1801.

INHERITANCE TAX LAW—SUCCESSION TO REAL AND PERSONAL PROPERTY UNDER A WILL IN PURSUANCE OF VALID CONTRACT TO MAKE SUCH WILL, SUPPORTED BY AN ADEQUATE CONSIDERATION, SUBJECT TO SAID TAX.

The succession to real and personal property under a will made in pursuance of a valid contract to make such will, supported by an adequate consideration, is subject to the inheritance tax according to the full value of such succession.

COLUMBUS, OHIO, January 21, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of the commission's letter of December 28 enclosing copy of a contract between one White and Mr. and Mrs. P. by which the latter agree to care for and lodge White during the remainder of his life, and to pay taxes and assessments on a certain farm and to keep the buildings and improvements in repair and properly insured during the remainder of White's life; and in consideration of which White agrees to permit Mr. and Mrs. P. to have the entire use and control of the farm, with the exception of a part of the dwelling house thereon reserved for his own personal use, not to diminish the value of the farm by cutting timber during his lifetime and to make a will disposing of all of his real and personal property to them.

The commission advises that the will stipulated for in this contract was made and that White died leaving it as his last will and testament, and that Mr. and Mrs. P. performed the conditions of the contract on their part to be performed.

The commission desires the opinion of this department as to the taxability of the successions under the will of White.

In so far as the fact that the rendition of the services in pursuance of the contract constitutes a consideration for the testamentary disposition made by the will is concerned, such fact does not defeat the taxation of the devise and bequest at its full value, for reasons pointed out in the opinion of this department to the commission under date of July 2, 1920, being Opinion No. 1395. In connection with the present request the whole question of consideration affecting the taxability of testamentary dispositions has been reconsidered, and more recent authorities have been investigated, but so far as has been discovered there is no deviation from the now settled rule that the fact that a devise or bequest is founded upon and intended to be in satisfaction of a debt, or is based upon any consideration which would be valid in law, does not change its essential character as a succession by will nor affect the amount of its appraised value for the purpose of apportioning the inheritance tax.

The present question presents but one element not heretofore considered, namely, the fact that the dispositions made by the will were not only intended to be in satisfaction of the debt, but also in discharge of a contract specifically to make a will. That is to say, the testator agreed to make the will which he did make and leave, so that by leaving the will he was merely discharging a valid contract.

This fact is likewise immaterial, in the opinion of this department. Certainly no express exception is found in the statute imposing the tax which would justify giving any weight to the circumstances now under discussion. The statute makes its levy upon all successions "when the succession is by will." The present succession is by will. *Non constat* that the will was executed in discharge of an obli-

gation created by contract; the case is, therefore, within the terms of the statute.

Nor does there seem to be any reason for creating an implied exception to the literal terminology of the statute. If the rendition of the services by Mr. and Mrs. P. in pursuance of the contract had given rise to a debt of the decedent's estate, they would have the right, if they should object to paying inheritance tax, to repudiate the devise and the legacy and claim against the estate as creditors, in which event, of course, no inheritance tax would be imposed upon the amount which they would secure from the estate in such capacity. But by taking under the will in pursuance of their contract they take their interests subject to such burdens as the state has imposed upon the fact of succession by will, and hence are not in a position to object.

It must be conceded that a written contract of this sort, coupled with the performance of their obligations by the parties who are to perform services, may in a proper case give rise to specific equitable rights; so that had the testator broken his contract and disposed of his real property otherwise than in accordance therewith, it is conceivable that the successor could have been called upon by the contracting parties to convey the land to them by way of specific performance of the testator's contract. In such event, also, there might be no inheritance tax, the nominal successor not being taxable because he did not acquire the beneficial interest, and the contracting parties not being taxable because they have not received one of the kinds of successions which the statute does tax.

However, it is believed that in a case such as has been supposed a tax would be payable. See—Matter of Kidd, 188 N. Y. 274. In this case, the decedent in consideration of marriage and the promise of his expectant wife to turn over to him the sum of forty thousand dollars agreed to adopt her daughter, and in the event there should be no issue of the contemplated relation that he would devise and bequeath all of his property to such adopted daughter. The marriage was celebrated and the money turned over, but the testator's will disposed of his property otherwise than he had agreed. The step-daughter succeeded in establishing a contract for her benefit, and it was held that the property she had obtained thereby was subject to the transfer tax. The court pointed out in the opinion that no present interest in the estate vested in her by virtue of the agreement. The testator was to leave her whatever he had when he might have died, and could not have conveyed his property in fraud of her rights, but he might have entirely consumed it in living expenses or have lost it in speculation. So, in the case at hand the testator's agreement does extend to a definite compact not to sell, encumber or in any way dispose of the real estate, but he makes no contract about any particular personal property, and it is quite possible that his real estate might have passed out of his control by virtue of judgments against him during his lifetime. So that upon the authority of this case even if the testator had broken his contract in making his will, it is at least arguable that the inheritance tax would have been payable. None of these considerations alters the basic fact that the parties have stipulated for a succession by will, and the statute taxes all successions by will.

This is the reasoning of the court in the recent case of *State* vs. *Mollier,* 96 Kas. 514; L. R. A. 1916c, 551. In that case the testator more than twenty years before his death made an agreement with the defendant that if she would make her home with him, act as his housekeeper, and look after his welfare as long as he lived, he would make a will and bequeath to her all his property. She fully performed the contract on her part, and so did he. In resisting the imposition of an inheritance tax upon what she received under his will she relied upon the point that had he failed to perform his part of the contract, the courts would have enforced the contract in the indirect way just described, for which contention she had authority in Kansas. Indeed, Kansas had held (Nelson vs. Schoonover, 89 Kan.

779) that in case the contract was broken and a court of equity imposed a trust upon property as against heirs at law or legatees and devisees under the will which the testator actually made, no inheritance tax would be due. But the court in the *Mollier case* distinguished that case as follows:

> "In the case just cited no will was executed, and so the property did not fall within the letter of the statute imposing an inheritance tax. The defendant insists * * * that had Louis Mollier failed to make the will, she would have been entitled to a decree for specific performance * * *. It is urged that her title vested when the contract was made, subject only to being defeated by her nonperformance * * *; that the execution of the will was not required to vest her title * * *. The contract * * * was made many years before the inheritance tax law was enacted, and the will * * * was made * * * eight years before the law was passed * * *.
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> In our view of the statute, the exemption mentioned in section 1 (similar to that found or suggested in paragraph 3 of section 5332 of the General Code of Ohio, so far as it deals with consideration) was intended to apply solely to transfers by deed or grant. * * *
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> The defendant's claim that she does not, strictly speaking, take by virtue of the will, but solely by a contract which has been fully executed, and for that reason the statute cannot be held to operate, is quite fully answered by the reasoning of the court in Re: Gould, 156 N. Y. 423." (This reasoning is that which has above been set forth, in which it was pointed out that it is optional with the beneficiary to repudiate the will and stand on his legal rights as creditor).

The court also devoted a considerable part of its opinion to dealing with the question of so-called retroactive operation of the statute.

The annotation found in the L. R. A. states the conclusion of the editors that this case is in accord with the weight of authority. Among other cases quoted is *Carter* vs. *Craig,* 77 N. H. 200; 52 L. R. A. (n. s.) 212, in which the court said:

> "The contract was to bequeath and devise the property to Stone. It was not a contract to convey, but to make a will in his favor; and, French having made the will, and Stone having accepted its provisions and taken title to the property thereunder, the transmission was by will, and is subject to the tax. * * * It can make no difference that there was a valid consideration for the contract to transfer the property by will. The imposition of the tax is not limited to property passing gratuitously by will, but extends to 'all property' so passing."
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> See also *Richardson* vs. *Lane* (Mass.), 126 N. E. 44.

It must be admitted that the authors of Blakemore and Bancroft on Inheritance Taxes, section 135, state a contrary rule when they put it as follows:

> "Interests under a will made in pursuance of an ante-nuptial contract to leave by will are subject to the inheritance tax where the testator had during his life a discretion to use his own property; but not where the contract creates vested interests in the beneficiaries, as then their rights accrue under the contract and not under the will."

As authority for this proposition, however, the case of *In Re: Baker,* 178 N. Y. 575, affirming 83 App. Div. 530, is given. That was a case in which the

contract to make a will was broken by the promisor, so that the promisee claimed as creditor. It was distinguished in the *Kidd case,* otherwise similar, on the ground that the consideration in the *Baker case* had completely passed and it created a debt payable out of the estate. The distinction is between a contract which at the time it is entered into was purely executory and one whereby a debtor agrees to make a devise or bequest in payment of an antecedent debt and then fails to carry out his contract. This is the distinction made in Gleason and Otis on Inheritance Taxation, pp. 140-141.

In short, it is believed that the authorities will not sustain the distinction drawn in the text of Blakemore and Bancroft, which applied to the contract now under consideration would possibly produce an opposite result, inasmuch as the testator by his contract expressly agreed "not to sell, encumber or in any way dispose of any of the real estate now owned by him." This stipulation could only apply to the real estate, and not to the personal property. Moreover, while the testator agrees not to dispose of any property "now owned by him," his agreement to make a will extends to all real property which he may have at death, and it is conceivable that he might have inherited or otherwise acquired other real property than that owned by him at the time of the contract, though this does not appear from the statement of facts. At all events it is believed that the weight of authority, and so far as investigation has shown the unanimous voice of the adjudicated cases, sustains the imposition of the tax upon the successions created by the will of White.

In arriving at this conclusion the effect of the fact that the contract was made prior to the date when the inheritance tax law was passed and became effective has not been overlooked, as the above excerpts from the Kansas case will show.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1802.

OFFICES COMPATIBLE—DISTRICT SUPERINTENDENT OF SCHOOLS—CLERK OF BOARD OF EDUCATION IN HIS SUPERVISION DISTRICT.

Where it is physically possible for one person to discharge the duties of a district superintendent of schools, and the duties of clerk of one of the boards of education in his supervision district, such positions are compatible, and may be held by one and the same person at the same time.

COLUMBUS, OHIO, January 21, 1921.

HON. BYRON A. FOUCHE, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department upon the following statement of facts:

> "We have three district superintendents of rural schools in Sandusky county, Ohio. In one of these districts, the district superintendent is acting with a salary as clerk of the township board of education. Is it compatible with the law that a district superintendent of rural schools act as clerk for compensation, of the township board of education, said township being within the district superintendent's district?"