3372.

INHERITANCE TAX LAW—WHERE HUSBAND AND WIFE, AGED RESPECTIVELY SEVENTY-FIVE AND SEVENTY-NINE YEARS CONVEY ABSOLUTELY REAL ESTATE TO CHURCH ON CONSIDERATION THAT CHURCH PAY GRANTORS $20.00 PER MONTH DURING THEIR JOINT LIVES AND LIFE OF SURVIVOR—WHEN SAID CONVEYANCE NOT TAXABLE.

Where a husband and wife aged respectively seventy-five and seventy-nine years convey absolutely certain real estate to a church for general church purposes, on consideration that the church would pay to the grantors the sum of $20.00 *per month during their joint lives and the life of the survivor, both grantors being in fair average health; and where their respective expectancies of life are such that the present worth of the annuity which constituted the consideration was less than the actual value of the land conveyed, such facts standing alone do not establish the taxability of the conveyance as a deed in contemplation of death, though both grantors actually died within* 18 *months after the conveyance.*

COLUMBUS, OHIO, July 21, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission has requested the opinion of this department as follows:

> "On March 2, 1920, Catherine T (aged 75 years), who was the owner of the fee, and Peter T (aged 79 years), her husband, by deed of general warranty conveyed certain real estate to ———————— church for general church purposes, the consideration being that said church would pay said grantors the sum of $20.00 per month during their joint lives and the life of the survivor. Both grantors at the time of the conveyance were in fair average health but Catherine died in March, 1921, and her husband in December following. The property conveyed was fairly worth $4,500.00 and had a fair rental value of $25.00 per month. According to the usual method of computation the present value of the annuity to be paid by the church on the prospective lives of the grantors, at the date of the conveyance was $1,382.50. The actual amount paid by way of such annuity was only $440.00.
>
> In the facts as stated, is the succession to this property subject to the inheritance tax?"

In the opinion of this department, the succession to this property is not subject to inheritance tax. The succession occurred by conveyance *inter vivos*. It apparently took effect in possession and enjoyment immediately. That is to say, there is nothing in the statement of facts to show that the couple in question continued in the occupation and enjoyment of the premises conveyed during the remainder of their lives. They merely sold and yielded possession of the premises for a consideration, which in this instance, was an annuity, payable monthly.

Section 5332, paragraph 3, of the General Code, reads as follows:

> "When the succession is to property from a resident, or to property within this state from a non-resident, by deed, grant, sale, assignment or gift, made without a valuable consideration substantially equivalent in money or money's worth to the full value of such property:

(a) In contemplation of the death of the grantor, vendor, assignor, or donor, or

(b) Intended to take effect in possession or enjoyment at or after such death."

The remarks already made show that sub-paragraph (b) of the above quotation cannot be applied. The only question, therefore, arises under the general clause and sub-paragraph (a). Do the facts show this to have been a deed made without a valuable consideration substantially equivalent in money or money's worth to the full value of the property, and in contemplation of the death of the grantors?

The present value of the annuity, according to the mortality tables, is stated by the commission to be less than one-third of the value of the whole estate. It may be, therefore, taken as true without regard to the actual amount paid, which is much less than the theoretical value of the consideration, that such consideration was not substantially equivalent "in money or money's worth to the full value of such property." This leaves for consideration the question as to whether the fact that a life annuity constitutes the consideration for the property, coupled with the advanced age of the grantors, make this a transfer in contemplation of the death of the grantors. This phrase is defined in the Inheritance Tax law, section 5331, paragraph 5, as follows:

" 'Contemplation of death' means that the expectation of death which actuates the mind of a person on the execution of his will."

The commission states the fact that both grantors were in fair average health at the time of the conveyance, so that as above stated, we have nothing but the nature of the consideration and the age of the grantors as evidence of contemplation of death.

It has been held that advanced age of itself is not sufficient evidence of contemplation of death. In re Dessorts Estate (Wis.) 142 N. W. 647.

The statute erects no presumptions whatever, either on the footing of the age of the grantor, his condition of health, the time which elapses between the conveyance and his demise, or on any other footing; but requires that in cases of this character, it be established that the disposition was actuated by the expectation of death which fills the mind of a person on the execution of his will. What constitutes evidence of a substantial testamentary disposition is therefore left to the general principles of the law of evidence; and the question becomes one as to the competency and sufficiency of certain objective facts as constituting proof of a substantial testamentary intent.

Thus in New York it has been held in a series of cases which have been commented upon in other opinions, that a transfer *inter vivos* upon trusts which are completely revocable and amendable by the trustor during his life time, is a transfer in contemplation of death, because it shows the ambulatory attitude of mind that characterizes the intention of a person upon the execution of a will. The cases do not universally require such evidence of intention to control the disposition of the estate up to the moment of death; so that in case of a gift *causa mortis*, statutes like this have been applied, and even where a person in failing health, especially if he be of advanced age, makes a general distribution of his property by irrevocable conveyance *inter vivos*, the courts have found evidence of the requisite intent to constitute contemplation of death.

So also the fact that the disposition of this character is substantially donative is a fact which is always entitled to weight. In this case, though the consideration is not adequate measured by the mortality tables, and though it turned out to be even more inadequate in fact than it would have been had the grantors lived out their respective expectancies of life, yet the transfer was not a pure donation, nor even

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,
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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,