

In view of the foregoing and in specific answer to your questions, it is my opinion that where an accused is charged with murder in the first degree or other crime, failure or refusal of the attorney for such accused to notify the judge of the court in which the defendant is to be tried, in writing, of the defendant's intention to defend on the ground of insanity, as provided in Section 13608, General Code, does not bar the defendant from making such defense at the trial, and that it would be prejudicial error to exclude testimony offered by the defendant, showing or tending to show lack of mental capacity.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2379.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF FOREST E. ROBERTS,  
IN BENTON TOWNSHIP, PIKE COUNTY, OHIO.

COLUMBUS, OHIO, July 23, 1928.

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

DEAR SIR:—There was recently submitted to this department for my opinion a second corrected abstract of title to certain lands situated in Benton Township, Pike County, Ohio, which lands stand of record in the name of Forest E. Roberts, and which are more particularly described in Opinion No. 1941 of this department, directed to you under date of April 6, 1928.

An objection to the title to said lands noted by me in the opinion above referred to, as well as in Opinion 2150, directed to you under date of May 23, 1928, was one arising out of the fact that on the sale of said lands to Charles H. Wiltsie in 1903, on delinquent land sale, no tax deed had thereafter been executed and delivered to either Charles H. Wiltsie or to C. E. Still and Warren Hamilton, to whom the tax title certificate had been transferred by said Charles H. Wiltsie. There is nothing in the second corrected abstract of title submitted to me which in any way corrects the defects in the record title of these lands. However, the abstracter has procured and made a part of the said abstract two affidavits by persons long familiar with the lands here in question, to the effect that said C. E. Still and Warren Hamilton have held actual, continuous, notorious and exclusive possession of said land for more than twenty-one years and that they had acquired prescriptive title to the same. The question whether Forest E. Roberts, as the successor of the interest that C. E. Still and Warren Hamilton formerly had in these lands, now has legal title to the same by prescription arising out of the adverse occupation and user of the same by Mr. Roberts and his predecessors in interest, is one of prime importance; for even though it were held that said Forest E. Roberts, as the present owner and holder of said tax title certificate, if such be the fact, could now demand and receive of the county auditor a tax deed for said lands, he would have no rights under the same which could be asserted against the heirs or other persons in possession claiming under A. J. Miller, for the reason that the statute of limitations would now be a bar to the assertion of any such rights by Mr. Roberts. *Wilcott vs. Holland*, 5 O. C. C. (n. s.) 604.

In one of the affidavits touching this question the categorical statement is made that to the affiants personal knowledge "the said C. E. Still and Warren Hamilton have held actual, continuous, notorious and exclusive possession of said premises for more than twenty-one years and thereby acquired prescriptive title to the same."

In the other affidavit referred to the statement is made "that for about twenty-five years the said C. E. Still and Warren Hamilton have held actual, continuous, notorious and exclusive possession of said premises without let or hindrance from any person or persons claiming the same or any interest therein." In the absence of a more complete statement of the facts touching the question of the adverse possession of the premises here in question, these affidavits are not satisfactory to this department, in view of the fact that the abstract shows that said Warren Hamilton died in Adair County, Missouri, August 2, 1911, and of the fact that said C. E. Still, and the heirs and next of kin of Warren Hamilton, were residing in Adair County, Missouri, at the time of the execution of their deed conveying their interest in these lands to Forest E. Roberts. If said Forest E. Roberts claims to have and hold the legal title to these lands by reason of the exclusive and adverse possession of the same by himself and his predecessors in interest, the facts relating to such claim of adverse possession will have to be more satisfactorily presented than is done by the affidavits above referred to.

The corrected abstract of title submitted is, therefore, disapproved and the same is herewith enclosed for transmission to Mr. Roberts for such action as he may care to take in the matter.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2380.

INSOLVENT DEBTOR—APPOINTMENT OF COMMISSIONER BY PROBATE COURT IS MANDATORY—INSOLVENT DEBTORS ACT DISCUSSED.

SYLLABUS:

1. *The insolvent debtors' act (Sections 11146 et seq., General Code) does not apply to a person convicted of a misdemeanor and sentenced to pay a fine and costs and to stand committed to a workhouse "until such fine and costs shall be paid or the prisoner be otherwise discharged according to law", since Section 11151, General Code, specifically excepts a case in which the judgment requires imprisonment until the fine, penalty and costs are paid.*

2. *In the event a person is convicted of a misdemeanor and the magistrate sentences him to pay a fine and costs without ordering such person to be imprisoned until such fine and costs are paid and the accused be taken into custody, upon execution, as provided by Section 13718, General Code, to be confined in jail until such fine and costs are paid, or secured to be paid, or the defendant is otherwise legally discharged, after serving sixty days, such prisoner would be entitled to the benefit of the insolvent debtors' act and may secure his discharge as provided by Section 11150, General Code, since the judgment of the magistrate does not require his imprisonment until the fine, penalty or costs be paid.*

3. *By the terms of Section 11146, General Code, it is mandatory that each probate court of the several counties of the state appoint a commissioner of insolvents. By the terms of Section 11180, General Code, when the office of commissioner of insolvents is vacant, the duties of commissioner shall be temporarily discharged by a master commissioner.*

COLUMBUS, OHIO, July 23, 1928.

HON. F. E. SLABAUGH, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads: