commerce but of course any system of taxation which resulted in one state taxing the property which really is located in another state and subject to taxation there, would not be sanctioned by federal courts. It is conceivable that the system adopted by Ohio whether the phrase "length of road" be interpreted as being the distance between termini or as meaning the length of all tracks might result in such a situation. I am not therefore attempting to say that either method is impervious to attack, but merely that your commission should apply this section in the sense in which the Legislature has apparently used it.

I am therefore of the opinion that the phrase "length of road", as used in Section 5445, General Code, means the distance between the termini of the road, regardless of the number of tracks, sidetracks and turnouts comprising the road.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2378.

INSANITY—FAILURE TO NOTIFY JUDGE OF PLEA AS REQUIRED BY SECTION 13608, GENERAL CODE—NO BAR TO SUCH DEFENSE AT TRIAL.

SYLLABUS:

1. *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.*

2. *It would be prejudicial error to exclude testimony offered by the defendant, showing or tending to show lack of mental capacity.*

COLUMBUS, OHIO, July 21, 1928.

HON. ISAAC E. STUBBS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, as follows:

> "We have an indictment against a prisoner for murder in the first degree under Section 12400. We have reasons to believe that the defendant's counsel will try to follow the procedure in the Remus case. We are sure that they expect to make the plea of insanity.
>
> Since the amendment of Section 13608, which went into effect July 27, 1927, can a defendant make the defense of insanity and introduce evidence under that defense if his attorney fails and neglects to notify the Judge in writing of his intention to make such defense at or before the arraignment or calling for trial of the defendant so indicted.
>
> If the attorney for the defendant in this case follows the steps provided by Section 13608 we will have no difficulty. If he does not notify the Judge in writing as provided by that section and then insists on the right to introduce evidence of insanity as a defense, would it be error to exclude such testimony? This is our question and it seems to me to be a serious one.
>
> The case of *Fenney* vs. *State*, 16 O. A. R. 517, was decided July 10, 1922, and the crime committed February 27, 1921, and of course was long before the

amendment of Section 13068 and is not a construction of the statute in its present form. We do not have the date of the Remus murder, but it must have been prior to the effective date of the amendment of Section 13608.

There is nothing in this Section as amended stating that the failure to file the notice in writing and certificate shall be a bar to making a defense of insanity, or that such defense is waived by the neglect to notify the Judge in writing."

You asked if a defendant charged with first degree murder may interpose the defense of insanity by introducing evidence at the trial, if his attorney has failed and neglected to notify the judge in writing of his intention to make such defense at or before the arraignment or the calling for trial of the defendant; that is, if the attorney for the accused does not notify the judge in writing, as provided in Section 13608, General Code, that he intends to make such a defense, but at the trial on the indictment insists on introducing evidence of insanity as a defense, would it be error to exclude such testimony?

Section 13608, General Code, as passed by the 87th General Assembly, April 11, 1927 (112 v. 168), reads:

"That whenever upon arraignment or the calling for trial of a defendant indicted for a criminal offense, immunity from pleading to the indictment is claimed on behalf of the defendant on the ground that he is at the time insane, such claim of immunity shall be made in writing signed by defendant's counsel and supported by a certificate of a reputable physician and both filed as part of the record in the case; and whenever upon such arraignment or calling for trial of a defendant so indicted, the defendant shall plead not guilty, if the existence of insanity in the defendant at the time of the commission of the alleged offense is to be claimed as a defense, the defendant, by counsel, shall in writing upon plea pleaded or within such later period of time as the court may fix, notify the judge of his intention to make such defense, which notice to the judge shall be filed as part of the record in the cause; and whenever after a verdict of guilty the attorney for the defendant notifies the trial court in writing, supported by a certificate of a reputable physician that the defendant is not then sane, such written notice and certificate shall be filed as part of the record in the cause, and the following proceedings shall be had: A jury shall be immediately impaneled as in other cases, and the trial as to the defendant's mental condition at the time in question shall be had and three-fourths of said jury can return a verdict. The judge of the trial court shall appoint one or more disinterested qualified physicians, not exceeding three, to testify as experts at such trial, and shall immediately notify counsel of the persons so appointed, giving their names and addresses. In the event the defendant is found to be sane such finding can be introduced in evidence on the trial of the defendant under the indictment, and where no error proceedings have been prosecuted, and the time for prosecution thereof has expired, such findings shall be conclusive evidence of the sanity of the accused at the time in question. The expert witnesses appointed by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense, and the power herein granted to appoint experts shall apply to the trial under the indictment as well as to the trial on the question of the defendant's mental condition. The appointment of expert witnesses and the calling thereof by the court shall not preclude the prosecution or defense from calling other expert witnesses to testify. The witnesses appointed and called by the judge shall be allowed such fees as in the discretion of the judge seem just and reason-

able, having regard to the services performed by the witnesses. The fees so allowed shall be certified by the judge making the appointment and paid by the county where the indictment was found."

