1321.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND J. W. WEEKS, DAYTON, OHIO, FOR CONSTRUCTION OF DAM NO. 1 AT MT. GILEAD, OHIO, FOR DEPARTMENT OF AGRICULTURE, AT AN EXPENDITURE OF $15,558.25—SURETY BOND EXECUTED BY THE SOUTHERN SURETY COMPANY.

COLUMBUS, OHIO, December 23, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works for the Department of Agriculture, Division of Fish and Game, and J. W. Weeks of Dayton, Ohio. This contract covers the construction of Dam No. 1, located at Mt. Gilead, Morrow County, Ohio, for the Department of Agriculture, Division of Fish and Game, Columbus, Ohio, and calls for an expenditure of fifteen thousand five hundred and fifty-eight and 25/100 dollars ($15,558.25).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent and approval of the Controlling Board to the expenditure has been obtained as required by Section 11 of House Bill 510, of the 88th General Assembly. In addition, you have submitted a contract bond upon which the Southern Surety Company of New York appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data, submitted in this connection.

Respectfully,
GILBERT BETTMAN,
*Attorney General.*

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1322.

TAX AND TAXATION—STOCK IN FOREIGN CORPORATION ASSIGNED TO FOREIGN TRUST COMPANY BY OHIO RESIDENT—NOT TAXABLE AT DONOR'S DOMICILE.

*SYLLABUS:*

*Where a resident of this state owning and holding shares of stock in a foreign corporation assigns and transfers such shares of stock to a trust company in another state in good faith under a trust agreement by which said trustee is to have the exclusive dominion and control of such shares of stock and to collect the dividends declared thereon and to invest or re-invest the proceeds of the sale by it of such shares of stock for the benefit of the certain named children of the donor of such trust estate such shares of stock or the proceeds of the sale thereof in the hands of said trustee are taxable at its domicile; and in such case, the shares of stock constituting the corpus of such trust estate cannot be legally taxed in the name of the donor of such trust in this state, although such trust agreement is by its terms*

*revocable by such donor during his or her lifetime, and the actuating purpose of said donor in creating said trust was to avoid the payment of taxes on said shares of stock in this state.*

COLUMBUS, OHIO, December 23, 1929.

*The Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—You have submitted for my consideration and opinion the question made on a complaint filed with you by one Florence J. Stone of Cleveland, Ohio, under the authority of Section 5616, General Code, asserting the invalidity of a tax assessed by the county auditor of Cuyahoga County for the year 1928 on 600 or more shares of stock of the Blaw-Knox Company, a Pennsylvania corporation, as property owned by said Florence J. Stone. From the evidence taken by you on a hearing of this complaint, it appears that on and prior to January 28, 1928, the shares of stock here in question were owned and held by Florence J. Stone, a resident of the city of Cleveland, Ohio. Mrs. Stone and her husband desired to keep said shares of stock for their children but they felt that she could not continue to own and hold this stock and pay the taxes assessed upon the same at the place of her residence. Actuated by this thought, Mrs. Stone and her husband considered the matter of placing these shares of stock in trust for the benefit of their children and after some negotiations to this end between E. E. Stone, her husband, and the Union Trust Company of Pittsburgh, Pennsylvania, Mrs. Stone, on January 28, 1928, entered into a trust agreement with the Union Trust Company of Pittsburgh by the terms of which she granted, transferred and set over to said company such shares of stock, the power to have and to hold said securities and the investments into which they might thereafter be converted, and to invest and reinvest the same from time to time in safe interest bearing securities in trust, however, for the purpose of collecting and receiving the dividends, interest and income from said securities, moneys or investments, and after the deduction of the expenses incident to the management of the trust and the compensation of the trustee, to pay over the whole net income to John B. Stone, Daniel Stone and Elizabeth L. Stone, children of Florence J. Stone, the donor, in quarterly installments during the full term of the natural lives of said children.

Said trust agreement, among other things, reserved to the donor the right from time to time to subject additional moneys, properties and securities to said trust; and by said trust agreement the donor reserved the right upon thirty days notice to the trustee to revoke, alter or amend said trust at any time, with the provision that after the decease of the donor her husband, E. E. Stone should have the same right to revoke, alter or amend said trust. Pursuant to the provisions of this trust agreement, the certificates, three in number, evidencing the issue of these shares of stock to Florence J. Stone, were indorsed, assigned and transferred to the Union Trust Company of Pittsburgh, the trustee named in said agreement, which company has continued to hold such shares of stock, thus transferred for the uses and purposes of said trust agreement.

