inheritance tax proceeding in his court in which tax is assessed and collected and a fee of three dollars in each such proceeding in which no tax is found, which fees shall be allowed and paid to such judges as the other costs in such proceedings are paid but are to be retained by them personally as compensation for the performance by them of the additional duties imposed on them by this chapter. Provided always, however, that the amount paid to any probate judge under this section shall in no case exceed the sum of three thousand dollars in any one year."

This section speaks clearly and in so many words says the fees "are to be retained by them personally as compensation for the performance by them of the additional duties imposed upon them by this chapter."

Nowhere in section 1602 as amended is such language found. Therefore the fees are collected for the sole use of the treasury of the county as provided in section 2977 G. C.

Attention is called to *State ex rel. Enos, Pros. Atty.* vs. *Stone, et al.*, 92 O. S. 63, on page 65, wherein the court after quoting from section 2977 G. C., says:

"This section, as well as the sections following, clearly indicates the settled purpose and fixed policy of the state to pay county officials a fixed lump sum, no matter what additional duties may be imposed on them from time to time, unless there be a clear purpose to add further compensation for such further duties."

You are therefore advised, in answer to your second question, that the probate judge is not entitled to any compensation under the provisions of section 1602 as amended in 109 O. L., 42.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2500.

TAXES AND TAXATION—WHERE RESIDENT OF OHIO HAS ESTABLISHED REVOCABLE TRUST—RESIDENT OF NEW YORK SOLE TRUSTEE—RESIDENT OF OHIO SOLE BENEFICIARY—CORPUS OF TRUST, STOCKS AND BONDS—NOT SUBJECT TO BE LISTED FOR TAXATION IN OHIO.

Where a resident of the state of Ohio has established a revocable trust, of which a resident of New York is the sole trustee and the Ohio resident the sole beneficiary, the corpus of the trust, consisting of stocks and bonds, is not subject to be listed for taxation in Ohio.

COLUMBUS, OHIO, October 24, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission requests the opinion of this department as follows:

"Will you please advise the commission whether a resident of the state of Ohio, who has established a revocable trust of which a resident of New York is the sole trustee, and the Ohio resident the sole

beneficiary, must report for personal property taxation in Ohio, stocks and bonds constituting the corpus of the trust?"

At the outset a few general principles ought to be stated. It is true that the constitution directs the general assembly to pass laws taxing all property, intangible as well as tangible (Article XII, Section 2). It is true, moreover, that section 5328 of the General Code defines the property subject to taxation in Ohio as follows:

> "All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. * * *"

So that by this provision the intangible property belonging to persons residing in this state is declared to be subject to taxation in Ohio. However, the same section goes on to provide that:

> "Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

It must follow, therefore, that if "this title" makes no provision for entering on the list of taxable property any valuable thing that might be considered to be the intangible property of a person residing in Ohio, there is no obligation to list it and hence it escapes taxation.

> See McNeill vs. Hagerty, 51 O. S. 255;
> Chisholm vs. Shields, 67 O. S. 374 (Dictum).

In short, the constitution is not perfectly self-executing, and while it prohibits express exemptions other than therein authorized, it obviously does not effectively prevent casual omissions or discrepancies in the statutes providing machinery for carrying the mandate of the constitution into effect.

The result of this is that while in the interpretation of the statutes relative to the listing of property for taxation, the presumption is always against any construction that is at variance with the principles enjoined upon the legislature by Article XII, Section 2 of the constitution and with the legislature's own declaration of policy as found in section 5328 of the General Code; yet we cannot supply machinery from these mere declarations of policy, and in the absence of express provision of statute from which at least reasonable implications can be drawn to the effect that machinery is provided for the listing of a given kind of property, we must reach the conclusion that such property is not required to be listed for taxation.

Property held in trust or controlled by fiduciaries, such as guardians, executors and the like, presents a problem in tax legislation. That problem is the avoidance of double taxation in the real sense. Obviously, such property should not be listed by and taxed to both the fiduciary and the beneficiary. A choice is indicated, and Ohio, in common with most of the other states at least and consistently with the common law, has imposed the obligation in question upon the fiduciary in all instances, thus clearly relieving the beneficiary therefrom. The principle involved in such legislation is that liability to respond to the state in taxes is an incident of the legal ownership, which in the case of a trust is vested in the trustee. In short, in the taxation

of property legal interests are taxed, and beneficial or equitable estates in the same property are ignored as between the state and the taxpayer, being left to adjustment as between the trustee and the beneficiaries of the corpus of the trust. This policy is found in the Ohio statutes at section 5372-1 of the General Code, which is as follows:

> "Personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise in the possession or control of a person as parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney, or otherwise, on the day preceding the second Monday of April, in any year on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by the person having the possession or control thereof and be entered upon the tax lists and duplicate in the name of such parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney or other person, adding to such name words briefly indicating the capacity in which such person has possession of or otherwise controls said property, and the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs; but the failure to indicate the capacity of the person in whose name such property is listed or the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs shall not affect the validity of any assessment thereof."

