I deem it unnecessary that express authority be found in the Constitution of Ohio for the regulation of banks. However, this authority is expressly conferred by Section 3 of Article XIII of the Constitution, the pertinent part of which is as follows:

> "* * * No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank,' 'banker' or 'banking,' or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

You will note that this specifically authorizes the regulation of banks in such manner as may be provided by law.

I am therefore of the opinion that the proposed law, with the amendment suggested, would be a constitutional enactment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

314.

JOHN BRYAN NATURAL HISTORY RESERVE—MAY BE USED AS A FISH HATCHERY.

SYLLABUS:

The construction, maintenance and use of a fish hatchery upon the lands devised by the late John Bryan to the state of Ohio, is not such a use of said lands as is inconsistent with or constitutes a breach of the conditions, upon which the devise of such lands was made, to the effect that the "said farm be cultivated by the state, as a forestry, botanic and wild animal reserve Park and experiment station," to be called "The John Bryan Natural History Reserve."

COLUMBUS, OHIO, April 13, 1927.

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

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

> "The State Department of Agriculture has requested permission from the Board of Control of the Ohio Agricultural Experiment Station to construct a fish hatchery on the 'John Bryan Natural History Reserve.' This property came to the State of Ohio through the will of John Bryan, deceased, and was accepted by the legislature of Ohio. Certain conditions were attached in the will in the following words:
>
> 'My "Riverside Farm," consisting of 500 acres, more or less, situated southeast from and near Yellow Springs, Ohio, I give and bequeath to the state of Ohio, conditioned that said farm be cultivated by the state as a forestry, botanic and wild animal reserve park and experiment station, and call it after my full name, "The John Bryan Natural History Reserve;" and conditioned further, that my body and my wife's body shall never be

disturbed nor the tombs molested if I or she should be buried on said reserve, nor allow any religious public worship to be practiced or promulgated on said reserve; nor shall the state exclude from said reserve well-behaved people of any race or color in the world.

I further condition that my wife and her attendants, if she so desires, shall be allowed by the state to reside on said reserve during her life, in a house she may choose and retain or build and maintain thereon, and have such reasonable use of barn room and of horses, automobiles, carriages and other animals of her own as she may need; but she shall interfere not at all, or as little as possible, with the use of said reserve by the state of Ohio as aforesaid.

If the state of Ohio does not accept said reserve and use it according to the conditions hereinbefore declared by me, then under similar conditions, I hereby will and bequeath said reserve to Greene county, Ohio. If not accepted by Greene county, Ohio, then said reserve shall be sold and considered a part of my general estate and pass with the residue of it as herein after provided.'

The Board of Control respectfully requests the opinion of the Attorney General as to whether or not the construction of a fish hatchery on the Bryan Farm will be in violation of the terms as laid down in the will of Mr. Bryan "

The property described in the excerpts from the will of John Bryan quoted in your letter was accepted by the legislature of Ohio by "An Act—Accepting the gift of John Bryan, (late of Greene and Hamilton counties, Ohio, deceased) passed, notwithstanding the objections of the Governor, on April 28, 1923. (110 vs. 132.)

It is obvious that the only part of these sections of the will set forth in your letter with which your inquiry is concerned, is that reading as follows:

"My 'Riverside Farm,' consisting of 500 acres, more or less, situated southeast from and near Yellow Springs, Ohio, I give and bequeath to the state of Ohio, conditioned that said farm be cultivated by the state as a forestry, botanic and wild animal reserve park and experiment station, and call it after my full name, 'The John Bryan Natural History Reserve;' and conditioned further, that my body and my wife's body shall never be disturbed nor the tombs molested if I or she should be buried on said reserve; * * *."

