872.

APPROVAL, DEEDS TO LAND OF ANNA E. CORIELL AND A. A. ATKINSON IN HARRISON TOWNSHIP, SCIOTO COUNTY AND MADISON TOWNSHIP, VINTON COUNTY, FOR FIRE TOWER PURPOSES.

COLUMBUS, OHIO, September 16, 1929.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval two certain warranty deeds, executed by Anna E. Coriell and husband, and by one A. A. Atkinson, unmarried, conveying to the State of Ohio small parcels of real property in Harrison Township, Scioto County and in Madison Township, Vinton County, respectively, which parcels of land are more particularly described in said respective deeds. In each case the conveyance of this property is to the State of Ohio for fire tower purposes as a means of prevention against forest fires, and in each deed the conveyance is conditioned upon the use of the property for this purpose by the state. Each of said conveyances is made to the state by way of gift, and the authority of the state to receive the same subject to the conditions imposed is given in Section 18 of the General Code, which, among other things, provides that the state may receive by gift lands or other property for its benefit and hold and use the same according to the terms and conditions of the gift.

The deeds here submitted have been properly executed and acknowledged and are in form sufficient to convey to the State of Ohio said respective parcels of land for the purpose therein mentioned, and the same are accordingly hereby approved by me.

Respectfully,
GILBERT BETTMAN,
Attorney General.

873.

CRIMINAL—UNDER SUSPENDED SENTENCE—CONVICTED OF ANOTHER CRIME BY DIFFERENT COURT—CONCURRENT RUNNING OF SENTENCES DISCUSSED.

SYLLABUS:

1. *When a person is under sentence for a crime, and is convicted and sentenced for another offense to the same penal institution, by a different court, and the second sentence does not state that the term is to begin at the expiration of the former sentence, the sentences run concurrently, in the absence of statutes providing a different rule.*

2. *Where a prisoner was sentenced in Franklin County, and the execution of the sentence suspended, and he was placed on probation, under the provisions of Section* 13706 *of the General Code, as that section existed prior to July* 21, 1925, *the effective date of the so-called Rubenstein Law, and while on probation, the person is convicted in Licking County and sentenced to the Ohio penitentiary, and while he is in the peni-*

tentiary the sentence in Franklin County is ordered into execution, the prisoner is serving both sentences concurrently.

COLUMBUS, OHIO, September 16, 1929.

HON. H. H. GRISWOLD, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which reads as follows:

> "At the April term of the Court of Common Pleas of Franklin County, a prisoner was sentenced to the Ohio Penitentiary for forgery. The entry reads in part as follows:
>
> 'It is therefore ordered by the court that the execution of the sentence heretofore imposed be now and it is hereby suspended, and defendant be placed on probation as provided by law upon the following terms and conditions. * * * '
>
> While on probation under order, the prisoner issued forged checks in Licking County; pleaded guilty to forgery in that county and was sentenced to the Ohio Penitentiary being admitted April 9, 1926. On May 4th, 1926, his probation was terminated and he began serving his sentence as imposed by the Franklin County Court and is still serving that sentence. Will you kindly advise us as to whether this sentence from Franklin County should be served concurrently with the sentence from the court in Licking County or must the sentence from Licking County be served after the termination of the sentence from Franklin County?
>
> The late opinion by Hon. Edward C. Turner, Attorney General, does not seem to be applicable to this case for the reason that that opinion was based upon a situation where both sentences were imposed by the same court. I also call your attention to the opinion of the Attorney General 1913—Vol. II, page 1000."

I assume from the facts as given by you in your letter, that the prisoner was placed on probation under the provisions of Section 13706, General Code, as that section existed prior to July 21, 1925, the effective date of the so-called "Rubenstein Law" (111 Ohio Laws, 423).

At the time this prisoner was placed on probation, Section 13706, General Code, read as follows:

> "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."

The authorities are generally agreed that in the absence of a statute, if it be not stated in either of two or more sentences imposed at the same time, that the imprisonment under one of them shall take effect at the expiration of the other, the periods will run concurrently, and the punishments executed simultaneously. However, the

authorities seem to be divided as to whether or not this rule is applicable where different sentences are imposed by different courts. In 16 C. J. 1307, the rule is stated as follows:

> "Where defendant is found guilty of more than one offense, if the court desires to have imprisonment under one sentence commence on the expiration of another, the sentence must so state, or else the two terms of imprisonment will run concurrently, and defendant will be entitled to his discharge at the expiration of the longest term. This rule does not apply, however, when different sentences are imposed by different courts."