Notwithstanding this trust agreement and the assignment and delivery of the shares of stock here in question to the trustee therein named pursuant to the terms of said agreement, the county auditor assessed said shares of stock for taxation for the year 1928 in Cuyahoga County, apparently on the view that by reason of the purpose of said trust agreement and the revocable nature of the same said shares of stock were, as a matter of law and fact, still the property of said Florence J. Stone and assessable for taxation at the place of her residence.

The power of taxation residing in the General Assembly of this state is included within the general grant of legislative power vested in the General Assembly by the provisions of Section 1 of Article II of the State Constitution; this power of taxation is subject to some implied limitations inherent in the nature of the power itself, but otherwise said power is subject only to such limitations and restrictions as are ex-

pressed in the state and federal constitutions. Pursuant to the taxing power thus granted and the mandate contained in Section 2 of Article XII of the State Constitution, the Legislature has enacted statutory provisions for the taxation of real and personal property. Without discussing the statutory provisions touching the question, it may be observed that except as limited by the provision of Section 5372, General Code, that no person shall be required to list for taxation any shares of the capital stock of a company, the capital stock of which is taxed in the name of such company, shares of stock in a foreign corporation owned and held by residents of this state are taxable in this state at the place of residence of the owner or of the person holding the legal title to such shares of stock. *Bradley* vs. *Bauder*, 36 O. S., 28; *Lee* vs. *Sturges*, 46 O. S., 153. In such case the taxability of such shares of stock is not affected by the fact that the certificates evidencing these shares of stock may, for some purpose of the owner, be held outside of the state. *State* vs. *Kidd*, 125 Ala., 413; *Com.* vs. *Peebles*, 134 Ky., 121; *Com.* vs. *Bingham*, 188 Ky., 616; *Com.* vs. *Williams*, 102 Va., 778; *State* vs. *Great Northern R. R. Co.*, 139 Minn., 469; *McKennon* vs. *McFall*, 127 Tenn., 393. So in the case here presented, if as a matter of law and fact, the shares of stock here in question are owned by Florence J. Stone, they are taxable in her name, in Cuyahoga County, notwithstanding the fact that the certificate respresenting such shares of stock may be held by the Union Trust Company of Pittsburgh at its office and place of business in said city and state. However, the State of Ohio has no power to subject to taxation things wholly beyond its jurisdiction and control and if in this case said shares of stock are owned and held by the Union Trust Company of Pittsburgh, the State of Ohio may not, consistent with the due process clause of the Fourteenth Amendment to the Constitution of the United States, assess a tax against said shares of stock as the corpus of the trust estate owned and held by said the Union Trust Company of Pittsburgh as trustee under said trust agreement. *Brooke* vs. *City of Norfolk*, 277 U. S. 27. In this case it was held that the beneficiary of a trust consisting of property located in another state and bequeathed by a resident of such state to a trustee, also a resident of such other state, is not subject to taxation in the state of the residence of such beneficiary upon the corpus of the estate. See also for this point the case of *Wachovia Bank and Trust Co.* vs. *Doughton*, 272 U. S. 567; *Safe Deposit & T. Co.* vs. *Virginia*, decided by the Supreme Court of the United States, and reported in 74 L. Ed. 76. No question is here presented with respect to the taxability of the respective interests of the beneficiaries of the trust here in question, but the question presented is one with respect to the right to tax in the name of the donor of said trust shares of stock which constitute the corpus of said trust estate, and assuming the validity of said trust agreement and that the trustee therein named owns and holds said shares of stock as the corpus of said trust, it follows upon the considerations above noted that the assessment of said shares of stock for taxation in this state is invalid, as an act beyond the power of the State and of Cuyahoga County.

This leads to a consideration of the validity of said trust agreement with respect to the question of taxation of the property composing said trust. In this view the first question presented is as to the effect of the power reserved by Florence J. Stone in said trust agreement to revoke the same. In this connection it is to be noted that said trust agreement was signed by Florence J. Stone on January 28, 1928, and accepted by the Union Trust Company of Pittsburgh through its authorized officers at Pittsburgh on the same date. In this view and by reason of the further fact that said trust agreement is to be carried out and performed in the State of Pennsylvania, the validity and construction of said trust agreement is to be determined by the laws of the State of Pennsylvania. In the case of Dolan's Estate, 279 Pa. 582, it was held that a reserved right of revocation in a deed of trust is not inconsistent with the creation of the trust; and that if the right is not exercised during the lifetime of the donor according to the terms reserved, the validity of the trust remains unaffected, as though there had never been a reserved right of revocation. In the case of Dickerson's Ap-

peal, 115 Pa., 198, it was said that: "A reserved right of revocation is not inconsistent with the creation of a valid trust." Other Pennsylvania cases to the point that revocable trusts are valid and pass a present estate to the trustee are *Lines* vs. *Lines*, 142 Pa. 149; *Windolph* vs. *Girard Trust Co.*, 245 Pa. 349; *Houston's Estate*, 276 Pa. 330.