I assume that in the construction and operation of the proposed fish hatchery the body of John Bryan will not be disturbed, nor his tomb molested, if it be the fact that he is buried on the reserve. So that your question narrows as to whether or not the construction of the fish hatchery and the maintenance and use thereof would be in conflict with and a breach of the condition of said will, to the effect that the farm devised should be "cultivated by the state as a forestry, botanic and wild animal reserve park and experiment station," named in honor of the donor, "The John Bryan Natural History Reserve." In other words, is the construction, maintenance and operation of a hatchery for the propagation of fish a legitimate use of the property under consideration in its cultivation by the state as a wild animal reserve park and experiment station; or would the erection and use of such a hatchery constitute a breach of the condition upon which the devise in question was made?

The purpose of construing and interpreting a will is to ascertain the intention of the testator as expressed therein and in construing a will a much greater latitude is allowed than in the construction of deeds, or other written instruments, and rules which apply only to the construction of statutes cannot be applied. See 40 Cyc. 1382.

The cardinal rule in the construction and interpretation of wills is to give effect

to the testator's intention. *Tax Commission vs. Oswald*, 109 O. S. 36; *Knepper vs. Knepper*, 103 O. S. 529; *Bank and Trust Co. vs. Alter*, 103 O. S. 188. And in order to effect the testator's intention a will should not be construed technically, but sensibly and liberally. *Brasher vs. Marsh*, 15 O. S. 103; *Thompson vs. Thompson*, 4 O. S. 333.

The rule is stated in 40 Cyc. 1386, in the following language:

> "The cardinal rule in the construction and interpretation of wills or codicils is that the intention of the testator must be ascertained if possible, and, if it is not in contravention of some established rule of law or public policy, must be given effect, and by this is meant the actual, personal, individual intention, and not a mere presumptive intention inferred from the use of a set phrase or a familiar form of words. For this purpose the will should be construed liberally, but it cannot be construed so as to effectuate an intention which is contrary to some rule of law or public policy."

Another well settled rule of construction is that, generally speaking, a testator is presumed to use the words with which he expressed himself in his will in their common or ordinary sense.

40 Cyc. 1396, states the rule as follows:

> "A testator is presumed to use the words in which he expresses himself in his will in their primary or ordinary sense, and in construing the will the words employed are to be taken in that sense,unless it is manifest from the context of the whole will, or from the subject-matter, that the testator intended to use them in a different sense, or unless a reading of the words in their primary or ordinary sense will lead to some absurdity, repugnancy, or inconsistency with the declared intention of the testator as ascertained from the whole will, in which case the natural and ordinary meaning of the words may be modified, extended, or abridged. Where the words when given their natural, ordinary, or popular meaning are plain and unambiguous, and show a clear intention on the part of the testator, they must be given that meaning notwithstanding their effect, and such meaning cannot be departed from for the purpose of giving effect to what it may be supposed was the intention of the testator, or merely because they lead to consequences which are capricious or even harsh or unreasonable."

In *Blackwell vs. Blackwell*, 15 N. J. L. 386, it was held:

> "Whether a word is to be used in its technical or more general sense is to be determined by considering which will better effectuate the testator's intention."

It is perfectly apparent from the terms employed and language used in the parts of the will quoted in your inquiry that the testator intended that his farm should be used by the state as a natural history reserve park and experiment station for the purpose of the preservation and study of plant and wild animal life generally.

In both the legal and scientific definition, and in the lay definition as well, the term "wild animal" includes fish.

In 3 C. J. 15, it is said:

> "The term 'animal' is less extensive as used in law than in natural science. * * * it is now generally held to include all irrational beings, all living creatures not human, endowed with the power of voluntary motion

or self-motion. * * * The word has been held to include bees, deer, foxes, otter, dogs, horses, domestic fowls generally, doves, chickens, turkeys, ducks, geese, rooks, *fish* and turtles."

As authority for this statement the case of *State vs. Shaw*, et al., 67 O. S. 157, is cited, wherein in determining whether or not one could be guilty of larceny of fish taken from a net the court said:

"To acquire a property right in animals *ferae naturae*, the pursuer must bring them into his power and control, and so maintain his control as to show that he does not intend to abandon them again to the world at large."

