tion that when such an omission is made, though the constitution is violated in an academic sense, the result can not be reached that the omitted property is therefore subject to taxation.

Accordingly it is the opinion of this department that the making of a loan on a policy of life insurance to the policy holder does not give rise to any obligation on the part of the policy holder to list any interest he may have in the policy for taxation.

Respectfully,
JOHN G. PRICE,
*Attorney-General.*

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2374.

INHERITANCE TAX LAW—CONSIDERATION OF A CERTAIN TRUST AGREEMENT ENTERED INTO IN 1916 WHEREBY GRANTOR CONVEYED TO TRUST COMPANY CERTAIN PROPERTY WITH POWER TO HOLD AND MANAGE SAME, PAY INCOME TO GRANTOR FOR LIFE AND AT DEATH OF GRANTOR TO DIVIDE SAME IN CERTAIN MANNER.

*On the 9th day of February, 1916, S entered into an agreement with the C Trust Company whereby he conveyed to such company certain property with power to hold and manage the same, pay the income therefrom to the grantor for his life and at the death of such grantor to divide the same in certain manner among certain specified persons. The trust agreement contained the following language:*

*'I reserve the right at any time during my life or so long as I am competent to act in the matter, to revoke the settlement hereby evidenced, either in whole or in part, as well as the right to modify in any respect the terms of this settlement, any such revocation or modification to be evidenced by written instrument to be signed by me and delivered to the trustee.'*

*S died subsequent to June 5, 1919.*

*HELD:*

1. *The trust agreement was effectual to vest ultimate beneficial estates in the persons to whom distribution was to be made.*

2. *Query as to effect of section 8617 G. C. If this section is to be construed as making the trust voidable only, the taxing authorities are not in a position to avoid it.*

3. *That the successions arising under the instrument are taxable in the abstract; whether they are to be taxed under the collateral inheritance tax law in force at the time of the execution of the trust agreement or under the inheritance tax law of 1919, in force at the time of the death of the donor, is a doubtful question which should be submitted to the courts for determination, the taxing authorities taking the view that the later law governs.*

COLUMBUS, OHIO, August 26, 1921.

*Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—Some time ago the commission requested the opinion of this department upon the following questions:

> "On the 9th day of February, 1916, S entered into an agreement with the C Trust Company whereby he conveyed to such company

certain property with power to hold and manage the same, pay the income therefrom to the grantor for his life and at the death of such grantor to divide the same in certain manner among certain specified persons. The trust agreement contained the following language:

'I reserve the right at any time during my life or so long as I am competent to act in the matter, to revoke the settlement hereby evidenced, either in whole or in part, as well as the right to modify in any respect the terms of this settlement, any such revocation or modification to be evidenced by written instrument to be signed by me and delivered to the trustee.'

S died subsequent to June 5, 1919. Distribution of the estate is about to be made pursuant to the directions contained in the trust agreement and the question now arises as to whether or not the property passing to the several distributees is subject to inheritance tax.

In case you are of the opinion that the power of revocation as expressed in the trust agreement does not make the succession subject to tax under the law of June 5, 1919, would such opinion be modified in the event that in the year 1920 and prior to the death of the decedent the trust agreement had been modified in a minor particular, such modification being a slight increase in the amount of one of the specific payments to be made at the death of the grantor?"

In approaching the consideration of the commission's first question certain points are encountered which bear upon the validity and effect of the trust agreement. That is to say, despite the commission's statement that distribution is about to be made pursuant to the directions contained in the trust agreement, there are certain features of the case which raise the question as to whether or not the execution of the trust agreement and the presumed manual delivery of the property covered thereby from the creator of the "trust" to the "trustees" were effective to divest the grantor and his legatees or legal representatives after his death of the property in the subject of the agreement, regardless of the time when for inheritance tax purposes such possible divesting might have taken place.

In the first place, doubt is engendered as to the legal validity of the transaction by section 8617 of the General Code, which at the time the transaction was had provided as follows:

"All deeds of gifts and conveyances of goods and chattels, made in trust to the use of the person or persons making them, shall be void and of no effect."

Indeed, the section quoted has but recently been amended by an act which is not yet in effect. In so far as property covered by the trust agreement may have been personal property, this section suggests the possibility of its invalidity. That question, however, depends upon the proper interpretation of the section, which has received no judicial construction on the point raised, namely, as to whether a deed of gift or conveyance of goods and chattels, made in trust to the use of other persons than the person making the deed or conveyance but partly to the use of such person, is within the scope of the operation of the statute. The phrase "shall be void and of no effect" occurring in other sections of the statute of frauds, of which section 8617 is a part, has been construed as meaning "voidable at the election of the parties injured." Burgett vs. Burgett, 1 Ohio, 469. Whether or not

section 8617 would be so construed is one question; and if it were so construed it seems likely, though no final opinion is expressed upon the point, that the taxing authorities in proceedings to determine the inheritance tax would not be in a position to avoid such a conveyance.