This section is followed by section 5372-3, which provides as follows:

> "A person required to list property on behalf of others shall list it separately from his own, specifying, in each case, the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs, and the capacity in which he holds it, * * *."

and is preceded by section 5371, which is very material in connection with the commission's question and which provides in part as follows:

> "A person required to list property, on behalf of others, shall list it in the township, city, or village in which he would be required to list it if such property were his own. He shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs. * * *"

Another section to be considered is section 5370, which is very similar to section 5372-1 and which provides as follows:

> "Each person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation, and all moneys deposited subject to his order, check, or draft; all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; and all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for it, if between the parties, it is

considered as security merely. The property of a ward shall be listed by his guardian, of a minor child, idiot, or lunatic having no guardian, by his father, if living, if not, by his mother, if living, and if neither father nor mother is living, by the person having such property in charge; of a person for whose benefit property is held in trust, by the trustees; of an estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers; of a company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by a society for savings or bank having no capital stock, by the president or principal accounting officer."

No exception is made in these sections to fit cases where the fiduciary resides in one state and the beneficiary in another; so that if the fiduciary resides in Ohio and the beneficiary outside of Ohio, the intangible property legally owned or controlled by the fiduciary for the benefit of the beneficiary is, nevertheless, taxable in this state. See Opinions of Attorney-General, Volume I, 1912, p. 596; Volume II, 1914, p. 1277. Here Ohio claims taxes on account of intangibles beneficially owned at least by a non-resident; but the converse of the proposition is also true, and if the beneficiary resides in Ohio and the fiduciary outside of the state the property is not required to be listed for taxation, though the interest of the beneficiary therein may be regarded as a substantial property right.

The second opinion above referred to discusses a number of cases from this and other states, notably

Tafel vs. Lewis, 75 O. S., 182;
Hawk vs. Bonn, 6 C. C., 452;
Goodsite vs. Lane, 139 Fed., 593;
Mackay vs. San Francisco, 128 Cal., 678;
Gallup vs. Schmidt, 154 Ind., 196;
Lewis vs. Chester County, 60 Pa. St., 235;
Grant vs. Jones, 39 O. S., 506.

The question under consideration was the foundation of the state's jurisdiction to tax a fiduciary in respect of intangible property held by him. The influence of various considerations was discussed, such as the physical presence of the evidences of indebtedness or muniments of title in the taxing state, the jurisdiction of the court appointing or having authority over the person who acts as fiduciary, the capacity in which he acts, i. e., whether as administrator, executor, trustee, receiver, etc., the residence of the beneficiary, the actual investment of the trust estate, or any part of it, in the taxing state, and whether or not the fiduciary acts in his official capacity in the taxing state. All of these points were regarded as having some bearing under possible combinations of circumstances. In the case now submitted, however, it is assumed that but for the one point, which will be hereinafter discussed, none of these considerations so operates as to give Ohio jurisdiction to tax. That is, it is assumed that the securities constituting the trust estate are physically present in New York; that the trustee has complete legal title in them, with authority to convey such title to other persons and to reinvest the proceeds of the sale of any such securities; that control over his acts as trustee would have to be exerted by a New York court exercising jurisdiction over his person; and that he is not appointed by or answerable to

any Ohio court. As a general proposition, therefore, it may be laid down that the trust estate is taxable in New York and, consequently, the beneficial interest of the Ohio beneficiary therein is not taxable in this state.

These observations, then, answer the commission's question so far as it is not complicated by the fact that the trust is revocable and the Ohio resident is the sole beneficiary at least for the time being. Some question arises as to the validity of such a trust if created prior to the recent amendment of section 8617 of the General Code. Such questions have been considered in a recent opinion to the commission in connection with the determination of inheritance tax on successions arising under such a trust. It was therein pointed out that while it is conceivable that an arrangement of the general sort described might be invalid, yet the mere fact that the life use is reserved to the creator, and the mere fact that the creator also reserves the power to revoke do not necessarily make the attempted trust ineffectual or illegal.

But the power of revocation, even if reposed in the Ohio beneficiary, is not the kind of property that the Ohio statutes require to be listed for taxation. As previously pointed out, these statutes exhaust their force upon the owner of the legal title, who in this case is the trustee; and though the legal title of such trustee may be qualified and defeasible because of the existence of a reserved or created power of revocation, such quality in the legal title does not affect the application of the Ohio law to it or to its owner, nor convert the interest of the possessor of the power into the kind of legal interest which the statutes of Ohio tax. Section 8617 of the General Code as amended may be considered, though the facts stated by the commission do not show that it applies. It now provides as follows:

> "All deeds of gifts and conveyance of real or personal property made in trust for the exclusive use of the person or persons making the same shall be void and of no effect, but the creator of a trust may reserve to himself any use of power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend or revoke such trust, and such trust shall be valid as to all persons, except that any beneficial interest reserved to such creator shall be subject to be reached by the creditors of such creator, and except that where the creator of such trust reserves to himself for his own benefit a power of revocation, a court of equity, at the suit of any creditor or creditors of the creator, may compel the exercise of such power of revocation so reserved, to the same extent and under the same conditions that such creator could have exercised the same." (109 O. L., 215.)

The fact that the creditors can under this statute reach any beneficial interest reserved to the creator does not make that interest taxable, because the creditors of a beneficiary can, in the absence of lawful restraints on alienation, reach his interest in satisfaction of their claims against him by appropriate proceedings in equity. The fact that a creditor may in a court of equity compel the creator of a trust to exercise the power of revocation which he reserves is likewise immaterial, for though this may be a new right created by statute (as to which no opinion is expressed), it is, nevertheless, but an equitable right and one which the statute relating to taxation does not recognize.

For all the foregoing reasons, then, it is the opinion of this department that on the facts stated by the commission the stocks and bonds constituting the corpus of the trust are not subject to be listed for taxation in Ohio.

Respectfully,
JOHN G. PRICE,
Attorney-General.