2800.

INHERITANCE TAX—JOINT DEPOSIT—WITHDRAWN BY SURVIVOR AFTER DEATH OF ONE PARTY—LIABILITY OF BUILDING AND LOAN ASSOCIATION FOR TAX DISCUSSED.

SYLLABUS:

1. *The provisions of Section 5348-2, General Code, do not restrict or otherwise affect the terms of Section 9648, General Code, providing for the payment by a building and loan association of a joint deposit account to the survivor upon the death of the other joint deposit owner, further than to require the building and loan association in such case to retain a sufficient amount of money to pay the inheritance tax upon the interest in such joint deposit account accruing to such survivor by the death of the other joint owner of such deposit, in the event the Tax Commission of Ohio does not give its written consent to the payment of such account.*

2. *The liability imposed in such case by the provisions of Section 5348-2, General Code, for the failure of a building and loan association to retain from such joint deposit account a sufficient amount of money to pay the inheritance tax on the succession accruing to the survivor upon the death of the other joint owner of the deposit account, is a liability of the corporation itself, and is imposed in every such case unless the payment of such joint deposit account is made to the survivor in good faith without knowledge of the death of the other joint owner, and without knowledge of facts and circumstances sufficient to place the building and loan association upon inquiry with respect to its duty to retain a sufficient amount of money to pay such inheritance tax.*

COLUMBUS, OHIO, January 7, 1931.

HON. JOHN W. PRUGH, *Superintendent, Division of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication from you in which, after quoting the provisions of Section 9648, General Code, relating to the payment of joint deposit accounts in building and loan associations, you request my opinion upon a question stated in said communication as follows:

> "Can the survivor, in case of the death of the other, require the building and loan association to pay over to him the entire amount of such account without first obtaining the written consent of the Ohio Tax Commission as required by Section 5348-2 of the Ohio General Code, and if a transfer is made by a building and loan association in such a case and without the consent of the Ohio Tax Commission, is the company and its officers liable under the provisions of said Section 5348-2?"

Section 9648, General Code, is one of the sections thereof relating to the powers of building and loan associations and provides that such companies shall have power:

> "To receive money on deposits, and all persons, firms, corporations and courts, their agents, officers and appointees may make such deposits and stock deposits, but such corporation shall not pay interest thereon exceeding the legal rate. When such deposits or stock deposits are made to the joint account of two or more persons, whether adults or minors, with a joint order to the corporation that such deposits or any part thereof are to be payable on the order of any one or more of such joint depositors, and to continue to be so payable notwithstanding the death or incapacity of one or more of the persons making them, such account shall be payable to any one

> or more of such survivors or survivor or order notwithstanding such death or incapacity. No recovery shall be had against such corporation for amounts so paid and charged to such account."

Provisions analogous to those contained in Section 9648, General Code, above quoted, are found in Section 710-120, General Code, relating to the payment of joint deposit accounts in banks and trust companies.

Upon consideration of the provisions of this section of the General Code it has been held that as between the bank and the survivor of two or more persons having a joint deposit account in said bank, the survivor is entitled to payment of the balance of such joint deposit account remaining at the time of the death of the joint owner or owners. *Union Trust Company* vs. *Hutchison*, 27 O. App. 284; In re Estate of Ellen Morgan, 28 O. C. A. 222. Moreover, under the provisions of this section of the General Code, as well as independent thereof, the terms of the deposit of such money on the joint account of two persons may be such as to give the survivor the right to collect the balance of such joint account as against the administrator or other legal representative of the other joint owner of such account. *Osterlan, Admr.*, vs. *Schroeder*, 22 *O. App.* 213; *The Cleveland Trust Company* vs. *Scobie, Admr.*, 114 O. S. 241. The decisions here cited touching the question of the right of the survivor of a joint bank account to the payment of the balance of such account upon the death of the other joint owner, are obviously likewise applicable with respect to the rights of the survivor of a joint deposit account in a building and loan association.

The interest accruing to such survivor in a joint deposit account in a bank or in a building and loan association upon the death of the other joint owner is, however, taxable as a succession under the inheritance tax laws of this state, particularly Section 5332, General Code, which by paragraph 5 thereof provides as follows:

> "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."

In the case of *Tax Commission of Ohio* vs. *Hutchison*, 120 O. S. 361, it was held that under the provisions of Section 5332, General Code, above quoted, a succession tax may be imposed upon the interest of a deceased husband accruing to a wife in a joint bank account maintained by them to which both contributed and which was subject to withdrawal by either during life, and in case of death of either the balance to belong to the survivor.

