substantially so in the sense required to furnish cogent proof of contemplation of death.

The following cases have been found in which courts have been called upon to consider transfers *inter vivos* made upon consideration of contracts for support and the like:

People vs. Burkhalter, 247 Ill. 600;
Re: Edgerton, 64 N. Y., Supp. 700.

Of course, in a sense the disposition looks forward to the death of the grantors, in that the consideration is an annuity for their lives and that of the survivor of them. But in the absence of any showing to the effect that an evasion of the inheritance tax law was attempted, it is not believed that the evidence afforded by the facts stated by the commission would be sufficient to establish the quasi testimentary intention which the statute requires.

In order to bring the case out in bold relief, suppose it be assumed that the conveyance was an out and out gift. Unless the property constituted practically the whole estate of the donors, or they were at the time in failing health with consciousness of shortly impending death, or proof were available of conferences, negotiations etc., looking to means of evasion of the inheritance tax law, or means of preventing the property from falling into the hands of some heir at law distasteful to the donors, a conveyance in contemplation of death could probably not be established. In this case there is a consideration which was theoretically inadequate at the time and turned out to be actually much more so. Yet, it was of a speculative nature, and it might conceivably have turned out to be more than adequate; that is, the church may have had to pay before the death of the survivor of the grantors a sum in excess of the value of the premises, though the younger of the two grantors would have had to attain the advanced age of ninety-four years in order to bring about such a result. Of course, the decision of the question of this kind cannot be arrived at as a proposition of strict law. The question in the last analysis is one of fact. The fact to be established is subjective and defies demonstration. The question is, what was the actual state of mind of these two aged persons? This can only be proved by what they did. This opinion is to be understood as going no further than to advise that in the judgment of this department, a court would probably not feel justified in finding the requisite "contemplation" from the facts given; but if other facts were adduced, it is conceivable that the result might be reversed by a very slight change in the evidence.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3373.

INHERITANCE TAX LAW—WHERE TESTATOR DEVISES HIS RESIDUARY ESTATE TO EXECUTORS AS TRUSTEES DIRECTING THEM TO PAY ALL TAXES, ETC., AND ALL EXPENSES OF MANAGEMENT INCLUDING REASONABLE COMPENSATION AND TO PAY OVER FROM TIME TO TIME TO EACH OF THREE NAMED PERSONS AMOUNT SUFFICIENT FOR NECESSARIES OF LIFE—ALSO OTHER STIPULATIONS FOR TRUSTEES—HELD, TAXES NOT DEDUCTIBLE—TRUSTEES' COMMISSIONS AND COST OF FILING ACCOUNTS DEDUCTIBLE—AMOUNT OF RIGHT RECEIVABLE BY ANY OF BENEFICIARY TRUST UNCERTAIN, INHERITANCE TAX UNDETERMINABLE AT PRESENT TIME.

Where a testator gives and devises his residuary estate to his executors as trustees,

*directing them to pay all taxes, assessments and charges on the property, and all expenses of management, including their just and reasonable compensation, and to pay over from time to time to each of three named persons from the clear net income "a sufficient amount of money as their necessities require for each of them to live comfortable and have all the necessaries of life, but not to live extravagantly", and in case of the incapacity of either "through sickness * * * or other cause then * * * to the one so incapacitated," and further directs that out of any surplus remaining after making such payments, and upon like terms and conditions, to contribute to the support of J and the education of her son M such amount as in their uncontrolled discretion the trustees may deem just and proper, and the contingent remainders over to the issues surviving C, W and L or either of them,*

HELD: (1) *The taxes, assessments and charges are not to be deducted from the residuary estate in the hands of trustees before the determination of the inheritance tax.*

(2) *The trustees' commissions and the cost of filing accounts required by the statute are to be deducted; this may be done by taking the present value of the annuity of an amount sufficient to cover the annual charges of this character, based on the life of the youngest possible beneficiary.*

(3) *The amount of right receivable by any of the beneficiary trust being uncertain and incalculable by any of the means required to be applied in determining the present value of annuities for sums certain, no inheritance tax on such residuary estate can at present be determined either as to the interests of the life beneficiaries or as to the contingent remainder under the highest possible rate.*

COLUMBUS, OHIO, July 21, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission has requested the opinion of this department on the following questions:

> "R died testate. By his will he appointed X and J as executors, directing them after payment of debts to transfer and deliver to the trustees under the will the residue of his property and estate.
>
> By item third he gave and devised such residue to X and J, (being the same individuals who are named as executors) and their successors to be held in trust. He further conferred on them full power of management, sale, disposition and reinvestment of the different items composing the residuary estate and then proceeds as follows:
>
> 'Out of the income realized from the use and management of said property and from all investments and investments made as herein directed, to pay all taxes, assessments and charges upon the property and estate and all expenses of this trust and the management of the estate, including the just and reasonable compensation of said trustees for their services.
>
> I will and direct that said trustees after paying said taxes, assessments and charges and expenses as hereinbefore directed, shall pay over from time to time to C, W and L, during each of their natural lives and in the order named from the clear net income arising from my said estate a sufficient amount of money as their necessities require for each of them to live comfortably and have all the necessaries of life but not to live extravagantly * * * and in case of the incapacity of either of said parties through sickness or other cause * * * then said trustees shall while such incapacity continues apply such payments to the one so incapacitated * * *.
>
> I further will and direct that if there is any surplus of income left after providing for C, W and L, that upon the same terms and conditions as the

payments are made to them that if in my said trustees' judgment Mrs. J, my niece, and her son, M, need assistance in their support and the education of said M, then my said trustees may contribute to them out of said surplus such sum as they may deem just and proper, and their determination as to their necessity and amount to be paid them hereunder is to be final and not reviewable by any court * * *.

This trust shall cease and determine upon the death of C, W and L, unless the said Mrs. J or her son M survive them, if either survive them then said trust shall continue until their death, then this trust is to cease upon their death and in the event of their dying without issue surviving them at their decease I give and bequeath all of said trust estate to the Board of County Commissioners of M county, Ohio, to be held by them as a fund for the purpose of assisting in the erection of a hospital in the village of L but in the event of either of said parties dying leaving issue surviving them then said issue is to take said trust fund share and share alike.'

Will you be good enough to advise the commission as to the following points?

1. What taxes, assessments and charges, if any, are to be deducted from the res duary estate in the hands of the trustees before the determination of inheritance tax?

For your information we may say that we have been advising probate judges when determining inheritance tax on the successions in a trust estate, to make no allowance for taxes to be paid or for trustee's compensation for services rendered in the management of the trust estate, on the theory that such taxes when paid and such services when rendered, inure for the benefit of the beneficiaries of the trust. It would seem, however, as though the testator in the instant case creates a succession only in the net estate and that the items mentioned should be deducted. If you shou'd so hold, on what basis can we arrive at the proper deduction to be made for taxes to be paid during the duration of the trust? The estimated value of the trust fund is $26,000.00 but it is invested at present largely in non-taxable securities.

2. What 'expenses of this trust and management of the estate, including just and reasonable compensation to said trustees for their services' should be deducted, if any?

It has been estimated that $150.00 per annum will cover the compensation of the trustees and the cost of filing the accounts required by the statute. Shall we deduct the present value of an annuity of that amount based on the life of M, who is by far the youngest beneficiary?

3. In view of the indefinite nature of the provision made by the will for C, W and L and the amount to be paid to each one by the trustees, how can the value of their successions be arrived at? It is to be noted that C, the first in order, is in the seven per cent class while the other two are in the five per cent class under the inheritance tax law.

4. In view also of the uncertainty as to whether or not there will be any surplus left after providing for C, W and L, so long as they shall live, how can the present value of the successions passing to Mrs. J and her son, M, be computed?"

It is understood that the trust is not one to pay taxes, assessments and charges which have fastened themselves on the property at the death of the testator, and consequently furnish no part of his estate to which succession takes place; but that these charges which the trustees are directed to pay are such as will accrue against the property after the death of the testator, and during the duration of the trust.

In the opinion of this department, the mere fact that the trustees are directed to

pay these charges, and their reasonable compensation out of the income is immaterial. This is merely a declaration of what the legal result would have been without any such stipulation, for though the trustees would be liable in the first instance for any taxes, assessments and charges upon the property, they would be entitled to reimbursement from the trust funds, and this reimbursement should be taken out of the income. The same is true as to the expense of the management of the estate. As to the reasonable compensation of the trustees, this is also chargeable to income.

In short, the trustees are to manage the estate and to pay over the net income from time to time to the persons who constitute the beneficiaries. As the commission puts it, the expenses are such as are necessary in the management and preservation of the estate, and inure to the beneficiaries of the trust. They are only such expenses as the full beneficial owner of the property would be subject to in the management and control of his own estate. Looking to the substance of things and disregarding the form of words used, it is the opinion of this department that the value of the trust fund to which succession takes place should in the first instance be determined without any deduction for future and anticipated expenses of this character. Putting it in another way, the interests of C, W and L, so far as they are ascertainable, are for inheritance tax purposes to be appraised as interests in the income of the entire fund. Obviously, no one else succeeds to the difference between gross income and what the will denotes "net income." The trustees themselves do not take beneficially, and it is going too far to say that the direction to pay taxes, etc., is in effect an equitable bequest to the public.

The commission's first question is therefore answered by the statement that no taxes, assessments or charges accruing subsequent to the death of the testator are to be deducted from the estate in the hands of the trustees before the determination of the inheritance tax.

