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TAXABLE SUCCESSION — WHEN PROPERTY IS CONVEYED TO HUSBAND AND WIFE AND TO THE SURVIVOR AND TO HEIRS AND ASSIGNS OF SURVIVOR, UPON DEATH OF ONE OF SUCH GRANTEES, TAXABLE SUCCESSION PASSES TO SURVIVOR — SECTION 5332, PARAGRAPH 5 G.C.

SYLLABUS:

When property is conveyed to a husband and wife and to the survivor and to the heirs and assigns of the survivor, upon the death of one of such grantees a taxable succession passes to the survivor under the provisions of the fifth paragraph of Section 5332, *General Code.*

Columbus, Ohio, March 19, 1941.

Hon. William S. Evatt, Tax Commissioner,
Columbus, Ohio.

Dear Sir:

Your request for my opinion reads as follows:

"On two previous occasions since the enactment of Section 5332 of the General Code, this department directed a question as to the applicability of Paragraph 5 of said section to the declaration of a taxable succession under the following facts:

A grantor, X, for a valuable consideration, conveyed certain real estate by deed to A and B, husband and wife, and to the survivor and to the heirs and assigns of such survivor. Upon the death of B, does a taxable succession pass to A, the joint grantee in said deed?

We refer to an opinion appearing in Opinions of the Attorney General for 1920, Vol. I, page 473 and one appearing in Opinions of the Attorney General for 1922, Vol. II, page 1001.

Since the foregoing opinions were rendered by your office, the Supreme Court of Ohio decided the case of Tax Commission v. Hutchinson, 120 O.S., 361. We believe the following cases may also be pertinent: Tax Commission v. Reeves, 11 Ohio Law Abstract, 154 and 574; James E. Tyler, Jr., et al. v. U.S., 281 U.S. 497, 74 L.Ed. 991.

We shall greatly appreciate it if you will review the 1922 opinion of your office, supra, in the light of the above cited de-

cisions and advise us whether or not in your opinion this 1922 opinion is still declarative of the law of Ohio."

The fifth paragraph of Section 5332, General Code, reads as follows:

> "A tax is hereby levied upon the succession to any property passing, in trust or otherwise, to or for the use of a person, institution or corporation, in the following cases: * * *
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> 5. Whenever property is held by two or more persons jointly, so that upon the death of one of them the survivor or survivors have a right to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right by the death of one of them shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the enhanced value of the whole property belonged absolutely to the deceased person, and had been by him bequeathed to the survivor or survivors by will. * * * "

The first branch of the syllabus of Opinion No. 1169, found in the Opinions of the Attorney General for 1920, Vol. I, page 473, referred to in your letter, is as follows:

> "A deed of real estate in Ohio to 'V. and E. and to the survivor of them and the heirs and assigns of such survivor forever' vests in V. and E. estates in common for their joint lives with a remainder in fee to the survivor. The death of V. after June 5, 1919, does not give rise to a taxable succession under the inheritance tax act of 1919 where the conveyance was made prior to June 5, 1919."

In support of this conclusion the former Attorney General said:

> "The first question, however, does not seem to offer great difficulty. It is assumed that the real estate in question is located in Ohio. There seems to be no intention to create what was known as a joint estate at common law, and if there had been such intention it would have been ineffectual as such estates are not known to the law of Ohio.
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> Sergeant vs. Steinberger, 2, Ohio, 305.
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> The legal effect of the conveyance mentioned in the first question therefore would seem to be an estate in common in V. and E. for their joint lives, remainder in fee to the survivor of them.
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> This being the case, V.'s death after the going into effect of the act of June 5, 1919, does not give rise to a taxable succession under that act, as the estate in fee thereby arising in E. was vested in interest, though not in person, prior to June 5,

1919. This is true whether the original conveyance was donative in character or not.

The reason for this conclusion lies in the fact that the estate of E. was created by conveyance inter vivos and not by death. Nothing appears to indicate that it was even a conveyance in contemplation of death or intended to take effect in possession or enjoyment after the death of the grantor. Even if it were, the schedule of the act of June 5, 1919, excludes such conveyance occurring prior to that date from the operation of that act, as the commission has previously been advised."

The same conclusion was reached in Opinion No. 3791, Opinions of the Attorney General for 1922, Vol. II, page 1001, also noted in your letter, the syllabus thereof being as follows:

"Since June 5, 1919, X for a valuable consideration conveyed certain real estate to A and B, husband and wife, and to the survivor and to the heirs and assigns of such survivor, B died.

HELD. No succession taxable under the inheritance tax law of Ohio thereby arose."