In 8 R. C. L., Section 242, the rule is stated as follows:

> "Accordingly the rule is that when the defendant is already in execution on a former sentence, and the second sentence does not state that the term is to begin at the expiration of the former, the second will run concurrently with the first, in the absence of a statute providing a different rule; but when the different sentences are imposed by different courts it seems that it is not necessary that the sentence should state that the second term is to begin on the expiration of the first."

Both Corpus Juris and Ruling Case Law cite the case of *Hightower* vs. *Hollis,* 121 Ga. 159, as supporting the statement that when different sentences are imposed by different courts it is not necessary that the sentence should state that the second term is to begin at the expiration of the first.

The syllabus of the case of *Hightower* vs. *Hollis,* supra, is as follows:

> "The principle ruled in *Fortson* vs. *Elbert County,* 117 Ga. 149, that if a defendant is found guilty of more than one offense, and the imprisonment under one sentence is to commence on the expiration of the other, the sentence must so state; else the two punishments will be executed concurrently, has no application in a case where the different sentences were imposed by different courts."

In 5 A. L. R. 380, it is stated that the general rule on this subject is as follows:

> "When a person is under sentence for a crime, and is convicted and sentenced for another offense in a different court, the sentences ordinarily are concurrent."

The following cases are cited in support of this proposition:

Ex parte Greene, 86 Calif. 427;
Re Block, 162 N. C. 457;
Ex parte Gafford, 25 Nev. 101;
Fred G. Zerbst, Warden U. S. Penitentiary;
Atlanta vs. John Grant Lyman, 255 Fed. 609.

In the case of *Zerbst* vs. *Lyman,* supra, the syllabus is as follows:

> "Two or more sentences of a convict to the same place of confinement run concurrently, in the absence of specific provision in the judgment to the contrary."

In this case, the facts were as follows:

Lyman, the appellee, was convicted of a crime in the southern district of New York, and committed to the United States Penitentiary at Atlanta, Georgia. This sentence was imposed while he had an appeal pending from a judgment of conviction in the southern district of California. While he was serving the sentence imposed by the southern district of New York, the judgment of the California court was affirmed, and the judgment of the California court also provided that he be sentenced to the United States Penitentiary at Atlanta.

The United States Circuit Court of Appeals, for the Fifth Circuit, in the course of its opinion, says as follows:

> "It could well be assumed that the court intended if it had knowledge of the pendency of another sentence, that the ordinary effect should follow. Ordinarily, two or more sentences run concurrently in the absence of specific provisions in the judgment to the contrary. This rule seems to apply when the conviction is had in different courts. Ex Parte Greene, 86 Cal. 427; Re Block, 162 N. C. 457; Ex Parte Gafford, 25 Nev. 101.
>
> The case cited by appellant of *Hightower* vs. *Hollis,* 121 Ga. 160, if not distinguishable by reason of the nature of the punishment, is apparently in conflict with the weight of authority."

The court further says:

> "The California court either knew that Lyman was in custody of the warden of the Atlanta Penitentiary, or did not know of the fact. If it had knowledge of the fact, the commitment which it caused to be issued would evidence an intention that the sentence should run concurrently. If it had no knowledge of that fact, there could have been no intention other than that its sentence should begin forthwith, as directed by the commitment."

The statutes of Ohio, in effect at the time the sentences were imposed, in the case you present, did not provide the manner in which such sentences should be served, that is, whether they should be served consecutively or concurrently. While there were statutes which provided for consecutive sentences in certain classes of cases these statutes were not applicable to the case before me.

Sections 13601 and 13605, General Code, provide as follows:

> Section 13601. "A convict in the penitentiary who escaped or forfeited his recognizance before receiving sentence for a felony or against whom an indictment for felony is pending, may be removed to the county in which such conviction was had or such indictment was pending, for sentence or trial, upon the warrant of the court of such county. This section shall not extend to the removal of a convict for life, except the sentence to be imposed or the indictment pending against him, is for murder in the first degree."
>
> Sec. 13605. "If such convict is acquitted, he shall be forthwith returned by the sheriff to the penitentiary to serve out the remainder of his term, but, if he is sentenced to imprisonment in the penitentiary, he shall forthwith be returned thereto by the sheriff and the term of such imprisonment shall begin at the expiration of the term for which he was imprisoned at the time of his removal. If he is sentenced to death, such sentence shall be executed as if he were not under sentence or imprisonmnt (imprisonment) in the penitentiary."

