The statute (section 5370 G. C.) requires the "property of * * * an estate of a deceased person * * * to be listed by his executor or administrator." The authorities seem uniform to the effect that under statutes like this, property actually in the hands of an executor or administrator must be listed by him, and that the duty of the distributees and legatees to list does not arise until distribution is actually made to them. In other words, the fact that their respective shares are ascertained by the final account does not give rise to an obligation on their part to list the property which still remains in the hands of the executor. Such property is personal property; the legal title to it is vested in the executor, and is transferred only upon delivery through distribution. When the respective shares are certain, it is arguable that the executor is a mere trustee, but this does not help the case for the executor, as the same section above referred to requires the property "of a person for whose benefit property is held in trust" to be listed "by the trustees." It is also arguable, though certainly not on grounds consistent with the last suggestion, that the relation between the executor and the distributees is that of debtor and creditor. This, however, does not help the executor, though it might impose a duty upon the distributees or legatees; for if one has money in the bank and owes a sum equal to its amount, yet he must list the money in the bank without deduction on account of the debts, which can only be deducted from credits.

This department is therefore unable to find any basis on which to justify the position that after the filing of a final account, but before distribution, money in the possession of executors or administrators of the estates of deceased persons should be listed by the legatees and distributees, instead of by the executor or administrator. There seems to be no express adjudication upon the exact point in Ohio, though *Greeg* vs. *Hammond,* 4 N. P. (N. S.) 214, is somewhat analogous and tends to sustain the position herein taken. The rule, however, is generally stated in the form in which it has been expressed in this opinion. See 37 Cyc., 794.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2059.

POOR RELIEF—LEVY OF SIX-TENTHS OF MILL IN SECTION 2530 G. C. IS NOT EXEMPT FROM LIMITATIONS OF TEN AND FIFTEEN MILLS PROVIDED BY SECTION 5649-2 ET SEQ. G. C.

The levy of six-tenths of a mill mentioned in section 2530 *G. C. is not exempt from the limitations of ten and fifteen mills provided by sections* 5649-2 *et seq. G. C.*

COLUMBUS, OHIO, May 10, 1921.

HON. MARY KATHERINE DAVEY, *Prosecuting Attorney, Logan, Ohio.*

DEAR MADAM:—You have recently written to this department as follows:

> "I should like an opinion from your office on the following matter:
> Does section 2530 of the General Code authorize the county commissioners to levy a tax of not exceeding six-tenths of a mill outside of the ten mill limitation or the fifteen mill limitation when the funds applicable for the support of the poor are inadequate?

The commissioners of Hocking county have been compelled to borrow money to meet the necessities of the poor fund and with the amount borrowed they will scarcely have sufficient to run them until August first, without any added burdens upon the fund. The additional burden upon the poor fund is the necessity for maintenance of tubercular patients who are infirmary or county charges in a tuberculosis hospital, for which the minimum charge is fifteen dollars a week per patient. Under section 3140 of the General Code the maintenance of such person in such hospital shall be a legal charge against the county in which such patient has a legal residence.

The position taken by the commissioners is that they are perfectly willing to pay the expense of such maintenance if there is any method by which the funds to so maintain such patients can be raised. As it is, the maximum amount of taxes have been levied and still the amount is not sufficient for the charge against it. Our only hope is that section 2530 authorizes the tax outside of all limitations, but since the note following the section refers to section 5649-2, we are dubious."

The basic county tax for the support of the poor is mentioned in section 5627 G. C., which reads as follows:

"The county commissioners, at their March or June session, annually, shall determine the amount to be raised for ordinary county purposes, public buildings, the support of the poor, interest and principal of the public debt, and for road and bridge purposes. They shall specifically set forth in the record of their proceedings the amount to be raised for each of such purposes."

Section 5630 G. C. reads as follows:

"The commissioners of any county, at their June session, annually, may levy not to exceed three mills on each dollar valuation of taxable property within the county, for county purposes other than for roads, bridges, county buildings, sites therefor, and the purchase of lands for infirmary purposes. For the purpose of building county buildings, purchasing sites therefor, and lands for infirmary purposes, they may levy not to exceed two mills on such valuation."

Section 2529 G. C. reads:

"On the first Monday of March in each year, the board of county commissioners shall certify to the county auditor the amount of money they will need for the support of the infirmary for the ensuing year, including all needful repairs thereof. The county auditor shall place the amount so certified on the tax duplicate of the county, and the county commissioners shall have full control of the poor fund and shall be held responsible therefor."

In addition to the statutes quoted, passing reference may be made to sections 6094 and 6094-1, which are to the effect that certain liquor license revenues shall pass to the poor fund.

In considering your inquiry as applied to section 2530 G. C., it is well to note that in a practical sense that section has been in effect since 1898. In its earlier form as section 964a R. S., the levy was authorized to be made by the board of infirmary directors (see Act, 93 O. L. 261, 264). When the board of infirmary directors was

abolished by Act 102 O. L. 433, the power to make the levy mentioned in section 2530 G. C. was transferred from the board of infirmary directors to the county commissioners. Since the levy was originally authorized to be made by a board other than the county commissioners, it would seem that the original purpose of that section was to provide for a sort of emergency levy over and above the levy for the care of the poor which was authorized by sections 5627 and 5630 to be included within the county levy of three mills described in section 5630.

However, the so-called Smith law providing for limitations upon taxes was enacted in 1911, and that law specifically provided, among other things, that the aggregate of all taxes for county purposes "shall not exceed in any one year three mills." It would thus seem that whatever may have been the original purpose of section 2530 G. C., the county commissioners upon the passage of the Smith law were stripped of authority to exceed the three mill limitation for the purposes of making the levy named in section 2530 G. C. (See Sec. 5649-3a, G. C.)

What has just been said may not be strictly in point as to your inquiry, since your question goes to the point of whether the levy mentioned in section 2530 G. C. may exceed the general limitations of ten mills and fifteen mills but, of course, it is plain that if the levy mentioned in section 2530 cannot be placed outside the three mill limitation, so much the less is there any reason for supposing that it may be placed outside the ten and fifteen mill limitation.

Coming directly to your question, it is to be observed that section 2530 G. C. does not in itself contain any provision exempting the levy therein mentioned from the ten and fifteen mill limitation; nor has any provision for such exemption been found elsewhere in the statutes. The exemptions mentioned in section 5649-4 G. C. do not refer directly or indirectly to the levy mentioned in section 2530 G. C.

Hence, the conclusion is inevitable that the levy mentioned in section 2530 G. C. must be made within the ten or fifteen mill limitation.

You make mention of the requirements of section 3140 G. C. which are to the effect that the state board of health may require the removal of tubercular patients from county infirmaries (now known as county homes) to be cared for at a hospital or institution devoted to the treatment of tuberculosis, in which event the cost of removal and cost of maintenance becomes a charge against the county. However, there is nothing in said section 3140 or related sections to indicate provision for a tax outside of tax limitations to meet the situation described in said section 3140.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2060.

COURT HOUSE—BUILDING COMMISSION—NOT AUTHORIZED TO CONTROL DEPOSIT OF FUND FOR ERECTION OF BUILDING—WHEN COUNTY AUDITOR MAY ISSUE VOUCHERS—APPROVAL BY FIVE MEMBERS OF BUILDING COMMISSION—PROSECUTING ATTORNEY LEGAL ADVISER OF BUILDING COMMISSION.

Sections 2333 to 2343 G. C. do not vest the building commission therein named with authority to control the deposit and investment of the fund raised by a sale of bonds for the erection of the building as to which such commission is serving. The deposit of such money is governed by sections 2715 G. C. et seq. (county depositary law).