3377.

INHERITANCE TAX LAW—BEQUEST TO TRUSTEES FOR SOLE USE OF CHARITABLE INSTITUTION SO LONG AS PROPERTY, IN JUDGMENT OF TRUSTEES, BE USED FOR SUCH PURPOSES AND THEREAFTER TO CHILDREN OF TESTATOR—HOW TAX TREATED—HILLS AND DALE CLUB, DAYTON, OHIO.

In case of a devise or bequest to trustees for the sole use of a charitable institution so long as the property should, in the judgment of the trustees, be used for such purposes, and thereafter to the children of the testator, should be treated for inheritance tax purposes as follows:

The property should be valued immediately and exempted. The inheritance of the future interest should be found and determined and the taxation thereof postponed until the children come into the actual possession and enjoyment of their respective estates.

COLUMBUS, OHIO, July 21, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission has requested the opinion of this department upon the following question:

"P in his will provides as follows:

'I hereby give, devise and bequeath unto F, E, D and N, as trustees for the H club the following real estate:

Said trustees and their successors shall hold the aforesaid property for the sole use and benefit of the H Club, or a club with similar objects; but if at any time said property shall no longer be used for the purpose of a club devoted to the recreation of its members, or if my said trustees or their successors in their own discretion consider that said property should no longer be used for said purposes, then said trustees or their successors shall at once convey said property to my children, as tenants-in-common, for the sole use and benefit of themselves, their heirs and assigns, entirely free from trust. If either or both of my said children be not living the interest of said deceased child or children in said property shall be conveyed to his, her, or their heirs-at-law, per stirpes.

It is intended in this item that said property be devoted to purposes of a club, devoted to recreation and improvement, so long as it may be useful for those purposes; but at the same time I invest my trustees with a wide discretion in determining whether or not the trust shall cease, using their best judgment, but bearing in mind my desire herein expressed.'

The H Club is open to residents of M County upon the payment of $1.00 annual dues. There is a club house in which parties, dinners and dances are given to which an admission is charged. It is not intended to make a profit but everything is run at cost.

While the Commission is satisfied that the H Club is an institution entitled to exemption as being for purposes of public charity only, yet in view of the broad discretionary powers of the trustees who may terminate the trust at any time and convey the property to the heirs-at-law of the testator, we are somewhat uncertain as to the proper order to be made by the Probate Court in the inheritance tax proceeding in this estate.

What procedure or finding do you suggest, and if you are of the opinion that the property is not subject to tax now, what course should be followed

if, at the end of a few years, the trustees should terminate the trust and convey the property to the children of the testator under the powers conferred upon them by the will?"

Note is taken of the Commission's statement that the H Club is an institution entitled to exemption as being for purposes of public charity only. In view of this statement, and inasmuch as the Commission does not submit any facts respecting the nature of the enterprise, this department will assume that in so far as the H Club may be said to have an interest under the will, its succession is not taxable.

It is clear that the trustees take no beneficial interest. They have what the will calls "a wide discretion," which for the purposes of this opinion may be regarded as virtually an uncontrolled discretion. But that discretion is limited to the decision of certain questions which may be described as follows:

1. Whether the H Club as such should continue to enjoy the use and benefit of the property;

2. In the event that a negative answer is returned to the first question, whether a club with similar objects (and therefore one as much entitled to exemption as the H Club) should have the use and benefit of the property.

In the event that a negative answer be returned to both questions by the trustees in the exercise of their uncontrolled discretion, such discretion is at an end, for in that event the trust would terminate and the property vest by reversion, so to speak, in the children, etc.

It is to be observed, therefore, that except in a very limited sense, which in no wise bears upon the problem of inheritance taxation, the trustees have no choice in the selection of beneficiaries. They have merely the power to determine the trust.