Although it may perhaps be beside the point, it may be noted that, measured by the statutory law of this state, the validity of a trust agreement of this kind is not affected by the fact that the donor of the trust may reserve to himself the power to alter, amend or revoke such trust. Section 8617, General Code, provides that all deeds of gift and conveyances of real and 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 that 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 that such trust shall be valid as to all persons, except that any beneficial interests reserved to such creator shall be subject to be reached by the creditors of the creator of such trust. See *Union Trust Co.* vs. *Hawkins*, 121 O. S. 159.

The remaining question here presented is whether the purpose sought to be accomplished by the trust agreement here in question was an evasion of taxes such as would invalidate said agreement and render the shares of stock involved in said trust agreement subject to taxation in the name of Florence J. Stone at the place of her residence. In the case of *Conn.* vs. *Jones*, 115 O. S. 186, it was held that the provisions of Section 5616, General Code, authorizing the Tax Commission to hear and determine complaints with respect to the liability of property for taxation in this state, afford a remedy concurrent with that provided for by Section 12075, General Code, under which a property owner may apply for an injunction in a court of competent jurisdiction to enjoin the levy and collection of illegal taxes upon his property; and I am inclined to the view that you are not authorized to afford said Florence J. Stone any relief under the complaint which she filed with you under the provisions of Section 5616, General Code, unless the case is such that she could enjoin the levy and collection of the tax complained of in an action brought by her under the provisions of Section 12075, General Code. Touching the immediate question here under consideration, it is contended by the county auditor that notwithstanding said trust agreement and the assignment and transfer of said shares of stock to the trustee therein designated, said Florence J. Stone, through said E. E. Stone as her agent, has in fact reserved control over this property and in support of this claim two communications directed by said E. E. Stone to the Union Trust Company of Pittsburgh, relating to the disposition of said shares of stock are noted. In one of these communications, which is under date of October 20, 1928, it is said: "I confirm phone conversation at 9:32 this morning requesting you not to sell the 770 shares Blaw-Knox stock from the Florence J. Stone trust, please be governed accordingly." In the other communication above referred to, which is under date of October 22, 1928, it is said: 'Confirming phone conversation this morning, place that order, good until further advised, to sell from the Florence J. Stone trust, 770 shares of stock at $148.00 per share." However, there is nothing in the evidence presented on the hearing of this complaint showing that said trustee gave any consideration to the request made in the communications of said E. E. Stone. On the contrary, it appears that said stock was not sold by the trustee pursuant to the direction of said E. E. Stone, or otherwise, but that at the time this matter was heard by you such shares of stock were still held by the trustee. By way of explanation of the communications of E. E. Stone to the Union Trust Company of Pittsburgh above referred to, it is stated in an affidavit of one of the officers of said company that it is customary for a trust company to have communications with settlors of trusts or their representatives in regard to the possible sale of securities constituting a part of the trust estate, regardless of the fact that the legal right is given to the trust company to make such sales without consultation; and that the letters written by said E. E. Stone are of the tenor and

purport of letters received by the trust company from settlors of trust estates or their representatives with respect to trust agreements made by said trust company wherein the power is given to it to sell securities constituting a portion of the trust estate and to invest the proceeds thereof without the consent, approval or advice of the settlor or of anyone acting in his or her behalf. In said affidavit it is further stated that such communications as had been had between any person representing said Florence J. Stone and the Union Trust Company with respect to the sale of securities constituting the trust estate have been wholly a matter of courtesy to Mrs. Stone and not in derogation of any rights given to said trust company with respect to the sale of such securities. In the case of *Sisler, Auditor,* vs. *Foster,* 72 O. S. 437, it was held:

> "The maxim that one who seeks the aid of a court of equity must come with clean hands has especial application to a case where the owner of promissory notes has, without valuable consideration, placed the legal title to the same in another by an instrument in writing purporting to be a deed of trust, but which, if given full effect, would avoid the payment of taxes upon the property at the place of such party's residence. And where the conduct of the party, taken in connection with the terms of the instrument, indicates a purpose to retain in himself the full and actual control of the property, and he does in fact maintain such exclusive control, and also shows unmistakably that the real purpose of the transaction was to escape the payment of taxes in the taxing district where he resides, the court will refuse to enjoin the county auditor from placing such property on the duplicate for taxation."