The commission inquires collaterally whether administration should be had in respect of the assets covered by the trust agreement. In so far as the supposed necessity for such administration arises out of the doubt engendered by section 8617 of the General Code, it is believed that the following statement covers the point:

If an administrator were appointed, he, as the representative of the creditors and next of kin, would doubtless be in a position to raise the question suggested by section 8617 G. C., and if he were successful in an attempt to set aside the trust agreement, then, obviously, the inheritance tax should be settled on the basis of such an outcome of his effort. But unless the question is so raised and determined, the commission or the other taxing authorities for inheritance tax purposes could claim nothing by virtue of section 8617 of the General Code, unless the phrase "shall be void and of no effect" in that section should be literally construed, on the one hand, and unless the phrase "made in trust to the use of the person or persons making them" should be liberally construed to include cases like the present one and to vitiate not merely the reservation of the life income, but also the beneficial dispositions to be made at death. Of course, if the taxing authorities can raise the question successfully the entire case would thus be disposed of, because there would then be no possibility of successions *inter vivos* under the trust agreement, but all successions would be referable to the death of the grantor and would therefore be governed by the present law. In view of the doubtful questions which have been suggested this department does not feel able to advise the commission with any certainty as to the effect of section 8617 of the General Code.

Still another question must be mentioned before the final problem can be stated and dealt with: It is noted that the grantor or settlor not only reserved to himself the income of the trust estate for life, as previously observed, but that he also reserved the right to revoke the settlement in whole or in part and to modify it. These two circumstances in combination suggest a question as to the *effect* of the trust agreement quite clearly distinguishable from the question already discussed, which relates to its *validity*. That question is raised by the existence of the principles applied in the case of *Worthington* vs. *Redkey*, 86 O. S. 128, the syllabus of which is as follows:

> "Where property is claimed as a gift by way of a trust which is not testamentary, it devolves upon the donees to prove an express and certain trust for their benefit, either assumed by the donor himself or imposed upon a third person, and in the latter case that the property or the legal title thereto passed beyond the dominion or control of the donor in his lifetime, to the donees or to the person designated as a trustee for them."

This case has been very carefully examined, and the conclusions of this department with respect to its bearing upon the question at hand may be summarized as follows:

(1) The court's holding was not exclusively predicated upon the fact that the so-called trust appointment therein involved was revocable.

(2) The court found evidence in the case tending at least to prove the absence of any delivery consistent with a trust for the benefit of third par-

ties. The following language occurs in the opinion of the court, referring to the reservation of the right to revoke the appointment:

> "It is said that this is a negligible factor in this case, because he never did revoke the appointment. Nevertheless, it reflects a strong light on the question whether he ever did intend to finally and forever abandon all control over the fund during his life. * * * And it would seem, at least in one point of view, that instead of an absolute and irrevocable payment of the money for the benefit of the donees, he did intend to let it get beyond the power of recall * * *. So that the best that can be made out of this document for the defendants in error is that it is ambiguous and they have not clearly made out their case."

(3) As a conclusion, then, it is felt that *Worthington* vs. *Redkey,* supra, does not stand for the simple proposition that the reservation of the power to revoke a trust for the benefit of third parties or to modify it defeats the trust itself, and converts it into a mere agency or trust for the benefit of the "donor", terminable by his death.

The court in the opinion in this case cites numerous cases from other jurisdictions, from which it appears that no intention was manifested to lay down any different rule for this jurisdiction than that which obtains generally on the subject. Numerous inheritance tax cases will be hereinafter cited in which the effect of a revocable trust for inheritance tax purposes has been considered, but in all of which it has been assumed, or decided, that the device was effective as against the devisees, legatees, heirs at law and next of kin and creditors of the grantor or creator, and operative to pass beneficial interests to the distributees thereunder. A succinct statement of the prevailing rule is found in 26 R. C. L., 1206, as follows:

> "A power of revocation may be reserved and is perfectly consistent with the creation of a valid trust, and it will not make the instrument a will or testamentary disposition of the property, but the trust remains operative and absolute until the right is exercised. * * * And if the right is not exercised during the lifetime of the donor or other person in whose favor it was reserved, and according to the terms of the reservation, the validity of the trust remains unaffected, as though there never had been a reserved right of revocation. The exercise, as to a portion of the trust property, of a power of revocation as to the whole, does not affect the trust as to the remainder of the property, and that portion of the trust continues in force after the death of the donor. * * *"

Some of the well considered cases which are cited in support of the text are:

> Nichols vs. Emery, 109 Cal., 323;
> Kendrick vs. Ray, 173 Mass., 305;
> Dickinson's Appeal, 115 Pa. St., 198;
> Lines vs. Lines, 142 Pa. St., 149.

