a contract, is sufficiently definite and certain in its provisions to give rights to definite legal obligations on the part of the several parties to the contract.

Upon consideration of the provisions of said lease, I am of the opinion that the same are in substantial conformity with the provisions of sections 431 and 14009, General Code. I am accordingly hereby approving said lease, as to legality and form, and my approval is endorsed upon said lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3074.

TAXATION—WHAT IS CONSIDERED DOUBLE TAXATION—SECURITIES FOUND IN DECEDENT'S ESTATE—CERTIFICATES OF PARTICIPATION IN FIRST MORTGAGE LOANS ONLY CONSTITUTE AN EQUITABLE INTEREST.

SYLLABUS:

Section 2 of article XII of the constitution of the state, as in force in the year 1930 and prior years, requiring all property to be taxed by uniform rule, was an implied prohibition against the double taxation of property in this state. And the shares or interests represented by certificates of participation issued against first mortgage notes and the income thereof in the hands of a trustee are not taxable in this state to the owner or holder of such certificates of participation, where said first mortgage notes and the income thereof constituting the corpus of the trust fund are taxable in the hands of a trustee residing and administering said trust in this state.

COLUMBUS, OHIO, March 21, 1931.

HON. JAMES M. AUNGST, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication which reads as follows:

> "I would appreciate having your opinion upon a question which has been submitted to my office by the taxing authorities of this county.
>
> During her lifetime a decedent owned a number of Certificates of Participation in First Mortgage Loans, these certificates being a part of an issue put out by the Canton Bank and Trust Company. These securities, along with others, were set forth in the inventory of her estate. The taxing authorities were inclined to list these securities for taxation for a number of years back, inasmuch as decedent had not returned them for taxation. The executors are claiming that the certificates are not taxable, on the theory that they represent a mere equitable interest in mortgages owned by and taxable if at all, in the hands of the issuing bank,—that is that they are somewhat akin to Land Trust Certificates which are not taxable because they represent merely an undivided interest in property which is itself otherwise taxed.
>
> The certificates in question are issued under a declaration of trust

by the bank in which first mortgage notes of a total value of One Hundred Thousand Dollars ($100,000) together with mortgages securing the same, are withdrawn from the files of the bank and deposited in the Trust Department of the bank for the purpose of the issue of certificates of participation to a total amount not exceeding One Hundred Thousand Dollars ($100,000). The notes and mortgages expressly remain under the 'absolute control, management and possession of said bank and may be withdrawn from the Trust Department from time to time by substituting for such mortgage notes withdrawn, cash or other first mortgage notes of like value.' The certificates may be issued in any denomination and draw interest at the rate of six percent (6%) per annum and are said to be mature in five years from date of issue of said certificates. Although there is no promise to pay any definite sum at any definite date, the certificates provide an expiration date and a provision that the holder, upon giving a written notice to the bank before expiration of the certificate, shall be entitled after expiration, to receive the amount represented by the certificate as rapidly as the bank, in due course of business receives a sufficient amount of principal from said notes to pay off all outstanding certificates. There is a further expressed provision that if all certificates are not paid upon maturity, the holder of each shall be entitled to receive his pro rata share of any interest thereafter collected without deduction of trustee's compensation.

The estate bases its claim as to nontaxability upon these features: (1) that no definite promise to pay is made, promise such as is found in a bond or note; (2) that the holder may only receive part of the face of the certificate in case of decline in property or mortgage values; and (3) that the certificates purport to be only undivided interests in property the legal title to which is in the bank or issuer.

We will be very glad to have your opinion so that we may advise the taxing authorities accordingly."

The question presented in your communication arises apparently out of the intended action of the county auditor of Stark County, Ohio, under authority of section 5398, General Code, in assessing for purposes of taxation to the estate of the decedent referred to by you, the value of certain property owned by said decedent in her lifetime and which was not returned by her for taxes for a number of years preceding her death, and thereby making the taxes so assessed and the penalties thereon a charge against said estate in the manner provided for by said section and by section 10662 of the General Code.

The property referred to in your communication as the object of the proposed action of said county auditor is that represented by certificates of participation in certain notes and the income thereof secured by first mortgages on real property, which notes and the mortgages securing the same are held by the Canton Bank and Trust Company in Canton, Ohio, as trustee, and against which notes and mortgages the certificates of participation here in question were issued.

The only character that I am able to ascribe to the shares or interests represented by the participating certificates referred to in your communication on the facts therein stated, is that of equitable interests in the notes and the income thereof and mortgages securing the same, held by said trustee.

Although the shares or interests represented by said participating certificates are equitable interests only, they were and are property. *Williston Seminary* vs.