In arriving at this conclusion, it is said in the body of the opinion:

"In this case the estates of A and B while both were living were undivided half interests in the whole of the real estate for their joint lives with a contingent remainder to the survivor.

You refer to an opinion found on page 473 of the Opinions of the Attorney General for 1920 wherein a somewhat similar question is considered. In that opinion it was intimated that the remainder was vested. This is probably an inadvertence. The remainder is not vested in such a case because who is to take cannot be ascertained until the death of one of the tenants in common.

On the death of B, therefore, A acquired an estate in fee simple in the whole tract which he therefore did not have as remainderman or otherwise. This was not a succession from B because A did not succeed to anything that B had theretofore. Whether or not it is a taxable succession under the inheritance tax law of this state depends upon whether the law enlarges the class of ordinary successions so as to embrace devolutions of title of this character within the scope of its provisions.

In the opinion of this department the case is not within sub-paragraph 5 of section 5332 of the General Code, which applies only to technical joint estates as has been heretofore held."

By the use of the expression "technical joint estates," I assume the former Attorney General referred to joint tenancies as known under the common law wherein two or more persons had one and the same interest

in a property, their interest having been acquired by the same conveyance, to take effect at the same time and be held by one and the same undivided possession during their lives, and having as one of its primary distinguishing features the right of survivorship whereby the entire estate upon the death of any of the joint tenants passed to the survivors and so on to the last survivor who took an estate of inheritance free from all claims of heirs and devisees of deceased cotenants. If such estate exists in Ohio today, obviously, upon the death of B in the case you have described, the succession to A is subject to the succession tax. But our Supreme Court has said on several occasions the estate of joint tenancy does not exist in Ohio. Sergeant v. Steinberger, 2 O., 305; Miles v. Fisher, 10 O., 4; Wilson v. Fleming, 13 O., 68; Farmers' and Merchants' National Bank v. Wallace, 45 O.S., 152; and In re Hutchinson, 120 O.S., 542. Thus it is seen that by an unbroken line of decisions commencing in 1826 the Supreme Court has denied the existence of joint tenancies in this state. Yet, in 1919 the Eighty-Third General Assembly amended and reenacted the inheritance tax laws, including Section 5332, supra, and for the first time included in the definition of a taxable succession the right acquired by the survivor or survivors of two or more persons who had owned property jointly. It hardly seems possible that the legislature could have had in contemplation only joint tenancies as existed under the common law at a time when the courts had been saying for nearly a century that such tenancies no longer existed in Ohio. I think the words "held * * * jointly" must be interpreted in a more liberal manner so as to include not only joint tenancies but tenancies in common and by entirety.

In Lewis v. Baldwin, 11 O., 352, the grant was to husband and wife "jointly, their heirs and assigns, and the survivor of them, his or her separate heirs and assigns." In the opinion of the court by Birchard, J., it was said:

> "Complainants contend that this makes them tenants in common with Baldwin, because, otherwise, the deed would be considered as creating a joint tenancy. But the respondent, Baldwin, has a fee by the terms of the grant, which was to him as survivor, and to his heirs and assigns. The deed gave a joint estate to the husband and wife, during their lives, and a grant over to him, as survivor, of the entire estate.
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> No perpetuity is created by such a grant. He holds title, not upon the principle of survivorship, as an incident to a joint tenancy, but as grantee in fee, as survivor, by the operative words

> of the deed. The entire estate, by the death of the wife, is vested in him and his heirs. This is the effect of the words of grant, contained in the instrument of conveyance. Bill dismissed."

Applying the rule pronounced in Lewis v. Baldwin, supra, to the situation outlined in your letter, it appears that upon the death of the wife, B, A, the widower, as survivor, acquires the entire fee to the realty "not upon the principle of survivorship, as an incident to a joint tenancy, but as grantee in fee, as survivor, by the operative words of the deed."

In the 1922 opinion the A and B there under consideration, while living, were said to hold undivided half interests in the whole of the real estate for their joint lives with a contingent remainder to the survivor. While the nature of their interests may not be determinative of the question under consideration, it was at least a matter discussed in reaching the conclusion you have requested me to reconsider. In 16 O. Jur., 479, section 98, it is said:

> "A contingent remainder is one where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event, so that the particular estate may chance to be determined and the remainder never take effect. It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. Where there is neither an immediate right of present possession nor a present fixed right of future possession, a remainder is contingent."

A vested remainder is defined in 16 O. Jur., 467, section 91, where it is said:

> "A vested remainder is one by which a present interest passes to a party, though to be enjoyed in the future, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent."