Indeed, instead of a reservation of the power of revocation being regarded as inconsistent with the creation of a perfect trust, it was at one time held in England that where the trust settlement was *voluntary* (as it is in the case under consider-

ation), the failure to reserve the power of revocation in the donor was regarded as a circumstance tending to show an improvident disposition, and enabling the court to set aside the settlement at the suit of the donor.

The conclusion of this department is, then, that the mere reservation of the power to revoke is not as a matter of law inconsistent with the creation of a valid trust for the benefit of third parties, which becomes fully operative at least upon the revocation of the power to revoke by the death of the grantor, or otherwise. Of course, the reservation of the power may be accompanied by other circumstances, as in *Worthington* vs. *Redkey,* supra, and thus constitute one of the facts from which the true intention of the nominal settlor may be inferred and the ultimate conclusion reached that the transaction amounted to no more than an agency for the benefit of the creator. No such facts are, however, stated in the commission's letter, and indeed it is well known that trusts of the kind described by the commission have come into somewhat general use of late years, and that the purposes of their employment are scarcely consistent with the theory of agency. Moreover, it would seem that in the case submitted by the commission all parties in interest have regarded the transaction as creating a trust. And while all the terms of the trust agreement are not quoted in the commission's letter, it is assumed that its effect is to vest the "trustee" with power to sell and convey the subject of the trust and reinvest the proceeds of such sale as its judgment may determine. So that while *Worthington* vs. *Redkey* and other cases are authority for the principle that a trust must be clearly established, this department in the consideration of the question now under examination can scarcely apply that principle by holding that the transaction cannot be held to amount to a trust, without more proof than is contained in the commission's letter, but must assume in the absence of other facts that a valid trust was created.

In passing it may be remarked that in the case under consideration the fact of the reservation of the income for life may be added to the fact of the reservation of the power of revocation and modification, as indicative of some intent other than that necessary to create a trust for the benefit of the ultimate donees; but even this is, in the opinion of this department, scarcely sufficient to justify advice on the facts submitted that the trust agreement, aside from questions arising under section 8617 of the General Code, is not effective to create, at least ultimately, beneficial interests in the distributees mentioned therein.

We are thus brought to the ultimate question to be answered in connection with the commission's first inquiry, which may be stated as follows:

> Waiving the question as to the effect of section 8617 of the General Code, and assuming the validity of the trust agreement and its effect as creating beneficial interests in the ultimate distributees, when did those interests become vested in right for the purpose of determining the application of Ohio inheritance tax legislation?

At the outset it may be stated that there can be no question in the present case as to the abstract taxability of the successions under the trust agreement, assuming it to be valid and effectual for that purpose. That is to say, the mere reservation of the life income is of itself enough to make the gift one "made or intended to take effect in possession or enjoyment at or after the death of the donor". Authorities need not be cited upon this proposition, which applies as well to original section 5331 G. C. (the collateral inheritance tax law) as to paragraph 3, subdivision (b) of present section 5332 G. C. Cases will be hereinafter mentioned in which the reservation of

the power to revoke or modify has been held to make a trust of this character a gift "made or intended to take effect in possession or enjoyment at or after the death of the donor", even where the income for life was not reserved to the donor. It is pointed out, however, that it is unnecessary to raise this question in the present case, the reservation of the income for life being in and of itself sufficient to establish the conclusion stated.

But even though the successions under the trust agreement are in the abstract taxable under either of the laws, an important question is presented; for the ultimate distributees, whose relation to the donor is not stated in the commission's letter, may be too closely related to him to bring their successions within the scope of the collateral inheritance tax law; and the amount and relationships involved may be such as to make a difference in rate, as will hereinafter be pointed out; so that we must still inquire whether the successions under the trust agreement are governed by the collateral inheritance tax law in force prior to June 5, 1919, or by the present inheritance tax law effective on that date.

As this department has previously advised in other opinions, the present inheritance tax law manifests a very clear intent not to impose a tax upon "successions taking place prior to its approval, whether the death of the decedent occurred prior to its approval or not." (See section 4). This language was made to fit cases in which successions *inter vivos* had already taken place but the death had not yet occurred on the date of approval. It necessarily follows that where the succession has thus occurred the former law governs.

Still staying within the bounds of the present inheritance tax law, it is to be observed that the word "succession" is defined in section 5331 of the General Code, as follows:

> "'Succession' means the passing of property in possession or enjoyment, present or future."