The term "fish" is defined by 26 C. J. 594, as follows:

"Fish", in its broadest sense, is a designation of almost any exclusively aquatic animal, vertebrate, or invertebrate. The term "fish" has been held to be included in the term "animal," and generically speaking, on account of their migratory character and want of fixed habitat, fish are classified as animals *ferae naturae*. * * *"

Bouvier defines fish as follows:

"An animal which inhabits the water, breathes by means of gills, swims by the aid of fins and is oviparous.

Fishes in rivers and in the sea are considered as animals *ferae naturae*. * * *"

Funk and Wagnalls Standard Dictionary of the English Language defines 'fish" as:

"A vertebrate animal with gills retained through life, breathing and passing its life in the water, and with the limbs, when present, modified as fins.

An animal habitually living in the water * * *."

The scientific definition of the word is the same:

"Some naturalists * * * have divided the whole organic world into three kingdoms, the *Human*, the *Animal* and the *Vegetable*." *Darwin's Descent of Man*. Vol. 1, page 179.

It is clear from the above definitions that fish are included in the term "wild animal". And it must be said, therefore, that when the testator used the term "Wild Animal Reserve Park and Experiment Station" he contemplated the propagation and conservation of fish, as well as non-aquatic animals.

This fact is supported by the next phrase in the will in which the testator directs that the reserve be called "The John Bryan Natural History Reserve." In its widest sense the term 'natural history" is generally held to embrace all the natural and physical sciences, although as sometimes used it refers to a study of animal life alone. In any event from the entire context of the paragraph of the will under consideration it is clear that it was intended by the testator that the natural history reserve provided for should be maintained by the state for the preservation and study of plant and animal life in the widest sense, including all species of each.

Specifically answering your question I am of the opinion that for the reasons stated the construction, maintenance and use of a fish hatchery upon the lands devised by the late John Bryan to the state of Ohio is not such a use of said lands as is inconsistent with or constitutes a breach of the conditions, upon which the devise

of such lands was made, to the effect that said lands "be cultivated by the state as a Forestry, Botanic and Wild Animal Reserve Park and Experiment Station" to be called "The John Bryan Natural History Reserve."

Respectfully,
EDWARD C. TURNER,
Attorney General.

315.

MOTION PICTURES—HOUSE BILL No. 367 PROBABLY UNCONSTITUTIONAL.

SYLLABUS:

The motion picture business is not so affected with the public interest as to justify legislation as proposed in House Bill No. 367 regulating the making of contracts between producers or distributors and exhibitors.

COLUMBUS, OHIO, April 13, 1927.

HON. HARRY BALL, *Chairman, Judiciary Committee, Ohio House of Representatives, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication in which you request my opinion as to the constitutionality of House Bill No. 367.

This bill is entitled:

> "A bill to prevent unfair competition in the sale, leasing and distribution of motion picture films."

and reads as follows:

> "Be it enacted by the General Assembly of the State of Ohio:
>
> Section 1. That it shall hereafter be unlawful for any person, firm or corporation or their or its agents, engaged in producing, selling, leasing or renting motion picture films, to require, request or compel by threats of refusing to sell, rent or lease such motion picture films to any owner or lessee of a motion picture theater within this state, or to compel such owner or lessee by such threats to buy, take or lease more motion picture films than is desired by such motion picture owner or lessee.
>
> Section 2. That it shall be unlawful for any person, firm or corporation engaged in the production, lease or sale of motion pictures to require, coerce or compel any person, firm or corporation owning or operating any motion picture theater within this state, to submit any matter or question which may be in dispute or in controversy between such motion picture producer and such motion picture theater owner or operator to submit to arbitration, any questions which in any way abridges the right of such motion picture owner or operator to the right of a trial by jury or a court or which in any way deprives such motion picture theater owner or operator of his or her right to have such question or matter in controversy tried and adjudicated by any court of competent jurisdiction.
>
> Section 3. Nothing contained in this act shall be construed to apply to any contract, agreement or understanding which shall have been entered into prior to the taking effect of this act.