An examination of the facts set out in the report of the case of *Sisler* vs. *Foster,* supra, shows that the pretended trust arrangement under consideration in that case was a mere subterfuge and that after the trust agreement, as well as before, Foster either in person or through others under his direction had control not only of the income, interest and profits of the notes and mortgages constituting the corpus of the pretended trust, but that after the lapse of a short time he, in the same manner, had possession of said notes and mortgages.

Although the underlying purpose of Florence J. Stone, in entering into the trust agreement here under consideration, was to avoid the payment of taxes on the shares of Blaw-Knox, the stock held by her, I am unable to say as a matter of law on the facts presented to me that this trust agreement and the transfer of this stock to the trustee therein named was a mere subterfuge, shift or manipulation for the purpose of evading the payment of taxes. The mere fact that the actuating motive of Mrs. Stone in executing and carrying out this trust arrangement was to avoid the payment of taxes on said shares of stock at the place of her residence in the State of Ohio, would not in itself present a case of illegal tax evasion which would justify the Tax Commission of Ohio or a court of competent jurisdiction in like situation in ignoring the trust, and in upholding a tax assessment upon said shares of stock as if said trust agreement had never been entered into. The fact that one disposes of his property for the purpose of avoiding taxation thereon does not in itself affect the validity of the transaction. In the case of *Ransom* vs. *City of Burlington,* 111 Iowa 77, it was held that: "While one may lawfully dispose of his property to escape taxation, the law will not uphold any mere manipulation under the guise of a disposition, the only effect of which is to defeat the tax." See *Mitchell* vs. *Board,* 91 U. S. 206; *Shotwell* vs. *Moore,* 129 U. S. 590. If in the case here presented, said Florence J. Stone made an actual and bona fide disposition of the shares of stock here in question to the Union Trust Company of Pittsburgh, pursuant to the terms of this trust agreement, and if said trust agreement is being carried out in good faith for the declared purposes of said trust, the assignment and transfer of this property to said trustee was valid, notwithstanding the fact that the actuating purpose in the arrangement was to avoid payment of taxes

on the shares of stock which now constitute the corpus of the trust estate; and in such case, the shares of stock constituting the corpus of such trust estate cannot legally be assessed for taxes in the name of said Florence J. Stone, at the place of her domicile in Cuyahoga County.

Respectfully,
GILBERT BETTMAN,
*Attorney General.*

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1323.

GENERAL APPROPRIATION ACT—PUBLIC WORKS DEPARTMENT UNAUTHORIZED TO EXPEND MONEY FOR PURCHASING LAND FOR ROAD.

*SYLLABUS:*

*Under the present appropriation bill there is no authority whereby the Department of Public Works can make an expenditure for the purchase of land for road purposes.*

COLUMBUS, OHIO, December 23, 1929.

HON. HARRY D. SILVER, *Director of Finance, Columbus, Ohio.*

DEAR SIR:—Your assistant Director of Finance has requested my opinion upon the following:

> "The Board of Control on November 4 released the sum of $400 from the Maintenance Appropriation of the Department of Public Works for the purchase of approximately 2¼ acres of land near Buckeye Lake for the purpose of extending a road. The Department of Public Works has requested the Department of Finance to allot the funds in order to make them available for expenditure. The question which arises at the present time is whether or not an expenditure for the purchase of land can be made from an appropriation for maintenance purposes. We will be pleased to have you advise us whether or not the Maintenance Appropriation of the Department of Public Works can be spent for this purpose and if not, whether there is any other fund from which such an expenditure can be made legally."

In considering your inquiry, it should be noted that Section 22 of Article II of the Ohio Constitution provides no money shall be drawn from the public treasury except in pursuance of specific appropriation. Since the adoption of the above constitutional provision in 1851, it has been the established policy of the Legislature to specify in more or less definite terms the purposes for which a given appropriation is to be used. That is to say, the Legislature has uniformly followed the policy of definitely appropriating money for salaries, maintenance and additions and betterments, and frequently has definitely specified as a subdivision of additions and betterments "lands." While it is admitted that it is unnecessary for the Legislature to make a detailed appropriation, yet when it does make a detailed appropriation, it is conceded that that detail must be followed in making the expenditure.

In examining the appropriation acts of the 88th General Assembly as suggested in your inquiry, there appears to be no specific appropriation for the purchase of land by the Department of Public Works.

Section 4 of the general appropriation bill, House Bill No. 510 of the 88th General Assembly, authorizes the Controlling Board among other things:

"* * *