From a reading of these sections, quoted above, it is apparent that they only apply

to a case where a convict in the penitentiary had escaped or forfeited his recognizance before receiving sentence for a felony, or against whom an indictment for felony is pending.

Section 2175 of the General Code, provides as follows:

> "A prisoner at large upon parole or conditional release committing a new crime, and resentenced to the penitentiary, shall serve a second sentence, to begin at the termination of his service under the first or former sentence, or the annulment thereof."

Section 2175, General Code, does not apply to a case where a prisoner was placed on probation by a trial court prior to July 21, 1925, the effective date of the so-called Rubenstein Law, 111 O. L. 423.

In Opinion No. 1126, of the Attorney General, found in Opinions of the Attorney General for 1927, Vol. III, page 1975, the first branch of the syllabus is as follows:

> "Sections 2174 and 2175, General Code, do not apply to that class of prisoners in the Ohio Penitentiary, who, prior to July 21, 1925, the effective date of the so-called 'Rubenstein Law' (111 O. L. 423) after being placed upon probation by the trial court, have had their probation terminated as provided by Section 2213, General Code, and imprisoned in the Ohio Penitentiary with a second sentence to follow:"

In Opinions of the Attorney General for 1927, Vol. II, page 1500, the first branch of the syllabus is as follows:

> "Sections 2174 and 2175, General Code, do not apply to that class of prisoners in the Ohio Penitentiary, who, after being placed upon probation by the trial court, have had their probation terminated by such court, as provided by Sections 13706 et seq., General Code, and have been sentenced to the Ohio Penitentiary."

Sections 2174 and 2175, General Code, were repealed by the 88th General Assembly. However, the repealing of these sections has no bearing upon the question presented by you.

The only case in Ohio which has any bearing upon the question presented is the case of *Henderson* vs. *James, Warden,* 52 O. S. 242. The first branch of the syllabus of this case is as follows:

> "An escaped convict who is convicted and sentenced to the penitentiary for another crime, may, at the expiration of the latter sentence, be held to serve out the remainder of his first sentence."

The court, in this case, based its conclusions largely upon the fact that the defendant used a fictitious name. The court, in the course of its opinion in this case, says as follows:

> " * * * As he concealed his true name and identity, and was sentenced by the name of Scott, his term to begin in praesenti, the warden was bound to receive and treat him as designated in the record, and even had the warden recognized him at first sight, as being the escaped convict Henderson, he would have been powerless to treat him as such, so long as the sentence from Cuyahoga county remained in force and unsatisfied. Both the warden

and the prisoner were conclusively bound by the record and sentence in that case.

While for many purposes there is nothing in a mere name, yet for many other purposes a name is very important. The pleas of abatement by reason of a wrong name, and the disclosure of a true name, is a very valuable protection to the prisoner, as in case of a second prosecution for the same crime, he can with more force invoke the record of the first case in support of his plea of former acquittal or conviction. * * *

A person allowing himself to be tried and convicted by the name mentioned in the indictment, is for the purpose of serving out the sentence under such conviction, conclusively held to be the person bearing such name, and he cannot lawfully gain any advantage by concealing his true name and identity. He may take his chance, as did the plaintiff in error, and if he succeeds, well and good for him; but should his identity and true name be discovered before his discharge, he would be liable to be held as an escaped convict to serve out his old sentence."