As to the second question, a distinction may be taken. All that has heretofore been said applies to that part of it which relates to miscellaneous expenses of the trust and management of the estate. But a different question arises as to the commissions of the trustees, and the cost of filing the accounts required by the statute. This is because paragraph 6 of section 5332 seems to imply that trustees' compensation is to be deducted. That provision is as follows:

> "When a decedent appoints one or more executors or trustees, and instead of their lawful allowance makes a bequeath (bequest) or devise of property to them, which would otherwise be liable to such taxes, or appoints them as residuary legatees, and such bequest, devise or residuary legacy exceeds what would be a reasonable compensation for their services, such excess shall be a succession and liable to such tax, and the probate court having jurisdiction of their accounts shall fix such compensation."

Because of the presence of such a provision in the New York statute, it was held in Matter of Gihon, 169 N. Y. 443, that the statutory compensation of a trustee of a life interest is a proper deduction. Cullen, J. delivering the opinion of the court recognized the distinction

> "that may be made between the commissions of executors or administrators whose appointment is an absolute essential to the lawful liquidation of an estate and those of trustees who are appointed solely for the protection of the property of the beneficiary,"

and conceded that in logic "such latter commission should be considered as an expenditure for his benefit." But his conclusion was that

"whatever force there may be in this view, we think the deduction of the trustees' commissions is justified and required by section 227 of the Tax Law itself (like the Ohio law above quoted), which prescribes that any legacy or devise to trustees in excess of their commissions allowed by law shall be taxable, thus necessarily implying that legal commissions shall be exempt."

This decision was followed in re Silliman, 80 N. Y. Supp. 336.

In re Beck's Estate, 57 N. Y. Supp. 940, which makes the distinction suggested by Judge Cullen in the Gihon case, must be regarded as overruled in New York. This distinction was adhered to in State vs. Probate Court, 101 Minn. 485, though the Gihon case and the Silliman case were noted. In the Minnesota case, however, the deduction disallowed was not the statutory or "reasonable compensation" of the trustees, but a compensation arbitrarily fixed by the will itself. No such circumstance appears in the case submitted by the commission.

Although no authority has been found on the exact point, it is believed that the inference to be drawn from paragraph 6 of section 5332 of the General Code goes far enough to justify the deduction of the cost of filing the accounts required by the statute. The principle is that any costs of administration or of trust imposed by the law of the state itself is a proper deduction. The allowance of trustees' commissions by the court and the cost of filing the account are both charges imposed by law.

No objection is seen to the procedure suggested by the commission in its comment on the second question, namely, deducting the present value of an annuity in the amount of $150.00 which is estimated to cover the expense of the trustees and the cost of filing the account, based on the life of M, the youngest of the beneficiaries.

The third and fourth questions submitted by the commission are of considerable difficulty. It was evidently the intention of the testator that the trust fund should accumulate for the benefit of the remaindermen to the extent of the surplus, if any, over and above the amount required to satisfy the necessities of C, W and L, and the amount, if any, contributed by the trustees in their uncontrolled discretion for the support of Mrs. J and M, and the education of M. Moreover, it seems to be the testator's intention not to measure the respective shares of C, W and L by such amount as would be applied to support each of them respectively without other income, but rather to make such contribution to them as with the income which they are enabled to derive from their own respective efforts will enable them to live "comfortably and have all the necessaries of life, but not to live extravagantly." This intention is manifest from the fact that it is further directed that in the event of the incapacity of either of them, the trustees shall during incapacity apply all the payments to the incapacitated one. It is further made apparent by the nature of the stipulation with respect to their discretion in the payment of any surplus on behalf of Mrs. J and her son M, this being expressly declared to be contingent on the need of "assistance" in their support and the education of M.

From all these considerations it is clear that it cannot be said that the persons named as beneficiaries take a direct beneficial life interest in the corpus of the fund. In other words, it is an annuity of uncertain amount that each of them takes, and not a direct interest.

The nearest case in point is that of Howe vs. Howe, 179 Mass. 546. In that case the testator directed his executors and trustees to pay over to his sister quarterly during her life out of the residue of his estate "such sums as with the rents and income of her own property would give her a net annual income of $10,000." The court approved an assessment of tax on this interest as an annuity for an annual amount equal to the difference between the beneficiary's annual income from her own property at the time of the testator's death, and the sum of $10,000, being $8,546.80 a year. The court intimated that it might have been proper to value this as an annuity of $10,000 a year, subject to a reduction by the amount of the net income of any re-

ceipts received by the beneficiary from her own property, which not being shown, the value of the annuity might be fixed in the first instance at $10,000. Inasmuch as it had been fixed by the Probate court at the smaller sum, however, this was approved.

In this case, however, we have the additional difficulty that the amount of the total income which the testator desires to have C, W and L enjoy respectively is not named as it was in the case just cited, but is measured by their "necessities." Actually, it will be as to each the difference between his income and the amount required for him to live comfortably and have all the necessaries of life.