County Commissioners, 147 Mass. 427; *Village of St. Albans* vs. *Avery,* 95 Vt. 249; see *Anderson* vs. *Durr, Auditor,* 100 O. S. 251. And aside from the question of the double taxation of property presented by the facts set out in your communication, it is not doubted that such equitable interests are property which is subject to taxation in this state under the comprehensive terms of section 5328, General Code, which provides that all real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. *City of St. Albans* vs. *Avery, supra; McCenoy* vs. *County Commissioners,* 153 Md. 25; *First Trust and Savings Bank* vs. *Los Angeles County,* 206 Calif. 240; *Anderson* vs. *Durr, supra.* In this connection it may be observed that in Opinion No. 1652, directed to the Tax Commission of Ohio under date of March 22, 1930, I held that shares represented by investment trust certificates issued against the corpus of an investment trust fund held by a trustee in another state, were, as equitable interests, taxable in the hands of residents of this state, although the moneys and securities constituting the corpus of such trust fund were likewise taxable in the hands of the trustee in such other state.

However, in the case here presented, the notes and mortgages securing the same constituting the corpus of the trust fund against which the participating certificates here in question are issued, are taxable in the hands of the trustee above named in this state, and, for that matter, in the same county in which said decedent lived during the years in which it is claimed she should have returned for taxation the shares or interests represented by the participating certificates above referred to. The trustee above named was required to list said mortgage notes for taxation in each and all of the years here in question, by virtue of sections 5370 and 5372-1, General Code, which provide that personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, in the possession or control of a trustee on the day preceding the second Monday of April in any year, on account of any person or persons, shall be listed by the person having the possession or control of such property and be entered upon the tax lists and duplicate in the name of such trustee.

Mortgage notes such as those held by the trustee in this case, are technically taxed as credits, but nevertheless as intangible personal property. And when such mortgage notes are taxed, they are assessed for the purpose to the extent of their real value in money without reference to any division in the title or interest by which they are owned and held, and in such manner as to comprehend every interest, whether legal or equitable, in and to such property. Touching this question it is obvious that the transaction whereby said mortgage notes were deposited with the Canton Bank and Trust Company in trust for the benefit of the holders of the participating certificates issued against such mortgage notes as a trust fund, and thereby effecting a division of the title by which such mortgage notes were owned and held, did not increase the amount of taxable property represented by the mortgage notes; nor did such transaction subject the property, the title to which was thus divided, to the liability to be taxed twice. But if the legal and equitable owners are both taxed this result follows, and double taxation becomes an accomplished fact. *Berry* vs. *Windham,* 59 N. H. 288.

That which constitutes double taxation is usually stated negatively, or in terms of what does not constitute double taxation in the objectionable or prohibited sense. Thus in the opinion of the court in the case of *Bradley* vs *Bauder,* 36 O. S. 28, 35, it is said that double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same property within the same jurisdic-

tion. The rule is stated somewhat more comprehensibly in 37 Cyc., at page 753, as follows:

> "Double taxation in the objectionable or prohibited sense exists only where the same property is taxed twice when it ought to be taxed but once, and to constitute such double taxation the second tax must be imposed upon the same property, by the same state or government, during the same taxing period, * * * but there may be double taxation in requiring a double contribution to the same tax on account of the same property, although the assessments are to different persons."

The certificates of participation here in question are but equitable interests in the mortgage notes held by the trustee; and it is evident that if such certificates of participation be taxed to the extent of their value as equitable interests in the mortgage notes, and such mortgage notes are likewise taxable to the full extent of their value in the hands of the trustee, the net result of the transaction will be to tax the mortgage notes here in question and the property interests therein at a greater rate than that which would be levied on mortgage notes of like value owned and held by absolute title by some individual or corporation in said county. A tax so levied would, in my opinion, exihibit all the essential elements of double taxation in the objectionable sense in which that term is used.

There is nothing in the constitution or laws of this state which *eo nomine* prohibits the double taxation of taxable property in this state. However, the question here presented requires a consideration of the provisions of section 2 of article XII of the state constitution in force during the year 1930 and the years prior thereto for which the county auditor of said county seeks to assess taxes against the estate of said decedent as taxes omitted from the return of the decedent in said years. In this situation the provision of section 2 of article XII, then in force, requiring all property to be taxed by a uniform rule, effectively prohibited the double taxation of the mortgage notes here in question such as would have been effected by taxing said notes at their full value in the hands of the trustee, and by again taxing the equitable and beneficial interest in such mortgage notes in the hands of the owners of said participating shares by which the equitable and beneficial interests in said mortgage notes was represented. *Ach, Treas.,* vs. *The First National Bank of Cincinnati,* 34 O. App. 420.

Giving effect to the decision of the court of appeals in the case above cited, the taxation of the shares or interests represented by the certificates of participation here in question would be no less double taxation even though on any view we were to ascribe to such shares the character of legal interests or property as distinguished from mere equitable interests in the mortgage notes against which such certificates are issued.

I am of the opinion therefore, upon the considerations above referred to and discussed, that the certificates of participation referred to in your communication, were not taxable during the years here in question, and that the county auditor is not now authorized to assess the same for taxation against the estate of said decedent by reason of her failure to list said certificates of participation or the interests represented thereby in said years.

Respectfully,

GILBERT BETTMAN,
Attorney General.