1841.

INHERITANCE TAX LAW—WHERE SPECIFIC SHARES OF STOCK BEQUEATHED TO AN EXECUTOR IN TRUST TO PAY DIVIDENDS DUE X. FOR LIFE, REMAINDER TO A NON-EXEMPT CORPORATION WHICH HAS NO FUNDS TO PAY TAX—HOW EXECUTOR IS TO PAY SAID TAX.

Where specific shares of stock are bequeathed to an executor in trust to pay the dividends due X. for life, remainder to a non-exempt corporation which has no funds to pay the tax, it is the executor's duty to pay the tax on the equitable remainder in the first instance and charge the same against the remainder interest. If the executor is without funds in the general estate to make this payment, he may sell enough of the shares to pay the tax on the remainder, and any loss that will thereby fall upon the life tenant must be borne by him. Such loss should be avoided if possible by reserving the dividends on the shares sold.

COLUMBUS, OHIO, February 5, 1921.

Tax Commission of Ohio, Columbus, Ohio.

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

> "A. by his will bequeaths five hundred shares of stock of the value of $50,000 to be held by his executor in trust for X. during life and at the death of X. to pass absolutely to Z. After the payment of debts and costs of administration just enough money of the estate is left in the hands of the executor to pay the inheritance tax on the succession of X. Z. is not related to the testator and is insolvent.
>
> Will you be good enough to advise this commission, by whom must the inheritance tax on the succession to Z. be paid? If by the executor, where would he get the funds, from a sale of part of the stock, or may he appropriate sufficient out of the income?"

This question seems to be answered by section 5336 of the General Code and by the Massachusetts case of *Minot* vs. *Winthrop*, 162 Mass. 113.

The statute cited provides that:

> "Such taxes shall be and remain a lien upon the property passing until paid, and the successor and the executors or administrators * * * and * * * trustees * * * shall be personally liable for all such taxes * * *. Such an administrator, executor or trustee, having in charge or in trust for distribution any property the succession to which is subject to such taxes, shall deduct the taxes therefrom, or collect the same from the person entitled thereto. He shall not deliver, or be compelled to deliver, any specific legacy or property, the succession to which is subject to said taxes, to any person, until he shall have collected the taxes thereon. He may sell so much of the estate of the decedent as he would be empowered to do for the payment of the debts of the decedent."

This provision on its face requires the payment of the inheritance tax to be made out of the corpus of the property the succession to which is taxed, unless it is paid by the successor. Similar provision is found in section 5343, which provides

for immediate taxation of contingent remainders at the highest possible rate, such taxes to be "due and payable forthwith out of the property passing."

The case cited was one in which the legacy was not of specific property but of a fund. The life legacy was exempt and the remainder was taxable. Taxes were paid out of the corpus and the court held that the life legatee, whose income was thus reduced by the amount of the interest on or income from so much of the corpus as had been used to pay the tax, would have to bear the loss.

This decision is not necessarily conclusive of the case now submitted, where five hundred specific shares of stock constitute the subject of the bequest. It is clear, however, that the executor must pay the tax immediately, unless he is able to collect it from Z., who is insolvent, and that in paying the tax he is without power to appropriate the income. He might appropriate the income to pay the tax on X.'s succession, because that income is the subject of a bequest to X. Even this is perhaps doubtful, but concerning the tax on the succession to Z., which is the subject of your inquiry, it is clear that the present income, which belongs to X., cannot be directly appropriated for the purpose of paying the tax thereon.

It is the opinion of this department that the executor has the power to sell the stock in order to pay the tax on Z.'s succession. This conclusion is further supported by the reasoning of the court in *Matter of Tracy,* 179 N. Y. 501. The question involved in that case may be gleaned from the opinion of Bartlett, J., as follows:

> "The entire property, real and personal, * * * is converted into trust estates for the benefit of life tenants and remaindermen, all of the latter being contingent, depending upon the status at the death of he life tenant, except the defendant, the Syracuse University, which takes its estate in remainder upon the death of * * * the testator."

The court refers to the language of the "highest possible rate section," which applied to the taxation of the contingent remainder, and made it clear that the temporary tax should be paid "out of the property transferred," and to the case of *Matter of Vanderbilt,* 172 N. Y. 69, in which this obvious interpretation of the law had been announced. The court then says:

> "As our decision in *Matter of Vanderbilt* * * * dealt only with a contingent remainder, this case, technically speaking, is not strictly in point, but the principle announced therein is necessarily involved in life estates created by trusts.
>
> In the case at bar it is the duty of the executors and trustees to ascertain the value of the respective life estates and estates in remainder in the manner pointed out by section 230; and having done this, they should compute the transfer tax and pay the same forthwith out of the property transferred. The result is that the life tenant loses, during the continuance of his estate, the interest upon the corpus of the trust so paid out, and eventually the remainderman receives his estate diminished by the amount of said payment."

This decision is not strictly in point, as it is complicated by the fact that the remainders after the life estate were all contingent and therefore the tax on these remainders was expressly provided for as a charge against the corpus of the estate by the "highest possible rate" section.

This case is also distinguishable from the present question on the same ground that the Massachusetts case has been distinguished, namely, that these were residu-

ary legacies and money legacies rather than legacies of specific income-producing property. This distinction, which has been mentioned before in this opinion, raises doubt as to whether the executor in the case under consideration should not at least attempt to sell the stock with reservation of dividends bequeathed to the life tenant. No authority has been found on this point. If such a sale is possible it would, of course, do exact justice.

Attention may be called to the case of *In re Meyer,* 209 N. Y. 386, holding that the executor in spite of the language of the statute is not personally liable, if the value of the estates upon which the tax has been assessed disappears during the course of administration without his fault, and without any default on his part in securing the assets from the payment of the tax. That is to say, the executor's liability, like the state's lien, is secondary merely, the primary liability being that of the successor. But this primary liability is secured in these two ways, and the clear intention of the law is that it may and shall be enforced in the way in which any secured obligation may be enforced.

Respectfully,
JOHN G. PRICE,
Attorney-General.

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APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENTS IN ERIE COUNTY, OHIO.

COLUMBUS, OHIO, February 5, 1921.

HON. LEON C. HERRICK, *State Highway Commissioner, Columbus, Ohio.*

1843.

APPROVAL, BONDS OF BLOOMINGSBURG VILLAGE SCHOOL DISTRICT IN AMOUNT OF $60,000.00.

COLUMBUS, OHIO, February 5, 1921.

Industrial Commission of Ohio, Columbus, Ohio.