Undoubtedly this is the sense in which the term is used in section 4 of the act. The word "property" is also defined in such manner as to include beneficial interests of an equitable character. The question then may be restated as follows:

Under the trust agreement which is now being assumed to be valid and effectual and to give rise to a right of ultimate distribution in each person named therein as a distributee, did such right pass in future possession or enjoyment—that is, did it become a present vested equitable right in a future interest at the time of the execution of the trust agreement and the delivery of the property covered thereby to the trust company? If it did, then clearly the former law governs. But if the effect of the reservation of the power to revoke and modify is such as to postpone the passing of the beneficial future interest in the property and its vesting, in the sense contemplated by the inheritance tax law, until the death of the donor and the extinction of the reserved powers, then it would follow that the present law governs inasmuch as the donor's death did not take place until after it was in effect.

At this point in the discussion the facts stated by the commission may be restated, as it is believed that all of them are material. The commission refers only to the reservation of a right to revoke the settlement either in whole or in part and the right to modify, provided such revocation or modification is to be evidenced in a certain way, viz., by written instrument signed by the donor and delivered to the trustees. In other words, the trust is not

generally revocable by any act inconsistent with its continuance, but only by delivery of a written and signed instrument to the trustee.

In the second place, powers which are sometimes reserved in instruments of this character do not appear by the commission's letter to have been reserved in this case. Among the cases examined by this department are several in which the donor reserves control over the disposition of the particular thing constituting the subject of the trust, as where the trustee is not given unlimited power of sale and reinvestment, but can only sell on terms directed by the donor and invest in accordance with the wishes of the donor. It is not clear that the absence of such reserved powers makes any material difference, but for the sake of exactness, if for no other purpose, their absence is now noted and the statement is repeated that a limited power of revocation and modification constitutes the only qualification of the trustee's ordinary legal powers, and the only enlargement of the creator's legal and equitable rights as compared with those under a simple trust.

With these facts in mind we may begin the discussion of the question now under examination by remarking that it seems strange that a trust agreement of this character can be held valid and effectual, as in the cases hereinbefore cited from other jurisdictions, and at the same time not operative until the death of the donor. It is hardly believed that this can be so in any general sense, yet, as the authorities seem to suggest it may be so for inheritance tax purposes, and in particular for the purposes of a question like that now under consideration; for the trust agreement itself was an act *inter vivos*, and whatever legal effect it had must have taken place in point of time when it was perfected, and if it be given legal effect in accordance with its terms, then the equitable interests which it creates must have been created when it was promulgated, and not at any other time.

To hold otherwise, while at the same time sustaining the validity of the dispositions made by the trust agreement, would seem to run counter to the statute of wills. In other words, to say of the trust agreement that it was substantially a testamentary disposition, because of the reservation of the power of revocation, is to give effect to it as a will, in spite of the fact that it is not signed and attested in the manner in which a will is required to be signed and attested, nor was it admitted to probate and administered upon as a will.

But there are obvious differences between any possible legal effect that may be given to the trust agreement under examination and a will. Without discussing all of them, the following may be mentioned:

A will is not only ambulatory as an expression of the testator's wishes, but it has no effect upon property whatsoever, either in law or in equity, until the testator's death. So property mentioned in a will may be disposed of by the testator in his lifetime and obviously the will will not operate upon it, for the simple reason that the will can operate only upon that which the testator has at the instant of death.

But in the case now under examination the transaction was certainly effectual to pass the legal title of the securities or other property constituting the subject of the trust to the trust company. This property was no longer the general property of the donor in spite of the reserved power of revocation. He could not sell it or otherwise dispose of it. If any of it consisted of stock he could not vote it. In these respects he had certainly parted with dominion over it, and while he had the legal power to reassume such dominion he could only exercise that power effectually by complying with the restrictions imposed upon it by the trust agreement. Yet the question is at least made doubtful, if not decided, by the decision in *Matter of Dana Co.*, 215 N. Y., 461. This case is so closely analogous to the case

presented by the commission in some respects, and yet so much in contrast with it in other respects, that it deserves very careful examination and somewhat lengthy quotation. The headnote of the case states the gist of the opinion most succinctly, as follows:

> "1. An instrument transferring shares of stock to a trustee which reserved to the donor the income from the stock during his lifetime; the right to direct how the trustee should vote thereon; the power to cause the trustee to sell the stock in such manner and at such price as the donor might direct; the right to substitute a different trustee; at will; and the absolute right of revocation at any time during the lifetime of the donor, is testamentary in character and must be regarded as speaking from the time when he became effective by reason of the death of the party who executed it.
>
> 2. Where the beneficiaries under such trust instrument are the same persons who are legatees under the donor's will, the transfers under the trust instrument should be combined with the legacies given by the will for the purpose of assessing the transfer tax required under the provisions of chapter 706 of the laws of 1910."

If this case is exactly in point, it obviously determines the question under consideration, for it will be observed that no reference is made in the syllabus (nor is any reference made in the opinion) to any peculiarity of the New York transfer tax law of 1910, as compared with the Ohio law of 1919, in respect of retrospective operation, but the conclusion is based solely on the proposition that the trust deed there involved was "testamentary in character, and must be regarded as speaking from the time it became effective by reason of the death of the party who executed it." The court held, as will be observed, that where the law had been changed between the time of the execution of the instrument and the death of the person who executed it, the law in force at the date of death governed. In that case the rates had been changed from flat rates to progressive rates, and the exact question was as to whether the successions under the trust agreement should be added to the successions under the will passing to the same persons for the purpose of working out the application of the new progressive rates.

Yet it is not clear that the case is decisive of the question now under consideration. The following differences may be noted:

(1) The right of revocation reserved in Matter of Dana Company was absolute and not limited as in the case now under consideration.

(2) There was reserved not only the power to revoke but also the power to direct the trustees how to vote the stock. No such reservation is made in the case now under consideration.

(3) In the case under consideration it is assumed, for lack of information to the contrary, that the trustee possesses the power of reinvestment. In Matter of Dana Company power to control the sale of the stock was reserved.

These enlarged reserved powers may have made it possible for the court to say, as it did per Willard Bartlett, C. J., (p. 464) that:

> "In fact, after the execution of the deed of trust Mr. Dana (the creator) still retained just as much power over the stock as he would have had it he had disposed of it by will instead of executing the instrument which he delivered to Mr. Seibert. There was no element of finality about the instrument during the donor's lifetime,

> for it was just as capable of revocation as a will would have been. Under these circumstances it was a transfer of a testamentary nature, and must be regarded as speaking from the time when it became effective by reason of the death of the party who executed it."

The problem is to determine whether this language can be applied to the facts stated in the commission's letter. In other words, we have here, in the form of a distinct question, another inquiry as to the effect of a simple limited power of revocation and modification. Hereinbefore that reserved power has been considered with respect to its bearing upon the question as to whether a trust was perfectly created for the benefit of the ultimate distributees or not, in the light of the decision in *Worthington* vs. *Redkey*, supra. Now it has to be considered upon the assumption that a trust was perfectly executed, but for the purpose of determining whether, with a view to the application of amendments to the inheritance tax law, the successions which it is assumed to have effectually created arose in the sense of vested rights prior to the death of the creator. That *Matter of Dana Co.* cannot be regarded as entirely conclusive of the question now under consideration, even as a matter of New York law, appears, it is believed, from a consideration of previous decisions in New York, one of which at least was cited in the opinion. The decisions which will now be mentioned were not upon the exact point under discussion, but upon the question as to whether the reservation of the power to revoke, in one form or another, stamped the interests arising under a trust so qualified as "made or intended to take effect in possession or enjoyment at or after the death of the donor." As previously pointed out, it is possible to argue, and it has been held, that in some instances, such a reservation, if sweeping enough, has that effect; but it has also been pointed out that that question is not even raised here because of the reservation of the income for life, which in and of itself is sufficient to bring the successions within the reach of either of the inheritance tax laws of this state as grants *inter vivos* "made or intended to take effect in possession or enjoyment at or after such death."

In *Matter of Masury*, 159 N. Y., 532, the decedent had executed trust deeds providing that the income should be paid to his two adopted sons, such payment to commence at once. However, he reserved the right "to revoke and annul the same during my lifetime." The court held that the succession was not taxable at all as it did not appear to have been made in contemplation of death, nor that it was intended to take effect in possession or enjoyment at or after the death of the donor. The fact that the grantor might have revoked the trust the court held to be immaterial, saying that whether or not "it should be determined that the gift did not become absolute until the possibility of its annulment ceased, upon the death of the grantor it would still be necessary to show that the gift was intended to take effect in possession or enjoyment at or after such death."

In *Matter of Bostwick*, 160 N. Y., 489, a like reservation, somewhat broader in terms, was held to make the succession taxable, on the ground that it was really not intended to take effect in possession or enjoyment until the settlor's death. The reasoning of the court will be shown by the following quotation, which is important because of the weight given to this case as an authority in the state of New York:

> "Instead of an out and out gift, which would provide for the enjoyment by the beneficiary of the income of the property during her life and for the disposition of the trust fund thereafter, we find powers reserved to alter, or amend, the trust by notice to the trus-

tee; to withdraw, or to exchange, any securities, and to control the acts of the trustee in selling, or disposing of, the securities, or with respect to investments. All these are indicia, rather, of an intention on the donor's part to retain a dominion over the properties transferred, and do not consist with an existing purpose to vest the absolute right to present and future enjoyment in the beneficiaries. He retained practical control of the trust property and left the question of its beneficial enjoyment and eventful possession open until his death.