The accused being indicted for the crime of "murder in the first degree under Section 12400," General Code, it is manifest he will be put on trial for the crime charged, committed in at least one of three ways, viz.: (1) murder committed by deliberate and premeditated malice, (2) murder committed by means of poison, or (3) murder committed in perpetrating or attempting to perpetrate rape, arson, robbery or burglary.

It is a principle of criminal law that generally speaking every crime primarily consists of two elements: (1) the physical element commonly called the "overt act," and (2) a mental element spoken of as "criminal intent." It is well established that to constitute unlawful homicide the acts of the accused must be proven by the state to have been done by defendant with the intent and purpose to kill, which imports an act of the will to commit the crime charged. It is also well established that, where a defendant enters a plea of not guilty to an indictment, the state is bound affirmatively to prove beyond a reasonable doubt every essential element constituting the offense charged in the indictment. Likewise, the rule is equally well settled that under such a plea the defendant has the right to show he did not commit the crime, and adduce any evidence that would legally justify or excuse it, such as the defendant's insanity at the time of the commission of the crime. See *State* vs. *Hauser*, 101 O. S. 404. If the attorney for defendant at the trial has evidence that the accused at the time of the commission of the unlawful act resulting in homicide did not possess mentality sufficient to form an intent to kill, or if he has evidence that the defendant has since the commission of the homicide become insane, the state, of course, would have no interest in his conviction of the alleged crime, for the state does not seek to punish an irresponsible agent.

In our jurisprudence it is well settled that a human mind diseased and impaired to such an extent as to make its possessor incapable of distinguishing between right and wrong and knowing that the act he is committing is an offense against the laws of God and man so that the accused is not a free agent in forming the purpose to kill, is excuse for crime. See *Blackburn* vs. *State*, 23 O. S. 146.

While the Legislature has the power to alter or create any rule of evidence, yet the power must be exercised within constitutional limitations so that no right or privilege of an accused guaranteed by the constitution is destroyed. A substantial right of a defendant, charged with murder, is to have his guilt or innocence determined by an impartial jury in a competent tribunal according to the law of the land.

Article 1, Section 1 of the Constitution of Ohio, provides:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

Section 5 of the same article provides:

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Article 1, Section 10, provides in part that:

"* * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature

and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial *by an impartial jury* of the county in which the offense is alleged to have been committed; * * *" (Italics the writer's.)

Under the constitutional provisions, supra, the defendant has a right to be tried by a common law jury consisting of twelve judicious and discreet persons having the qualifications of electors of the county where the offense was committed.

In the case of *Work* vs. *State*, 2 O. S. 297, the first and second branches of the syllabus read as follows:

"The essential and distinguishing features of the trial by jury, as known as the common law, and generally, if not universally, adopted in this country, were intended to be preserved, and all its benefits secured to the accused, in all criminal cases, by the constitution of Ohio.

It is beyond the power of the General Assembly to impair the right or materially change its character. The number of jurors can not be diminished, or a verdict authorized, short of a unanimous concurrence of all the jurors."

Commenting on the subject that the constitutional number constitutes twelve, Judge Ranney, at pages 304 and 306, said:

"In the ordinance of July 13, 1787, which first extended civil government over the territory northwest of the river Ohio, it was made an unalterable article of compact, that 'the inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus, and of the trial by jury.' Upon the organization of the state government in 1802, provisions, substantially the same as those in the present Constitution, were inserted in the bill of rights. It thus appears that persons accused of crime have, for every moment of time since civil government existed within the territory of this state, by fundamental laws, been secured in the right of trial by jury. An institution that has so long stood the trying tests of time and experience, that has so long been guarded with scrupulous care, and commanded the admiration of so many of the wise and good, justly demands our jealous scrutiny when innovations are attempted to be made upon it.