The case of *Henderson* vs. *James, Warden,* supra, is cited in Ruling Case Law, as an exception to the general rule that when a person is under sentence for crime, and is convicted and sentenced for a crime in another court, the sentences are ordinarily concurrent. It appears, from a reading of the cases supporting the general rule, as stated in Ruling Case Law, that the courts base their conclusions upon the intentions of the court imposing the sentence in each particular case; they argue that it being within the power of the court to order the sentences to be served consecutively, their failure to do so, indicates that they did not intend that the sentences should be so served. As stated before, the authorities are agreed that when the same court imposes a second sentence, when the defendant is already in execution on a former sentence, and the second sentence does not state that the term is to begin at the expiration of the former, the second sentence will run concurrently with the first, in the absence of a statute providing a different rule. The reason for this rule is that since the court has authority to impose cumulative sentences, its failure to clearly and definitely so order, indicates that the court did not intend that the sentences are to be served consecutively. It appears to me that the same reasoning applies to a case where the court imposes a sentence upon a prisoner who is under sentence by another court for another offense, when the court imposing the sentence has knowledge that the defendant is under another sentence, because in such a case the court also has the opportunity to impose a cumulative sentence if it so desires. In cases where the court does not have knowledge that the defendant is already under sentence for another offense, the court, in such a case, intends that the sentence should commence immediately, and further, unless there is express statutory authority, the warden is bound by the certificate of commitment, and he cannot change the time when the sentences are to commence. The question you present is not without difficulty, but courts resolve all doubts in favor of a defendant, and it may be said that a presumption exists against cumulative sentences unless the sentence pronounced clearly and definitely expresses the purpose and intent that the sentences are to be served cumulatively. The weight of authority supports the rule that when a person is under sentence for a crime, and is convicted and sentenced for another offense, in a different court, the sentences ordinarily are concurrent.

For the reasons set forth herein, I am inclined to the view that when a person is under sentence for a crime, and is convicted and sentenced for another offense, to the same penal institution, by a different court, and the second sentence does not state that the term is to begin at the expiration of the former sentence, the sentences run concurrently, in the absence of statutes providing a different rule.

In Ohio, cumulative sentences may be made, and also sentences may be made to commence in the future. *Williams* vs. *State,* 18 O. S. 46; Opinions of the Attorney General for 1913, Vol. 2, page 1000.

In the case you present, it is apparent that the Common Pleas Court of Franklin County knew that the defendant was serving a sentence in the Ohio Penitentiary before it ordered the suspended sentence into execution, for the action of the Common Pleas Court of Franklin County was taken immediately after defendant began serving a sentence imposed by the Common Pleas Court of Licking County. If the Common Pleas Court of Franklin Court desired that its sentence should be served at the expiration of the sentence imposed by the Common Pleas Court of Licking County, it could have so ordered, by providing that the execution of its sentence should commence at the expiration of the sentence of the Common Pleas Court of Licking County. The failure of the Common Pleas Court of Franklin County to make such an order, in my judgment, indicates that it was not the intention of the court that the sentences should be served consecutively.

Since there are no statutes in Ohio pertaining to consecutive sentences, applicable to such a case as you present, and for the reasons set forth herein, I am of the opinion that where a prisoner was sentenced in Franklin County, and the execution of the sentence suspended, and he was placed on probation, and while on probation, the person is convicted in Licking County, and sentenced to the Ohio Penitentiary, and while he is in the penitentiary, the sentence in Franklin County is ordered into execution, the prisoner is serving both sentences concurrently.

Respectfully,
GILBERT BETTMAN,
Attorney General.

874.

APPROVAL, CONTRACTS WITH ROBERT H. EVANS & CO. FOR THE CONSTRUCTION OF COTTAGE NO. 1, COTTAGE NO. 2, POWER HOUSE AND CHIMNEY AND WORKSHOP, RESPECTIVELY, AT THE INSTITUTION FOR FEEBLE-MINDED, APPLE CREEK, OHIO, AT AN EXPENDITURE OF $473,160.00—SURETY BOND EXECUTED BY THE AMERICAN SURETY COMPANY OF NEW YORK.

COLUMBUS, OHIO, September 16, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—There has been submitted for my examination and approval four certain contracts entered into by and between the State of Ohio, through you as the Director of the Department of Public Works, and Robert H. Evans and Company, a corporation organized under the laws of the State of Ohio, the successful bidder for the construction of Cottage No. 1, Cottage No. 2, power house, and chimney and workshop, respectively, at the Institution for Feeble-Minded, Apple Creek, Ohio, which contracts call for an aggregate expenditure of $473,160.00. With said contracts there has likewise been submitted files of the various proceedings had preliminary to entering into said contracts and relating to the same.

Upon an examination of said files submitted, I find from a certificate over the signature of the Supervisor of Plans and Contracts that plans, specifications, bills of material, estimate of cost, and copy of notice to bidders with respect to said proposed