On page 468, section 92, in the discussion of vested remainders, it is said:

> "A remainder which is otherwise vested is none the less vested because it is liable to be devested by a subsequent event, nor is it made contingent by the fact that the interest of the remainderman may be devested by his death before the death of the life tenant. There is a clear distinction between contingent estates which may vest, and vested estates which may be defeated upon the happening of a future event."

See also Jeffers v. Lampson, 10 O.S., 101; Linton v. Laycock, 33 O.S., 128; and Collins v. Collins, 40 O.S., 353. In the case of In re Hutchison,

120 O.S., 542, similar interests were held to be vested as shown in the third branch of the syllabus:

> "Where two persons purchase property to be owned by them in common during their joint lives and at the death of either to become the property of the other each party has an undivided one-half interest during their joint lives and each has a vested estate in remainder in the one-half interest of the other."

I must therefore conclude that the former opinion is in error, at least in so far as it holds the interest of A and B to be contingent remainders.

The remainders being vested, it was urged in Hutchison v. Tax Commission, 120 O.S., 361, that no additional rights accrued to the survivor at the time of death, death being only an extinction of the decedent's rights, and that the tax was upon a succession and not upon an extinction. It was the view of the court, however, that until death, the owners held as tenants in common. Death terminated the right of the decedent and simultaneously effected a complete fee simple title in the survivor.

While the courts have said that joint tenancy does not exist in Ohio, as far back as 1842 it was recognized in Lewis v. Baldwin, 11 O., 352, that a conveyance to husband and wife "jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns" vested an estate in fee in the survivor. In the opinion it is stated:

> "No perpetuity is created by such a grant. He holds title, not upon the principle of survivorship, as an incident to a joint tenancy, but as grantee in fee, as survivor, by the operative words of the deed."

The right of parties to contract for survivorship, when clearly expressed, has been upheld in numerous cases in Ohio. Cleveland Trust Company v. Scobie, Administrator, 114 O.S., 241; Tax Commission v. Hutchison, 120 O.S., 361; In re Hutchison, 120 O.S., 542; Sage, Executor, v. Flueck, 132 O.S., 377; Berberick v. Courtade, 137 O.S., 297, 18 O.O., 50; Foraker, Executor, v. Kocks, Administratrix, 41 O. App., 210; In re the Estate of Dennis, Deceased, 30 O.N.P.(N.S.), 118; and Buckeye State Building and Loan Company v. Fridley, 9 O.L. Abs., 293, 28 O.N.P. (N.S.), 257. Marshall, C.J., said in the opinion of In re Hutchison, supra, at page 552:

> "If a joint tenancy is expressed * * * such words will not be disregarded."

In the case of Foraker, Executor, v. Kocks, Administratrix, supra, the first four branches of the syllabus are as follows:

> "1. Joint tenancy with incidental right of survivorship does not exist in Ohio.
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> 2. Notwithstanding nonexistence of joint tenancy with right of survivorship, parties may contract for joint ownership with such right.
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> 3. If joint tenancy is expressed without words of survivorship, it will be considered as tenancy in common.
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> 4. Although joint tenancy is expressed, survivorship is not presumed."

The syllabus of In re the Estate of Dennis, Deceased, supra, reads:

> "1. Joint Tenancy: As at common law does not exist in Ohio and none of the incidents of such a tenancy, such as the right of survivorship, but
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> 2. Survivorship: When created by act of a grantor in a deed, clearly expressed so as to show an intention to create this right, is not contrary to the law of Ohio.
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> 3. Deed Construed: When by deed Hammen conveys a lot by deed to Florence G. Dennis and Alvin T. Dennis, husband and wife, with these words 'unto said Grantees and the survivor of either, their heirs and assigns' and the habendum clause is 'unto said Grantees and the survivor of either, their heirs and assigns forever.' Held, that this creates an estate in fee simple in Florence G. Dennis at the death of Alvin T. Dennis, by the right of survivorship clearly expressed and intended by the grantor. The rule in Shelley's case does not apply.
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> 4. Rule in Shelley's Case: This is a rule that is a part of the law of Ohio as to deeds: It is a rule of property and not a rule of construction. It has been abolished as to wills by statute since 1840, Section 10578, General Code."

While several of the above cases relate to stock certificates and bank deposits, at least two of the cases dealt directly with real property. Furthermore, all agree that while the survivor acquires no additional rights by reason of joint tenancy, which the courts have said does not exist in Ohio, yet when an instrument clearly expresses an intention on the part of the grantor to have the survivor take, effect must be given to such operative words and the survivor succeeds to the interest of the decedent by virtue of their agreement.