It remains to consider what were the distinguishing features of this mode of trial as it existed at common law, and as it has always been known and used in this country. I do not propose to attempt to discover its origin, or to determine at what time, or by whom, it was first introduced into England. Able men, with all the information to be had, have differed upon it. The distinguished commentator upon the laws of England informs us that traces of it are to be found in the laws of all those nations which adopted the feudal system, 'who had all of them a tribunal composed of twelve good men and true;' and that 'the truth seems to be, that this tribunal was universally established among the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other.'

After delineating with admirable clearness the means the law has provided to secure the independence, purity, and impartiality of the jury, and painting in glowing colors the many advantages of this mode of trial, this author proceeds to say: 'Upon these accounts, the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal

cases. But this we must refer to the ensuing book of these commentaries; only observing, for the present, that it is the most transcendent privilege which any subject can enjoy, or wish for, *that he can not be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.* A constitution that, I may venture to affirm, has, under Providence, secured the just liberties of this nation for a long succession of ages.'

Pursuing the same subject in the fourth book of his commentaries, in its application to criminal prosecutions, he characterizes it 'as the bulwark of the liberties of Englishmen; and affirms that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, *must be confirmed by the unanimous suffrage of twelve of his equals and neighbors, and superior to all suspicion,*' before the accused can be subjected to any manner of punishment.

We have extracted somewhat at length from this eminent author, for the purpose of showing beyond controversy the number of the jury at common law, as well as the other essential elements of its constitution and action. The number must be twelve, they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had.

We might cite other writers to the same purpose, but it can not be necessary.

We are of the opinion it was this very tribunal, thus constituted, that those who framed and adopted the Constitution of this state intended to perpetuate and make the safeguard of innocence, by securing its benefits to every person accused of crime in any of its courts.

There is certainly nothing in our history which points to a different conclusion. For half a century before its adoption, similar provisions had been so considered and acted upon. Until the passage of this law, no person had ever been convicted of crime by less than the concurrent assent of twelve of his peers; and no law has ever attempted to authorize it to be done.

If the power exists to diminish the number of the jury, it may be applied to all cases, and it may be reduced to two as well as to six. The same constitutional provision that secures the right in a charge involving the life of the accused secures it also in every other criminal case. It is no answer to say that this would not likely be done. If it had been deemed safe to leave it to the discretion of the General Assembly, no constitutional provision was needed; but, whether needed or not, it has been ordained by a power which both the General Assembly and this court are bound to obey.

A moment's consideration will show that diminishing the number impairs the right, lessens the security of the accused, and increases the danger of conviction.

If corruption or prejudice are to be feared and avoided, they are much more likely to influence the conduct of six men than of twelve; and if the jury are honest, impartial, and pure, it is a self-evident fact that the chances of a conviction upon conflicting evidence, by the unanimous approval of the larger number, is many times less than by the smaller. Nor is a conviction, even in cases to which this act extends, a matter to be lightly considered. The reputation and hopes of a man, and all those who stand connected with him, may be as effectually blasted by an unjust verdict of guilty upon a charge of petit larceny as for many crimes of much higher grade.

But, without pursuing these considerations further, our opinion is that the essential and distinguishing features of the trial by jury, as known at common law, and generally, if not universally, adopted in this country, were

intended to be preserved, and its benefits secured to the accused in all criminal cases, by the constitutional provisions referred to; that it is beyond the power of the General Assembly to impair the right, or materially change its character; that the number of jurors can not be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors. It follows that the act under which this conviction was obtained, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void.

In coming to this conclusion, we have not referred to the decisions in other states, because we were entirely willing to take the responsibility of considering the question upon principles alone. The question has seldom arisen, but whenever it has, the same result has followed, without a single dissenting opinion or *dictum* to the contrary, so far as we are advised."

The law of the land not only guarantees to the accused the right to have his guilt or innocence determined by a jury of twelve persons, but his constitutional and substantive rights also embrace his right to make a defense to the charges contained in the indictment and submit his case to that jury on all the evidence. As held in the case of *People* vs. *Dickerson*, 164 Mich. 148, 129 N. W. 199:

"The constitutional guaranty that no person shall be deprived of life, liberty or property, without due process of law, preserves to the people rights which were enjoyed under the common law, and guarantees such exercise of governmental power as is sanctioned by settled maxims of law, under such safeguards for the protection of individual rights as those maxims prescribe."