The question presented in your communication, however, arises more immediately under the provisions of Section 5348-2, General Code, which is likewise one of the sections of the General Code relating to the assessment and collection of inheritance taxes. This section of the General Code, so far as the same is material to the question here presented, provides as follows:

> "No safe deposit company, trust company, corporation, bank or other institution, person or persons, having in possession or in control or custody, in whole or in part, securities, deposits, assets or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, including the shares of the

capital stock of, or other interest in, such safe deposit company, trust company, corporation, bank or other institution, shall deliver or transfer the same to any person whatsoever whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon under this subdivision of this chapter, and unless notice of the time and place of such delivery or transfer be served upon the tax commission of Ohio and the county auditor at least ten days prior to such delivery or transfer; but the tax commission of Ohio may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons, from the obligation to give such notice or to retain such portion. The tax commission or the county auditor, personally or by representatives, may examine such securities, deposits or other assets at the time of such delivery or otherwise. Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons, liable for the amount of the taxes and interest due under this subdivision of this chapter on the succession to such securities, deposits, assets or property. Such liability may be enforced by action brought by the county treasurer in the name of the state in any court of competent jurisdiction."

It will be noted that under the provisions of this section of the General Code no safe deposit company, trust company, corporation, bank or other institution, person or persons, having in possession or in control deposits belonging to or standing in the joint names of one or more persons shall deliver or transfer the same to any person whatsoever whether in a representative capacity or not, or to the survivor or to the survivors of such joint deposit account, "without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon," unless the written consent of the Tax Commission of Ohio to such payment or delivery is first obtained, after notice to such commission and to the county auditor is given in the manner provided by said section.

The provisions of Section 5348-2, General Code, above quoted, were considered by this office in an opinion directed to the Inspector of Building and loan associations under date of October 11, 1919, Opinions of Attorney General, 1919, page 1271. This opinion was addressed to a question submitted to the Attorney General by the Inspector of Building and Loan Associations as to what extent the provisions of Section 9648, General Code, relating to joint deposit accounts, are restricted by the later provisions of Section 5348-2, General Code, above quoted. In this opinion it was held, as stated in the syllabus thereof, that "Section 5348-2 of the new inheritance tax law does not affect the validity of payments made by building and loan associations to survivors on joint deposits or joint stock deposit accounts; but if the tax commission's consent to the payment is not obtained and a sufficient amount is not retained to pay the inheritance tax, the building and loan association is liable for the tax that should have been so retained." In said opinion, after quoting the provisions of Sections 9648 and 5348-2, General Code, and those of paragraph 5 of Section 5332, General Code, it is said:

"Section 9648, G. C., relates to the payment of deposits or stock deposits. Its provision is that joint account deposits or stock deposits shall 'continue to be so payable (on the order of any one or more of such joint depositors) notwithstanding the death or incapacity of one or more of the persons making them;' and it is further provided that 'such account shall

be payable to any one or more of such survivors or survivor or order notwithstanding such death or incapacity.' It is further provided that: 'No recovery shall be had against such corporation for amounts so paid and charged to such account.'

So far from repealing or limiting the general effect of these provisions, Section 5348-2, G. C., assumes that joint accounts payable to the survivor or his order are legal. In fact Section 5348-2 must be read in connection with paragraph 5 of Section 5332.

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Under Section 9648, G. C., upon the death of one of the joint depositors 'the survivor or survivors' would 'have a right to the immediate ownership or possession and enjoyment of the whole property' (deposit). In other words, Section 9648, G. C., expressly authorizes joint deposits payable to the survivor, and prevents the ownership of an undivided half interest in the fund from vesting in the personal representatives of the decedent. That is to say, the section establishes a true joint ownership with the incident of survivorship in the whole. And the enhancement of value thus accruing to the survivor or survivors is taxed as a 'succession' by the inheritance tax law, not on the theory that it is illegal or to be penalized—because the inheritance tax law is not enacted on that theory at all—but merely as an excise tax upon the enjoyment of a privilege which is conceded to be lawful and consistent with public policy.

There is, therefore, nothing fundamentally inconsistent between the law allowing joint accounts and the law taxing the accrual of additional rights of survivors by the death of one of the joint depositors. The one makes such accrual lawful; the other taxes it.

Section 5348-2, G. C., is merely a means of collecting the tax in such cases. It imposes no absolute limitation on the right of the building and loan association to act under Section 9648, G. C. It merely provides that if the institution permits the survivor to draw out the joint account without retaining a sufficient sum to pay the tax payable on account of such joint account, (not the whole tax on the general estate of the decedent) the institution shall lay itself liable to a penalty recoverable in a civil action brought by the county treasurer, the penalty being the amount of the taxes due on account of the 'succession' arising by virtue of the accrual of such right of survivorship."

Speaking of the liability imposed upon a building and loan association by the provisions of Section 5348-2, General Code, in said opinion it is further said:

"This liability does not in anywise impair the validity of the payment made by the building and loan association. Section 5348-2, G. C., contains a prohibition, to be sure, but it also stipulates exactly what shall be the consequences of violation of this prohibition. Therefore, the second sentence of the section is not to be taken as an implied amendment of Section 9648, G. C., making invalid, as between the parties, what may have been done under the latter section when one of the joint depositors has died, but merely as a regulation, designed as it is to insure the collection of the public revenues.