* * * * * *

We thought there was some reason in the facts of the Masury case for finding an intention in the donor to make an absolute transfer of property during his life, which the mere reservation of a power to revoke was of itself insufficient to negative. But, if the trust transfers now in question were held to be without the operation of the act, too dangerous a latitude of action would be permitted to persons who desired to evade its provisions by some technical transfer, which would still leave the substantial rights of ownership in the donor."

*Matter of Bostwick* did not reverse *Matter of Masury,* but distinguished the earlier case, as the above quotation makes clear, on the ground that the Masury decision presented an instance of the reservation of the mere power to revoke, whereas in the Bostwick case there was added to this reserved power the power "to withdraw or exchange any securities, and to control the acts of the trustees in selling, or disposing of, the securities, or with respect to investments." This is the only real difference between the facts in the two cases. In short, the facts in *Matter of Bostwick* were like those in *Matter of Dana Co.,* which makes it doubtful as to whether or not the question involved in *Matter of Dana Co.* would have been decided in the way in which it was decided if the facts had been like they were in *Matter of Masury. Matter of Masury* has been recently followed in *In re Bowers Estate,* 186 N. Y. Supp. 913. *Matter of Bostwick* has been frequently followed in New York.

But if we use the New York cases involving the question raised and decided in *Matter of Masury* and *Matter of Bostwick* as an analogy we become involved in considerable confusion. Thus in *Matter of Ely,* N. Y. Law Journal, March 6, 1912, quoted in Chrystie on Inheritance Taxation, 1st Ed., p. 68, the court concluded that the reservation of the power to amend the deed of trust was more comprehensive than the power to revoke the trust, inasmuch as

"This power to amend must necessarily embrace within its signification the power to withdraw any portion of the trust property or to exchange the securities mentioned in the deed of trust for other securities; the power to change the beneficiaries of the trust fund or the time or in the manner in which the income or corpus of the trust fund should be distributed."

The court accordingly held the case ruled by the Bostwick case and not by the Masury case. It will be observed that in the case now under consideration the "right to modify in any respect the terms of this settlement * * * to be evidenced by written instrument to be signed by me and delivered to the trustee" is reserved as well as the power to revoke the settlement. The Ely case therefore becomes a case in point, if the analogy of the question involved therein to that now under consideration is admitted.

Unfortunately, the analogy is not perfect, because it is clear that it is perfectly possible for a vested estate to be created *inter vivos* and yet to be made or intended to take effect in possession or enjoyment at or after the death of the grantor or donor. Such would be the case in a simple deed of real estate reserving a life estate in the grantor; yet no one would question, it is believed, that if such a deed had been given prior to June 5, 1919, the death of the grantor after that date would not have subjected the remainder to taxation under the Ohio law of 1919. It is therefore impossible to accept without reservation the analogy of the lower court cases in New York distinguishing *Matter of Masury* from *Matter of Bostwick*, because of the difference between the questions involved. However, certain other cases may be noted.

In *Matter of Schermerhorn*, N. Y. Law Journal June 26, 1913, decided by the same surrogate who decided *Matter of Ely*, supra, the court held taxable successions under a revocable deed of trust in which the right to alter or modify was also reserved, which deed of trust was executed in 1902. Under this deed of trust distribution was made in 1911, though the grantor had died in 1903. In denying the application for exemption the court repeated its reasoning in *Matter of Ely*, but used the following significant and perplexing language from our point of view:

> "The transfer tax statute in force at the time the *deed of trust was executed* provided that a tax should be imposed upon the transfer of property effected by deed or gift intended to take effect in possession or enjoyment at or after the death of the grantor."

Of course, it was true that the transfer tax statute in force at the time distribution was made contained a similar provision, but the point is that the surrogate apparently applied the law in force at the time the deed was executed, or at least referred to it.

The New York decisions are further complicated by the statutory provision of that state referred to *In re Hoyt's Estate*, 149 N. Y. Supp. 91, another of the decisions of the same surrogate who decided *Matter of Ely* and *Matter of Schermerhorn*, supra. That provision is sufficiently disclosed by the following quotation from the opinion in this case:

> "An absolute power of revocation was always regarded in equity, as Chancellor Kent said, as property of the donor, grantor, or the donee or grantee of the power. Section 145, of the real property law, now declares that the reservation for settlor's own benefit of a power of revocation is property of the settlor. Yet I can conceive of a reservation of such a power in a manner which would not subject the power to that section, but this is not such an instance. Here the power of revocation is beneficial and absolute to the donor or settlor, and that in my judgment subjects it to the transfer tax."