In this case Section 3 of "An act to regulate the employment of expert witnesses" was held unconstitutional. This section read as follows:

"In criminal cases for homicide where the issues involve expert knowledge or opinion the court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify at the trial; and the compensation of such person or persons shall be fixed by the court and paid by the county where indictment was found, and the fact that such witness or witnesses have been so appointed shall be made known to the jury. This provision shall not preclude either prosecution or defense from using other expert witnesses at the trial."

In the opinion by Judge Brooke, it was said as follows:

"Section 16 of Article 2 of the Constitution of 1909 (Section 32, Art. 6, Const. of 1850), among other things, provides:

'No person shall * * * be deprived of life, liberty or property without due process of law.'

'Due process of law' has been variously defined. Mr. Cooley in his work on Constitutional Limitations (7th Ed. p. 502), adopts the definition given by Daniel Webster in the Dartmouth College Case, 4 Wheat. (U. S.) 519, as follows:

'By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.'

* * *

From an examination of the authorities, it is apparent that this constitutional guaranty simply preserves to the people rights which had existed for centuries, and which had been enjoyed according to the course of the common law. It means such an exercise of governmental power as is sanctioned by settled maxims of law, under such safeguards for the protection of individual rights as those maxims prescribed. It becomes pertinent, therefore, to ascertain what settled maxims and safeguards—what 'general rules which govern society'—are applicable to a criminal prosecution such as is here under consideration.

* * *

The power of selecting and appointing witnesses who shall, after appointment, acquaint themselves with the matter in controversy, and testify concerning the same, is in no sense a judicial act, and, if exercised by the court in accordance with the mandate of Section 3, would entirely change the character of criminal procedure, and would seriously endanger, if not absolutely destroy, those safeguards which our Constitution has so carefully enacted for the protection of the accused. The most cursory examination of Section 3 will disclose its vice. The court is directed to appoint one or more suitable, disinterested persons to investigate and testify. This appointment is to be made without notice to either the prosecuting attorney or the accused. The reasons which impel the court to make the selection are not of record and can never be known. The names of the selected experts cannot be indorsed upon the indictment by the prosecuting attorney as required by law, for he himself is as ignorant of their identity as is the accused. The right of one accused of crime to know in advance the names of the witnesses who will testify against him and to examine into their character, means of knowledge, etc., in order that he may properly prepare his defense, is a right as ancient as our criminal jurisprudence. The court is commanded to make known to the jury the fact of the appointment, and that his appointees have been found by him to be suitable and disinterested. The section then provides that other experts may be sworn by either prosecution or defense. This is an idle provision, for in the face of the certificate of character, fitness, and ability given to the court experts by the court, experts summoned by either side would receive but scant consideration at the hands of the jury; their testimony would be swept aside in a breath. Juries are most anxious to ascertain the opinion of the court as to the guilt or innocense of the accused, and, ordinarily, more than willing to adopt that opinion as their own. Trial courts, therefore, in doubtful cases, have jealously guarded their own opinions in order that juries might determine controlling facts uninfluenced by the mental attitude of the judge.

The expert witnesses provided for by this section testify under a sanction which gives to their testimony practically the same weight as if it were delivered by the court itself, and if that testimony, being against the accused, were either wilfully false or ignorantly mistaken, its baneful results would be appalling. To give to the testimony of a witness or witnesses this extraordinary certificate of candor, ability, and truthfulness, while the other testimony in the case must be judged by the jury by ordinary standards, is to subvert the very foundations of justice."

The provisions of Section 13608, General Code, in substance provide that if immunity from pleading to the indictment is claimed on behalf of the defendant on the ground that he is at the time insane, counsel for defendant shall make such claim in writing, supported by certificate of a reputable physician and filed as part of the record in the case, upon the arraignment or the calling for trial of the defendant. If at that

time the defendant enters a plea of not guilty to the indictment, the existence of insanity in the defendant at the time of the commission of the alleged crime is to be claimed as a defense, the statute provides that counsel "shall in writing upon plea pleaded or within such later period of time as the court may fix, notify the judge of his intention to make such defense." Provision is further made in the statute immediately to impanel a jury as in other cases and "the trial as to the defendant's mental condition at the time in question shall be had and three-fourths of said jury can return a verdict." It is then provided by the statute that, "in the event the defendant is found to be sane, such finding can be introduced in evidence on the trial of the defendant under the indictment, and where no error proceedings have been prosecuted, and the time for the prosecution thereof has expired, such finding shall be *conclusive evidence* of the sanity of the accused at the time in question.