As I have already stated, it was urged in Hutchison v. Tax Com-

mission, 120 O.S., 361, that, our inheritance tax being a succession tax, the survivor succeeded to nothing more than he already had, and there could be no tax. The same contention was made in Tyler v. United States, 281 U.S., 497, 74 L.Ed., 991, 50 Sup. Ct., 365, 69 A.L.R., 758, cited in your inquiry. This was answered by Mr. Justice Sutherland, who said:

> "Before the death of the husband (to take the Tyler Case, No. 428) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; but her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

In the Hutchison case Judge Robert H. Day said:

> "We are of opinion that by the death of James Hutchison there was an accrual to Letitia Hutchison of an exclusive right to the entire fund which she did not theretofore possess. The state claims that this amounted to one-half of the fund in question and was donative in character, and our conclusion is that the same is subject to the succession tax, as provided in Section 5332, General Code."

Each of the tenants, A and B, was subjected to the hazard of losing the complete estate to the other as survivor. United States v. Jacobs, 306 U.S., 363, 83 L.Ed., 763. In the case of Helvering v. Midland Mutual Life Insurance Company, 300 U.S., 216, 81 L.Ed., 612, Mr. Justice Brandeis said:

> "There is nothing unfamiliar in taxing on the basis of the legal effect of a transaction. Income may be realized upon a change in the nature of legal rights held, though the particular taxpayer has enjoyed no addition to his economic worth."

Returning now to a consideration of Section 5332, General Code, it will be recalled that a tax is levied upon successions. In the fifth paragraph a taxable succession is defined in part as follows:

> "Whenever property is held by two * * * persons jointly, so that upon the death of one * * * the survivor * * * have a

> right to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right by the death * * * shall be deemed a succession taxable under the provisions of this subdivision * * *."

No distinction has been made between real or personal property. "Held * * * jointly," as I have previously pointed out, does not mean held in joint tenancy, as at common law, for the courts have repeatedly said Ohio has no joint tenancy. It therefore follows that the term must be given a broader meaning. In 29 C.J., 758, under the definitions of the verb "hold," I find "as a technical term, 'hold' embraces two ideas, that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession. * * * The term may be employed as meaning to be in possession of; * * * to derive title to; * * * to have; to keep; to maintain authority over; to occupy; to own, have title to; to possess by lawful title; * * *." In 33 C.J., 875, "jointly" is defined as follows:

> "The word 'jointly' has a general meaning of plurality; more than one, both, all, and the like. It means in a joint manner; in concert; in conjunction; not separately; together; unitedly. Although the word 'jointly' as a legal term, when applied to real estate, involves the idea of survivorship, sometimes it is not used in that sense but in its ordinary meaning."

Applying these definitions to the words "held * * * jointly," found in the fifth paragraph of Section 5332, General Code, particularly when regard is given to the context of the entire section, I am of the opinion that the former Attorney General placed a construction on the section that was too narrow. The evident legislative intent was to prevent the circumvention of the inheritance tax laws by the creation of joint and survivorship ownerships. In Helvering v. Hallock, 309 U.S., 106, 84 L.Ed., 604, 60 Supreme Court, 441, 125 A.L.R., 1368, Mr. Justice Frankfurter, in discussing the relation of the "refined technicalities of the law of property" to taxation statutes, said:

> "The law of contingent and vested remainders is full of casuistries. * * * One of the cases at bar, No. 399, reveals vividly the snares which inevitably await an attempt to base estate tax law on the 'niceties of the art of conveyancing.' * * * The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax

> purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth."

It appears to have been the legislative intent to include all cases in which jointly owned property passed to the survivor or survivors upon the death of one of the owners. If the contrary were true, the words "so that upon the death of one of them the survivor or survivors have a right to the immediate ownership or possession and enjoyment of the whole property" would be meaningless and redundant, for the right of survivorship is one of the primary features of strict joint tenancy. This view has been taken by the Ohio courts in the cases of Tax Commission v. Hutchison, 120 O.S., 361, where joint bank accounts with provisions for survivorship were taxed and in Tax Commission v. Reeves, 11 O.L.Abs., 154, and on rehearing 11 O.L.Abs., 574, holding that bonds owned jointly with provisions for survivorship were subject to inheritance tax upon the death of one of the owners. While neither of these cases involve real estate, the reasoning found therein appears to be equally applicable.

In specific answer to your inquiry, I am of the opinion that when property is conveyed to a husband and wife and to the survivor and to the heirs and assigns of the survivor, upon the death of one of such grantees a taxable succession passes to the survivor under the provisions of the fifth paragraph of Section 5332, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.