In conclusion then, it is the opinion of this department that a payment made to a survivor of two or more joint depositors by a building and loan association is perfectly valid as between the association, the payee and the personal representatives of the survivor—indeed, as among all private

parties concerned, by virtue of Section 9648, G. C.; and that if the entire amount of the deposit is paid out on the order of the survivor or survivors, without the consent of the tax commission and without the retention of a sufficient amount to pay the taxes due on account of the succession, the only result will be to render the building and loan association liable for the amount of taxes that should have been paid on that behalf, which liability can be enforced only in an action brought by the county treasurer in the name of the state. Whether in such an action good faith and want of knowledge of the death of the decedent would be a defense to the building and loan association is a question which is suggested but not decided at this time. It follows that what you describe as 'the status of stockholders in building and loan associations on joint and survivorship accounts' is not affected at all by the inheritance tax law; that the powers granted in Section 9648, G. C., are not in anywise restricted as powers by that law; but that building and loan associations have certain duties to perform in connection with the inheritance tax law, failure to discharge which will subject them to liabilities thereunder."

I am in full accord with the views expressed by my predecessor in the opinion above noted, in so far as the same are pertinent to the question before him and to that presented in your communication.; and giving effect to the views so expressed by my predecessor, as well as to the court decisions above cited, I am of the opinion, by way of answer to your question, that the survivor of two persons having a joint deposit account in a building and loan association, payable to the survivor, may require the building and loan association to pay over to him the balance of such joint deposit account remaining at the time of the death of the other joint owner, subject to the requirements that the building and loan association must retain a sufficient amount of such joint deposit account to pay the inheritance tax thereafter to be assessed upon the interest in said joint deposit account accruing to such survivor upon the death of the other joint owner, unless the Tax Commission of Ohio consents in writing to the payment by the building and loan association of such joint deposit account, in which case the whole of the balance remaining on such joint deposit account may be paid to the survivor. Inasmuch as the specific question presented in your communication is whether the survivor in such case can require the building and loan association to pay over to him the entire amount of such joint deposit account without first obtaining the written consent of the Tax Commission of Ohio, as required by Section 5348-2 of the General Code, the answer to the question thus presented must be in the negative.

With respect to the second question presented in your communication as to the liability of the building and loan association and its officers if payment of the whole amount of the balance of such joint deposit account is made to such survivor without the written consent of the Tax Commission of Ohio, it is noted that Section 5348-2, General Code, provides:

"Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons, liable for the amount of the taxes and interest due under this subdivision of this chapter on the succession to such securities, deposits, assets or property. Such liability may be enforced by action brought by the county treasurer in the name of the state in any court of competent jurisdiction."

However, in the consideration of the question here presented the provisions of Section 5348-2, General Code, just quoted, should be read in connection with the later provisions of Section 5348-2a, General Code, which are as follows:

"In any action brought under the preceding section it shall be a sufficient defense that the transfer of shares of capital stock, or delivery or transfer of securities, deposits, assets or property, was made in good faith, without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry."

It is noted from the statutory provisions above quoted that with respect to the question presented by you, a building and loan association, rather than its officers, is subject to the liability imposed by Section 5348-2, General Code, for the failure of such corporation to retain from a joint deposit account a sufficient amount of money to pay the inheritance tax and interest on the succession accruing to the survivor of such joint deposit account, without the written consent of the Tax Commission of Ohio to the payment of the full amount of such joint deposit account; and that such liability is imposed in every such case unless the payment of such joint deposit account is made to the survivor in good faith without knowledge of the death of the other joint owner and without knowledge of facts and circumstances sufficient to place the building and loan association upon inquiry with respect to the death of such joint owner.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2801.

APPROVAL, LEASE TO OHIO CANAL LANDS IN THE CITY OF AKRON, OHIO, FOR THE USE OF THE QUAKER OATS COMPANY, AKRON, OHIO, FOR GENERAL INDUSTRIAL AND BUSINESS PURPOSES.

COLUMBUS, OHIO, January 7, 1931.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have this day submitted for my examination and approval a certain canal land lease in triplicate executed by the State of Ohio to you as Superintendent of Public Works by which there is leased and demised to the Quaker Oats Company, a New Jersey corporation doing business in this state, the right to use and occupy for general industrial and business purposes a certain parcel of Ohio Canal lands in the city of Akron, Ohio, which parcel of land is more particularly described as follows:

"Being all that part of the State Canal property leased by the State of Ohio to Glen Brown, as a railroad right-of-way, by lease dated April 27, 1916, lying between a line extending North 49° 31′ East from State Monument No. 3 of the Ohio Canal survey through Station 1819 of the G. F. Silliman survey of the Ohio Canal through the city of Akron, Ohio, to an iron pin on the easterly line of the State Canal property, said line being the southerly line of the property leased by the State of Ohio to the First Trust and Savings Bank of Akron, Ohio, and also the northerly line of land leased by the State of Ohio to L. H. Conger, and extending thence southerly over a right-of-way eighteen (18) feet in width 313 feet, more or less, to the northerly line of Ash Street, and containing 5634 square feet, more or less; excepting therefrom 1694 square feet that is now occupied by the Quaker Oats