In that case the deed of trust was executed in 1901 and the grantor died in the same year. Certain dispositions were limited on the life of a person who died in 1914. The opinion is more carefully prepared than any of the others emanating from the same surrogate on the question actually involved, and it is significant that he again refers to the law in force at the date of the execution of the deed, though this time he adds:

> "which was also the tax law in force at the date of the grantor's death"

thus showing that no decision on the point involved in *Matter of Dana Co.*, supra, and in the case now under consideration was necessary or contemplated. The following interesting paragraph appears in the opinion of the court (p. 94):

> "What, then, was the principle adjudicated in Matter of Bostwick? It seems to me it was that the reservation of an absolute power of revocation to the donor of a gift inter vivos or to the settlor of an estate by deed on relations is prima facie property in the donor which is subject to the transfer tax. To be sure, such a power, when executory, always ceases on the death of such donor or settlor. But only on that event can the donees acquire an absolute title, and that event is the death of the donor, which is the crux of the transfer tax or the 'death tax,' as it is often called. But I do not mean to be understood as now holding that every power of revocation is property, or that every settlement subject to a power of revocation may not be the property of the donee. For instance, a power reserved in a marriage settlement to revoke the uses and to reappoint or resettle the estate to new uses is founded on a high consideration, and may fall under a totally distinct principle from that I think contemplated in the cases I have cited. When a settlement is founded on a consideration, the introduction of a power of revocation may not be subject to the transfer tax in all cases. But we have not to do with such hypothetical cases here, but with the facts of this particular case. In the matter under consideration the donor reserved the power to amend or revoke the deed of trust. It will be observed that the power to amend was not reserved in the Masury case. That this reservation was regarded as no empty formality is evident from the fact that a deed executed by donor in 1896, and by which she directed that the income of the fund, after the death of her son, should be paid to his wife, Charlotte, was amended in 1901 so as to exclude Charlotte from participation in the income of the corpus of the trust fund."

As previously observed, it is not clear that this discussion has proper relation to the question of which law applies, though its relation to the question of the quality of the gift as "made or intended to take effect in possession or enjoyment at or after the death of the donor" is clear.

At page 131 of Gleason and Otis on Inheritance Taxation, 2d Ed., it is laid down unqualifiedly that

> "where there is reserved a power of revocation the gift does not become complete until the date of the donor's death and the law as of that date applies."

It is believed that the foregoing discussion shows that this proposition is laid down too broadly. No case has ever held that the mere power of revocation renders the gift incomplete until the donor's death. In the only case in which the question of the application of the law was involved (Matter of Dana Co., supra) that reserved power was accompanied by a reservation of the power to amend and also of the power to control the trustee in the management of the trust property. The other cases cited by the authors do not support the text, being on the other point above discussed. We are thus left somewhat in the dark as to whether the addition of the reserved power to amend, without that of the reserved power to

control the management of the estate, is enough to bring the case within the doctrine of *Matter of Dana Co.,* and that is the exact question which we now have to consider inasmuch as the power to amend is reserved in the trust agreement quoted by the commission, but the power to control investments, sales, etc., is not so reserved.

In passing the case of *Welch* vs. *Treasurer,* 217 Mass. 348, may be noted. The power of revocation in the trust agreement involved in that case was not reserved to the grantor alone but to him and his wife and the trustee jointly. Clearly, such a qualification of the powers which the trustees would otherwise have had was not effective to defeat the vesting of the estates, and the court held the law in force at the time the trust agreement was executed controlling.

On the other hand, there are a number of cases in which the trust agreement reserves the power to appoint by will. This is a clear case, however, for the application of the later law. Nothing but expectancies were created by the trust deed, and the will itself is after all the operative instrument. Our own law provides for such cases in a clause (par. 5 of section 5332 G. C.) which is expressly made retroactive and covers the case of failure to exercise the power of appointment as well as that of its exercise. This line of cases, of which *Crocker* vs. *Shaw,* 174 Mass. 266; *State* vs. *Bullen,* 143 Wis. 512; *In re Lines' Estate,* 155 Pa. St., 378, are more or less remotely examples, is mentioned for the sake of distinguishing the principles therein involved from those to be considered here.

Concluding the discussion of the cases, particular attention is due to *In re Bowers' Estate,* 186 N. Y. Supp., 912, already referred to as following *Matter of Masury,* supra. In that case the decedent had executed seven trust deeds, the effect of four of which for inheritance tax purposes was called in question. These granted, in most instances, securities and cash in trust, to pay the income to the beneficiary for life and after death to such persons as the beneficiary might nominate in her will, or other written instrument, in default of such nomination to her issue, and in default of issue to certain designated persons. Subsequent clauses of the deeds reserved to the grantor the power to approve the investment of the several trust estates in any securities other than certain securities specifically named in the deed itself; that is to say, the trustee had power to invest in designated securities, but if he desired to invest in any other securities the approval of the grantor was necessary.

The deeds further contained the following stipulation:

> "The party of the first part may at any time and from time to time, with the approval of either one of the parties of the second part, * * * alter, amend or extend all or any of the terms and conditions of this instrument, and may with like consent confer new powers upon the parties of the second part concerning the administration of their trust."

One of the deeds contained a provision not found in the other three, namely:

> "And may with like consent wholly cancel and destroy this trust and receive back the trust estate."

Of the first reserved power the court said:

> "There is nothing in this clause of the deed that tends to qualify or cut down the absolute character of the gift. * * * This pro-

vision is not for the benefit of the grantor, nor a limitation upon the grant, but a safeguard for the protection and benefit of the trust estate, and to insure the preservation of the fund for the use and purposes of the grant and in the interest of the beneficiary of the trust."

Of the second the court said:

"It is contended that this gave to the grantor the right at any time to change the trust in any way that he saw fit, even to revoking the deed and revesting the property in himself and by the possibility of the use of this power to retain the control of the property in himself * * *. The only use that was made of this power by John M. Bowers in his lifetime was to substantially increase the corpus of the trust fund by subsequent donations. Whether this clause reserved the right to entirely abrogate the trust, is to my mind doubtful. (The court here refers to the additional phrase found in one of the deeds as above quoted).

But, waiving that question and treating all the four trust deeds as though that right were expressly reserved, he did not exercise that right in his lifetime."

The court here refers to the Masury case and quotes with approval that part of the opinion in that case which pointed to the actual conduct of the grantor as manifesting an intention to reserve the power of revocation, not as beneficial to himself, but simply as a precaution to be exercised for the benefit of the ultimate takers. The court consequently held the case to be within the rule of the Masury case and not subject to the principles of the Bostwick case.

A detailed comparison of this case with the other cases which have been mentioned may not be worth while. It may be frankly stated, however, that the case tends to throw the New York law into greater confusion. The powers reserved in the trustees in that case seem equally as sweeping as some which the surrogate courts had previously held to be subject to the rule of the Bostwick case. The decision is important not merely because of its recent date, but also because it emanates from the appellate division of the supreme court and constitutes a partial reversal of the New York surrogate who undoubtedly had followed his predecessors' rulings, some of which have been hereinbefore referred to. With this remark, and the further remark that it seems clear that a trust, that so far as the reservation of the power to revoke or amend is concerned is held to be a complete transaction *inter vivos* as against the claim that it was made or intended to take effect in possession or enjoyment at or after the death of the donor, would have to be held to create interests vested at the time of its execution for the purpose of determining the law which should be applied, whether the converse is true or not.

In view of the above state of the law this department is unable to come to a very definite conclusion with respect to the question which has been discussed most at length in this opinion. There is, however, at least plausible ground for asserting that even if the trust agreement is valid, as this department is inclined to believe it is, at least when questions arising under section 8617 of the General Code are waived, the law in force at the time of the death of the donor is to be applied and the successions passing under the trust agreement at final distribution are to be added to other successions

to the same persons passing by will or intestacy from the donor, for the purpose of determining the tax under that law. This conclusion is not advanced with any degree of confidence, as intimated, but this department, not being able to advise the commission categorically that this position is incorrect, recommends that the position be taken by the commission, and in case of contest presented to a court for final determination.

This advice makes it unnecessary for the second group of questions submitted by the commission to be considered.

Respectfully,
JOHN G. PRICE,
*Attorney-General.*

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2375.

HEALTH FUNDS—MAY BE TRANSFERRED FROM ONE ITEM TO ANOTHER WITHIN TOTAL AGGREGATE AMOUNTS APPROVED BY BUDGET COMMISSIONER.

*Health funds are not divided according to the itemized statement submitted by the district board of health, as provided in section* 1261-40, *but such funds are regarded as a general health fund and may be expended in whole or in part for any of the purposes mentioned in said itemized statement.*

COLUMBUS, OHIO, August 26, 1921.

*State Department of Health, Columbus, Ohio.*

GENTLEMEN:—Your letter of recent date received, in which you request the opinion of this department as follows:

> "Section 1261-40 G. C. requires that the board of health of a general health district 'estimate in itemized form the amounts needed for the current expenses of such district for the fiscal year beginning on the first day of January next ensuing'. This estimate must be certified by the board of health to the county auditor and by him submitted to the budget commissioners. The budget commissioners 'may reduce any item or items in such estimate, but may not increase any item or the aggregate of all items.'
>
> The section further provides the procedure for raising funds for the 'district health fund'.
>
> The question on which I wish an opinion is this:
>
> Can funds be transferred from one item to another within the total aggregate amounts of the budget as approved by the budget commissioners and, if so, what procedure should be followed by the general district health board to effect such transfer?"

Section 1261-40 General Code provides in part as follows:

> "The board of health of a general health district shall annually, on or before the first Monday of April, estimate in itemized form the amounts needed for the current expenses of such district for the fiscal year beginning on the first day of January next ensuing. Such estimate shall be certified to the county auditor and by him submit-