While Section 39, Article II, Constitution of 1912, authorizes the enactment of laws regulating the use of expert witnesses and testimony in criminal trials, as follows:

> "Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings.",

it seems to me that if Section 13608 were to be interpreted otherwise than herein construed, the section would amount to much more than the mere regulation of the use of expert witnesses in criminal trials.

It is to be observed that the Legislature has specifically provided in Section 13608 that if the insanity of the defendant is to be urged as an excuse for the commission of the homicide, such defense to be available to the accused, according to the strict provisions of the statute, must be asserted preliminary to the trial on the indictment, by counsel for the accused notifying the judge of his intention to make such a defense, the statute further providing that the question of the defendant's sanity shall be determined by the concurrence of three-fourths of the number necessary to find him guilty as charged in the indictment, and that in the event defendant is found to be sane, such finding can be introduced at the trial of the defendant under the indictment and shall be conclusive evidence as to his sanity, unless the attorney for the accused has prosecuted error proceedings within the time for prosecuting error. The procedure necessary for the determination of a defense of insanity, as contained in Section 13608 of the General Code, is in effect a rule of evidence, which, if literally applied, would take from the consideration of the jury, duly impaneled to try the accused on the charges contained in the indictment, the question of his innocence on account of mental incapacity at the time. This jury is, of course, the fact finding arm of the court which must ultimately determine the guilt or innocence of the accused, and it is apparent that the effect of Section 13608, if not construed as herein set forth, would be to substitute the verdict of a jury on the subject of insanity, which manifestly is not the constitutional jury which is ultimately to determine the guilt or innocence of the defendant. Such a construction would result in depriving the accused of his life and liberty without due process of law.

The legality of provisions of a statute involving a somewhat similar question was considered by the Supreme Court of Ohio in the case of *Hammond* vs. *The State of Ohio*, 78 O. S. 15, where the Valentine Trust Law was under consideration. The court held certain provisions of Section 6399, General Code, by which it was enacted that "the character of the trust or combination alleged may be established by proof of its general reputation as such" to be unconstitutional. Judge Crew, in writing the opinion in the case, with reference to the provision of the statute there under consideration, said at page 21:

> "Thus the statute in terms makes proof of the general reputation of the trust or combination not only competent evidence against the accused, but

sufficient and conclusive evidence of the unlawful and criminal character of the combination to which he may belong. This in effect is to deprive the accused of the protection of the cardinal presumption that every person is to be presumed innocent until he is legally proven guilty, a presumption which attends the accused throughout his trial, and has reference and relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt. If the General Assembly, in order to make conviction easier under this act, can rightfully provide that one of the essential and constituent elements of the crime charged, viz., the unlawful character of the trust or combination, may be shown and made certain, by proof of common rumor, or general reputation, and the guilt of the accused be thus established, it is difficult to see why it may not, with equal right, provide that murder, arson, or any other crime, may be thus established by proof that the person accused thereof is generally reputed to be the person who committed the same; a proposition at once so obnoxious and repugnant to the plainest principles of reason and justice, that none would yield assent to it."

The general rule that the Legislature has power to provide that proof of one fact shall constitute prima facie evidence of the main fact is recognized, if the statute affords reasonable opportunity to the accused to submit to the jury all the facts on the issue.

In the case of *Mobile, etc.*, vs. *Turnipseed*, 219 U. S. 35, Mr. Justice Lurton, at page 43, said:

"If a legislative provision, not unreasonable in itself, prescribing a rule of evidence in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

On the other hand, while a Legislative body may, within constitutional limitations, provide that certain facts when established, shall be prima facie evidence of a fact in question, yet, our courts, national and state, quite uniformly hold that any act which makes such evidence conclusive of an essential fact in question, is unconstitutional, being in contravention of the due process of the constitution.

See *Hem* vs. *U. S.*, 268 U. S. 178-183; *Darbyshire* vs. *State*, 196 Ind. 608, 149 N. E. 166; *State* vs. *Champoux*, 33 Wash. 339, 74 Pac. 557; *State* vs. *Williams*, 46 Nev. 263, 210 Pac. 995.

In the case of *Board of Commissioners* vs. *Merchant*, 103 N. Y. 143, a pertinent observation was made on this general subject, as follows:

"The general power of the Legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime over which the party charged had no control and with which he had no connection, or which made that prima facie evidence of crime which had no relation to a criminal act and no tendency whatever by itself to prove a criminal act. But so long as the Legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds."

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."