The fact that the trustees do not take beneficially, coupled with the fact that the beneficial interest vests for the time being in a club which is presumed to be an organization permanent in its nature, takes the case out of the operation of the principles of opinions like those found in Opinions of the Attorney-General for the year 1916, Volume I, page 466; and Opinions for 1915, Volume I, page 495, in which opinions it was held that a bequest to trustees for undefined charitable purposes where neither the legal nor the beneficial interest vested in an organization of any kind, is not exempt from inheritance taxation. Here the beneficial interest for the time being, subject to the discretionary power of the trustees, is vested in the H Club, or a club (i. e., an organization) with similar objects.

We have it then that a beneficial interest of uncertain duration is vested in the H Club, etc. That interest may last indefinitely; for if the club is a charitable institution the rule against perpetuities does not apply. From the equitable point of view then the H. Club has a vested fee, subject to be divested by the exercise of the power of the trustees.

From the point of view of the inheritance tax, the case seems to this department to stand in substantially the same position as if the bequest or devise were made directly to the club so long as it should continue to conduct its operations in the manner in which they were being conducted at the death of the testator; and upon cessation of such user of the property, then to the children, etc. Substantially, the only difference between such a provision and the one found in the will is that the judgment of the trustees is by the will substituted for what would otherwise be the judgment of a court.

Under circumstances of this character no inheritance tax can presently be assessed. By the hypothesis on which this opinion is discussed, the present vested beneficial interest is not a taxable succession. The interest of the trustees is not beneficial and therefore not taxable. The future interest of the children, etc., is not presently vested, and does not depend upon any estate, the value of which can be determined in the manner provided by section 5342 of the General Code. The highest possible rate section cannot be applied because as the Commission has been previously ad-

vised, that section is workable only when the future contingent estates will arise upon the expiration of a present vested estate, the duration of which is either fixed or can be calculated in accordance with the method of section 5342 of the General Code.

In short, the case seems to this department to come within the principle of the *Matter of Terry*, 218 N. Y. 218.

The proper order to be made by the probate court in the inheritance tax proceeding in the estate of P is to value the property comprised in the devise and bequest to the trustees and enter an order of exemption based upon the value of the property as in fee; but said order should further note the future contingent interests of the children finding and determining that such interests when and if they arise will be successions in the estate of P., and should suspend taxation on such contingent interests.

When and if the children take, the proper procedure is to assess the tax under the second sentence of section 5336 of the General Code when the persons beneficially entitled thereto come into actual possession or enjoyment thereof. The appraisement at the time should be made under section 5344 of the General Code, to-wit, at the full undiminished value of the successions of the children, etc., without diminution for or on account of the valuation of the interest of the H Club upon which the several estates in expectancy have been limited.

In order to completely clarify the grounds of this opinion, it should be stated that it has been assumed as a matter of interpretation of the will that the H Club was in existence as a going concern at and prior to the death of the testator, and, moreover, that the H Club was actually in the enjoyment of the use of the premises in question in whole or in part at such times; so that the will has been construed as an expression of intention that this user should continue in the first instance, rather than that the trustees should make an initial choice between the H Club and some other club with similar objects. The materiality of this point is recognized, but the fact stated in the Commission's letter that the H Club is at present in existence, seems to justify this interpretation. If it were otherwise, it could not be said that the H Club or any other person had any present equitable interest, and a different problem would arise.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3378.

NEWSPAPERS—PROOF OF PUBLICATION BY AFFIDAVIT REQUIRED BY SECTION 4228 G. C. SHOULD BE FILED AFTER COMPLETION OF PUBLICATION OF EACH ORDINANCE—BLANKET PROVISION NOT PERMISSIBLE.

The proof of publication by affidavit required by section 4228 G. C. should be filed after the completion of the publication of each ordinance, etc., and it is not permissible to file an affidavit prior to publication to cover a prospective publication.

COLUMBUS, OHIO, July 21, 1922.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date submitting a question under section 4228 G. C. was duly received, and, omitting formal parts, reads as follows:

> "Section 4228 G. C., regulating the publication of ordinances, resolutions, etc., in municipalities provides in part that: