

fice. The form of this deed is such that with one correction the same when executed will be legally sufficient to convey this property to the State by fee simple title with a covenant that the property conveyed is free from all encumbrances whatsoever. The property is described in the deed as being in the northwest quarter of the southwest quarter of Section 16 of the township and range above mentioned. It seems quite clear from the plat submitted as well as from the earlier deeds on the chain of title that the property here in question is in the northeast quarter of the southwest quarter of Section 16 and the deed form should be corrected accordingly.

Upon examination of Contract Encumbrance Record No. 14, which has been submitted as a part of the files relating to the purchase of this property, I find that the same has been properly executed and that there is shown thereby a sufficient unencumbered balance in the proper appropriation account to the credit of the Ohio Agricultural Experiment Station to pay the purchase price of this property, which purchase price is the sum of \$340.00.

I further find from a recital of the fact in the encumbrance record as well as from the certificate of the Controlling Board that said Board has approved the purchase of the above described property and has released from the appropriation account the money necessary to pay the purchase price of the same.

Subject to the exceptions and corrections above noted, and suggested, the abstract of title, deed form, and other files submitted to me are herewith returned.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

4233.

TRUST—DONOR MAY MAKE RESERVATION IN TRUST INSTRUMENT OF
 RIGHT TO WITHDRAW FOR OWN USE PROPERTY IN THE TRUST.

SYLLABUS:

Although under the common law a reservation in a trust instrument of a right in the donor to withdraw, use and consume in the execution of the trust any or all of the property constituting the principal or corpus of the trust, has the effect of invalidating the trust and of imparting to the relation thus created the character of an agency, such is not the effect of a trust created in this State, under the provisions of section 8617, General Code, as amended by the act of April 29, 1921, 109 O. L., 215, and as construed by the Supreme Court in the case of Union Trust Company vs. Hawkins, 121 O. S., 159; and the relation created by such instrument is a valid trust under the statute, notwithstanding the reservation therein of a right in the donor to withdraw for his own use any or all of the property in the trust.

COLUMBUS, OHIO, May 7, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You recently submitted to me an instrument of indenture executed by and between W. B. of the city of Toledo, Ohio, therein called the "Donor", and The Toledo Trust Company, or its successors, of the city of Toledo, Ohio, therein referred to as the "Trustee". You request my opinion on the question whether, under the pro-

visions of this instrument, a trust relationship is created with respect to the securities and other intangible property transferred by the donor to The Toledo Trust Company as "Trustee", or whether, on the other hand, the relationship created by this instrument is that of an agency.

The question here presented is one of practical importance in the administration of the provisions of the intangible and personal property tax law, as the distinction between these relationships is one that is clearly recognized by said law. See section 5366, General Code. You are familiar with the provisions of the instrument here in question and I shall not make any extended statement with respect to the same. It is sufficient to say in this connection that the instrument, by the use of apt language, assigns and transfers to The Toledo Trust Company the title to certain property set out in Schedule A which is a part of the instrument and which is therein designated as the "trust property". In this instrument The Toledo Trust Company is required to pay the net income to the donor during the existence of the so-called trust and to make final distribution of the corpus of the trust upon the death of the donor to the persons named in said instrument and in the amounts therein provided. As a consideration more immediately pertinent to the question here presented, the instrument reserves to the donor the right of substitution with respect to property constituting the corpus of the trust, and likewise reserves to such donor the right to withdraw and consume the principal or corpus of the trust fund. In addition to this, this instrument reserves to the donor at any time during his life the right to revoke the settlement evidenced and provided for by said instrument, either in whole or in part, as well as the right to modify in any respect the terms of such settlement. In connection with the reservation above referred to and as a part of the same, it is noted that this instrument in terms provides that "The Donor shall also have the right to withdraw all or any portion of the principal of the Trust Property by written direction delivered to the trustee during his lifetime".

It will be observed that the instrument here in question, by the use of apt terms for the purpose, transfers the title to the property set out in the schedule thereto attached to the trustee therein named; and in this particular the transaction partakes of the nature of a trust rather than that of an agency such as might be created by a mere delivery of the possession of property for particular purposes. Moreover, I am inclined to the view that the fact that the trust created by this instrument is revocable at the pleasure of the donor does not affect the validity of the trust. In other words, a power of revocation reserved to the donor of a trust is perfectly consistent with the creation of a valid trust. *Cramer, Administrator, vs. Hartford-Connecticut Trust Company*, 110 Conn., 22, 73 A. L. R., 201; *Warsco vs. Oshkosh Savings and Trust Company*, 183 Wis., 156. Touching this question, the court in the case last above cited said:

"No difficulties arise from the fact that a trust is revocable. That does not affect its validity. *McEvoy vs. Boston Five Cents Savings Bank*, 201 Mass., 50, 87 N. E., 456; 26 R. C. L., 1206. Indeed, in an early day trusts not revocable were closely scanned by the courts to see that they were voluntary and understandingly made. 26 R. C. L., 1209."

However, a more serious question is presented by the provision of the trust instrument above quoted-which reserves to the donor the right to withdraw all or any portion of the principal or the corpus of the trust by written direction delivered to the trustee. In the case of *Warsco, Administrator, vs. Oshkosh Savings and Trust Company*, supra, it was held:

"A valid trust implies a donor, a trustee, and a *cestui que trust*, and the

donor may be the *cestui que trust* or one of them; but there must be an alienation of the property constituting the trust to the trustee under such terms that when it is executed a benefit accrues to the *cestui que trust* unless prevented by a condition subsequent resulting from a lawful revocation. If the donor has full control and dominion over the trust property so that he can use it as and when he pleases, the trustee becomes his agent to hold the title, invest, sell, and collect income for him and pay as he directs."

In the Warsco case above cited, the court had under consideration a trust instrument which provided among other things for the payment by the trustee therein named to one Dora E. Putzke, of such sum or sums of money as the settlor might direct the trustee to pay to her out of the moneys constituting the corpus of the trust. And in this instrument it was further provided that the trustee should at any time, on the request of Warsco, the donor, turn over and pay to him any of the moneys in its hands derived from the certificate of deposit, which constituted the corpus of the trust, without the consent of the said Dora E. Putzke. Speaking of this feature of the trust instrument, the court in its opinion in this case said:

"In the instant case the trust is not revocable at all, but its provisions are such that the settlor may, under the terms of the trust, demand every cent from the trustee, for the agreement provides that the trustee, 'shall at any time, on request of said Gust Warsco, turn over and pay to him any of the moneys in its hands derived from the said certificate of deposit without the consent of the said *Dora E. Putzke.*' In demanding all the money the trust would be executed according to its terms. A revocation implies the cessation and extinguishment of the trust, and when made operates to put an end to it, not to carry out its terms.

A valid trust implies a donor, a trustee, and a *cestui que trust*. The donor may be the *cestui que trust* or at least one of the *cestuis que trustent*. But there must be an alienation of the donor's property constituting the trust to the trustee and under such terms that when the trust is executed a benefit accrues to a *cestui que trust* unless prevented by a condition subsequent resulting from a lawful revocation of the trust. If the donor has full control and dominion over the trust property, so that according to the terms of the trust he can use it as and when he pleases, the trustee becomes his mere agent to hold title to the property, invest, sell, and collect income for him and pay as he directs. The donor has parted with no dominion over his property nor any part thereof by the terms of the trust, and such an agreement is no valid trust agreement."

The conclusion reached by the Supreme Court of Wisconsin in the Warsco case with respect to the settlement there in question is supported by the cases of *McEvoy, Trustee, vs. Boston Five Cents Savings Bank*, 201 Mass., 50, and *Russell vs. Webster*, 213 Mass., 491, and by other cases that might be cited on this point.

It follows therefore that in so far as the question here presented is governed by common law principles, the provision in this instrument reserving to the donor the right at his discretion to withdraw all or any portion of the trust property, would have the effect of imparting to the settlement the character of an agency rather than that of a trust.

In this connection, it is noted, however, that the trust instrument under consideration in the case of *Union Trust Company vs. Hawkins*, 121 O. S., 159, contained a like

provision reserving to the donor the right to withdraw from time to time any part or all of the trust estate held under the trust agreement; and that notwithstanding this provision the court held the settlement there in question to be a valid trust. Apparently, the conclusion reached by the court in this case upholding the instrument there in question as a valid trust settlement, was founded solely upon an amendment of section 8617, General Code, passed April 29, 1921, by which the following provision was added to said section:

“but the creator of a trust may reserve to himself any use or 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.”

Although the precise question presented for determination in the case of *Union Trust Company vs. Hawkins* was with respect to the devolution of the title to the principal or corpus of the trust after the death of the donor in accordance with the directions of the trust instrument, and the consideration of the court was not directed to the more general question as to whether the instrument created a trust or an agency, the court in holding that said instrument effected a transfer of the title of the corpus of the trust property after the death of the donor to the beneficiaries named in the trust instrument, necessarily held that the instrument created a valid trust as distinguished from a mere agency.

In view of the decision of the Supreme Court of this State in the case of *Union Trust Company vs. Hawkins*, supra, on the instrument there in question, I am not prepared to hold that the instrument executed by W. B. to The Toledo Trust Company creates any relation other than that of a valid trust, notwithstanding the fact that this instrument, as above noted, reserves to the donor exceedingly broad powers with respect to the modification of the trust including the right to withdraw from the trust any or all property constituting the principal or corpus of such trust. I am of the opinion, therefore, that the instrument here in question created a valid trust and that the same should be so considered in the administration of the provisions of the intangible and personal property tax law with respect to trusts of this kind.

Respectfully,

JOHN W. BRICKER,

Attorney General.

4234.

APPROVAL, ABSTRACT OF TITLE, ETC., RELATING TO THE PURCHASE OF LAND IN HANOVER TOWNSHIP, ASHLAND COUNTY, OHIO—RHODA BLACK.

COLUMBUS, OHIO, May 7, 1935.

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

DEAR SIR:—This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval an abstract of title, warranty deed,