest in land sold under any order or decree of any United States court, shall be sold,' etc., is mandatory and divests such courts of the discretion which theretofore existed of making sales otherwise than by public auction as therein prescribed, and a sale otherwise made is illegal and void and does not bind the purchaser even after confirmation, who cannot be required to pay for and accept a title which might be subsequently impeached for palpable legal defect in the proceeding itself under which the sale was made."

In holding said sale void the court said on page 356:

> "The act of Congress is explicit in its terms. It makes no exception, but provides one method, and only one, by which lands are to be sold under the orders and decrees of the courts of the United States. If, as contended, the act should be construed as merely directory, the inquiry arises, why the necessity of the legislation at all? The power already existed in the courts of equity to order or decree sales of realty by public auction, at such place and on such terms as said courts might direct, also the power to make sales by such other method as the courts in their judgment and discretion might adopt. In the face of these existing powers, and of the fact that the courts of equity had for time almost out of mind used and favored the practice of selling realty by the method of sealed bids, the Congress placed upon the statute books the act of 1893. It will be observed, also, that the title of the act states its purpose to be to regulate the manner in which property shall be sold under orders and decrees of the United States courts.
>
> The intention of Congress to limit the powers of the courts of the United States in respect to the sales of realty is emphasized by the fact that in the second section of the act it is provided that personal property shall be sold as provided in the first section, unless, in the opinion of the court, rendering the order or decree for sale, it would be best to sell it in some other manner. Thus it will be seen that it is still left by the plain terms of the act to the dis-

cretion of the court to sell personal property otherwise than at public sale; but there is no such provision in the first section, which directs the method by which real property shall be sold."

For the reasons above stated it is my opinion that the sale by the receiver in the case under consideration to The Roderick Lean Manufacturing Company was invalid, and that said company never obtained any title to said property by virtue of said sale.

I am therefore of the opinion that the city of Mansfield, the purchaser of said real estate from the Roderick Lean Manufacturing Company, does not have a good and merchantable title to the real estate in question, and I am accordingly disapproving the same and am returning the deed and abstract to you herewith.

Respectfully,

EDWARD C. TURNER,

Attorney General.

347.

COUNTY COMMISSIONERS—HAVE AUTHORITY TO CONSTRUCT AND IMPROVE DITCHES PASSING THROUGH A MUNICIPALITY—SECTIONS 6442 AND 6443, GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *County commissioners have jurisdiction to construct and improve ditches lying wholly within the county over their entire course, whether or not such ditches in their course pass into or through a municipality.*

2. *When a petition for a ditch improvement is presented to the county commissioners by the mayor of a city in accordance with the provisions of Sections* 6442 *and* 6443 *and related sections of the General Code, the county commissioners are authorized to receive and act upon such petition.*

COLUMBUS, OHIO, April 19, 1927.

HON. ELMER L. GODWIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

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

"The city of Bellefontaine has a ditch which passes through the entire city, originating beyond the corporate limits of said city and terminated beyond the corporate limits of the city. This is an open ditch most of the way, excepting, perhaps, a quarter or half a mile through the business portion of said city where the same is arched by stone.

At the time of high waters or big rains considerable damage is done to property in the city. The city and the county commissioners have been passing the buck as to who has jurisdiction in this matter. I am writing you to ask your opinion as to whether or not the county commissioners have authority under Section 6442 of the General Code, et seq., upon presentation of a petition by the mayor of said city? My opinion is that they have but the county commissioners are requesting your opinion in this matter."

The answer to your inquiry involves consideration of two questions which will be taken up in their order.