These interests are therefore not annuities in a strict sense, and they cannot be valued by the application of the principles stipulated for in section 5342 of the General Code. In the opinion of this department, it is impossible at the present time to value these successions,—certainly it is not possible without more evidence than is presented in the commission's letter. The whole succession both as to the life interests and the remainder is contingent, even if it be assumed that the trustees have not uncontrolled discretion in the amount of the payments which they are directed to make to C, W and L, and even though too the value of the whole trust fund is so small as to make it extremely likely that the whole net income will be paid out.

In State ex rel. vs. Probate Court, supra, the court held that no inheritance tax could be assessed until payments of this general character to life beneficiaries were actually made, and directed the lower court to make provision for imposing a tax "upon each installment paid the daughters under the law so as to secure to the state the full and proper rate imposed by the statute."

Whether such a procedure is practicable under the Ohio law this department feels unable to say. Strictly speaking, it seems to be required by section 5336 of the General Code, which provides in part as follows:

> "Taxes upon the succession to any estate or property, or interest therein limited, dependent or determinable upon the happening of any contingency or future event, and not vested at the death of the decedent, by reason of which the actual market value thereof cannot be ascertained at the time of such death, as provided in this subdivision of this chapter, shall accrue and become due and payable when the persons or corporations then beneficially entitled thereto shall come into actual possession or enjoyment thereof."

The same section makes trustees liable for all such taxes, etc., and directs them to deduct taxes therefrom or collect the same from the person entitled thereto, and not to deliver any property, the succession to which is subject to tax, to any person until he shall have deducted the taxes thereon. Literally, this would require a determination in the first instance under which the tax would accrue and become due and payable only if and when C, W and L or either of them should receive actual payments in excess of the amount of the exemptions to which they are respectively entitled, which in the case of C would be nothing, and in the case of W and L respectively would be $500.00. Possibly an arrangement of convenience might be worked out to avoid the detailed administration that would be necessary to carry out such an order.

For like reasons, the commission's fourth question must be answered by stating that there is no way of arriving at the present value of the succession, if any, passing to Mrs. J and her son M. Taxation should be postponed until the value becomes certain or calculated. The simple truth is that at the present time there is no way to estimate or calculate the extent of the beneficial interests of the *cestuis que trustent.*

For like reasons (though the commission does not ask this question), it is impossible at the present time to apply the highest possible rate section to the valuation of the contingent remainders.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3374.

DELINQUENT REAL ESTATE—MAY BE OFFERED FOR SALE WITHOUT APPRAISEMENT AND WITHOUT ANY EXEMPTIONS—SHERIFF AUTHORIZED TO ACCEPT ANY BID THOUGH AMOUNT NOT SUFFICIENT TO PAY TAXES, ETC.—WHETHER COURT MAY SET ASIDE OR REFUSE TO CONFIRM SALE NOT DECIDED—WHERE AMOUNT INSUFFICIENT TO PAY COSTS, ETC.—HOW APPLIED.

1. *Land sold in foreclosure proceedings for the enforcement of the lien for delinquent taxes and penalties under sections* 5718 *and* 5719 *of the General Code may be offered for sale for what it will bring without any appraisement and without any exemptions. The sheriff is authorized to accept any bid that is made, though the amount thereof may not be sufficient to pay the judgment for taxes, penalties and interest and the costs of the proceedings. Whether the court may set aside or refuse to confirm a sale under these circomstances is not decided.*

2. *If in such proceedings a sale is made or confirmed for an amount insufficient, to pay the costs and the judgment for taxes, penalties and interest, the costs constitute the first charge against the fund, after which the balance is to be applied on the claim for taxes, penalties and interest. Whether such proceedings discharge the state's claim for taxes, penalties and interest, or whether a personal liability still exists for the balance, and if so, how it may be enforced, are questions which are not decided.*

COLUMBUS, OHIO, July 21, 1922.

HON. LAWRENCE H. WEBBER, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—You have requested the opinion of this department on the following questions:

> "What constitutes a legal bid for land sold for delinquent taxes under section 5719 of the General Code?
>
> Two-thirds of the appraised value of course is the least the sheriff can sell land on execution. Section 5718 provides that the sheriff shall sell this land 'in the manner provided by law for the sale of real estate on execution.' As section 5719 provides that there shall be no appraisement, what is the least amount the sheriff can accept when this land is put up for public sale?"

Section 5718 of the General Code provides that the prayer of the petition in a suit brought to foreclose the lien of the state under an unredeemed land tax certificate shall in part be "that the court make an order that said property be sold by the sheriff of the county in the manner provided by law for the sale of real estate on execution."

Section 5719 of the General Code provides in part as follows:

> "Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty, interest and