guardian took the lunatic from her residence in Polk township into his custody at his residence in Jackson township, where she thereafter remained. In an action brought by the trustees of Jackson township against the trustees of Polk township to recover for poor relief furnished in Jackson township, the court "held that she was a resident of Jackson township and had no legal settlement in Polk township."

In the case put by your letter, it appears that A. is not now in the custody of the guardian, and has not been for the past five years; that, on the contrary A. has, during such time, resided with her mother and step-father and has been cared for by them, the guardian acquiescing in this.

Nevertheless, the guardianship still continues, and in law, at least, A. is still in the custody of her guardian. The actual custody of A. by her guardian may at any time be asserted, and the duty and responsibility of the guardian relation cannot be terminated by mere inaction.

On the facts stated, nothing appears which would indicate that A's legal settlement in Sandusky county has yet been changed. It is therefore believed that that county is the proper one wherein to bring proceedings under section 1953 G. C. As to proceedings for the admission of A. to the infirmary of Sandusky county, it is sufficient to repeat that admission to that institution can be had only upon the dissolution of the guardianship relation, agreeably to section 11010 G. C., quoted supra.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1884.

INHERITANCE TAX LAW—WHERE TESTATOR LEAVES LEGACY ABSOLUTELY TO DAUGHTER AND RESIDUARY ESTATE TO TRUSTEES OF PROPOSED CHARITABLE INSTITUTION—TESTATOR DIED WITHIN YEAR—SUCCESSIONS TO DAUGHTER TAXABLE—GEORGE MARSH ESTATE—SEE OPINION NO. 1623, OCTOBER 20, 1920.

A testator left a legacy absolutely to his daughter and his residuary estate to trustees of a proposed charitable institution. Prior to the execution of the will he entered into a contract with his daughter whereby he agreed to give her the legacy and certain other property, and she agreed that in the event of the invalidity of any part of the will she would by her will transfer the legacy to the proposed institution and immediately after his death transfer all the property covered by the residuary clause to the same institution; the testator died within the year:

HELD: That the entire specific and residuary legacies are taxable under the inheritance tax law as successions of the daughter.

COLUMBUS, OHIO, March 2, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—By letter of recent date the commission requests further opinion of this department upon the question reserved from consideration in Opinion No. 1623 under date of October 20, 1920. In that opinion it is held that a certain bequest to trustees for the purpose of establishing a foundation for the conduct of a children's home and school is exempt from inheritance taxation. The question reserved

arises from the fact that the will of the testator making this bequest was executed within a year of his death, and that he left a living daughter. This question is amplified by a further statement of facts which the commission now furnishes in the form of a further quotation from the will and copy of a contract entered into between the testator and his daughter contemporaneously with the execution of the will. The additional items of the will necessary to be quoted in this connection are as follows:

"ITEM 1. I give and devise to my daughter, K. * * * for and during the term of her natural life, the dwelling in which we now reside, together with two and one-half (2½) acres of land surrounding same, with remainder over to the trustees and their successors in office of the trust hereinafter created.

ITEM 2. I give and bequeath to my said daughter, K. * * * absolutely, all the household furniture, carpets, rugs, pictures and similar articles in our home at the time of my decease.

ITEM 3. I give and bequeath to my said daughter K. * * * the sum of three hundred thousand ($300,000.00) dollars, bonds, par value, and direct that my executors, hereinafter named, permit my said daughter to elect which of my securities of said kind and to the amount aforesaid, she will take.

ITEM 7. The rest, residue and remainder of my estate, real, personal and mixed, wheresoever situate and whether now owned or hereafter acquired, I give, bequeath and devise, in trust and not otherwise, in perpetuity, to M., C. and K. and to their successors in office, for the sole use and benefit of the trust to be known as the M. Foundation, whose purposes and objects" (were fully dealt with in the previous opinion).

The contract referred to provides, in part, as follows:

"This agreement by and between G. H. M., first party, K. M. C., second party, and A. I. C. (husband of K.), third party, witnesseth:

Whereas, first party is the owner of certain real and personal property located in Van Wert county, Ohio, and elsewhere, which first party expects to dispose of by will soon to be executed, and a portion of said property first party expects to bequeath and devise to certain persons in trust for charitable and educational purposes, now,

In consideration of the sum of one dollar paid by first party to second party, the receipt of which is hereby acknowledged, and in consideration of the agreement on the part of first party to make, in said will of first party, a devise for life to second party of the homestead including two and one-half acres surrounding same, a bequest of all household goods in the home and a bequest in favor of second party of three hundred thousand ($300,000.00) dollars, par value bonds, (second party to have the privilege of selecting from the holdings of first party such bonds in said sum as she may desire,) second party agrees that in event of the death of first party prior to the expiration of sufficient time to validate such will as regards said charitable and educational purposes, or, if said will be invalid for any reason, then and in that event, out of and from such portion of the estate of first party as may not pass to such charitable and educational purposes under said will because of an insufficient lapse of time or for any other reason, and in consequence thereof might or would pass to second party, second party will execute her certain deeds of conveyance, bills of sale and

such other instrument or instruments as may be necessary to pass all and every right, title and interest, of, in and to the property which the will attempts to bequeath and devise to, or vest in, trustees for such charitable and educational purposes, and deliver same to said persons and institutions; that it to say, second party agrees to and will do whatever may be necessary to convey, transfer and pass title to such persons as are named in the will or their successors in office as trustees of the charitable and educational institution or institutions, reference being made to the will for the character, amount and extent of said property. In other words, second party waives the law of Ohio or the law of any other state in which first party may have property at his decease, providing that a will bequeathing or devising property to a charitable or educational purpose may or shall be invalid or void.

Second party further agrees on her part to make her will and bequeath said sum of three hundred thousand ($300,000.00) dollars so to be received by her from first party's estate, to the trustees named in the will of first party, or their successors, title in said trustees to be solely and only for the use and benefit of their cestui que trust. First party, on his part, agrees in his will to make a bequest in favor of second party in the sum of three hundred thousand dollars ($300,000.00), par value, bonds, and also provide that second party may have the privilege of selecting the bonds from the holdings of first party.

Third party, on his part, for and in consideration of the premises, as contained in the foregoing agreement, hereby promises and agrees, either by joining with his wife or separately, to make and execute such deeds or conveyance, bills of sale or other instruments as may be necessary to convey, transfer and pass title to, all and every interest, claim or right, third party may or might have as husband of said K. M. C., or as her widower, heir, legatee or devisee, or in any manner whatsoever, whether such interest be real or apparent, in the property in said will of first party bequeathed and devised for charitable and educational purposes, and also as to said fund of three hundred thousand ($300,000.00) dollars."

The contract was signed in the presence of witnesses and acknowledged before a notary public.

Section 10504 of the General Code provides as follows:

"If a testator dies leaving issue of his body, or an adopted child, living, or the legal representative of either, and the will of such testator, gives, devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational, or charitable purpose, or to this state or to any other state or country, or to a county, city, village, or other corporation, or association in this or any other state or country, or to a person in trust for such purposes, or municipalities, corporations, or associations, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not; such will as to such gift, devise, or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator."

By reason of this statute the residuary bequest in the will at least is absolutely void, and property disposed of thereby not being otherwise disposed of, in the event of the invalidity of the will, by the will itself or any codicil thereto (see Trustees vs. Folsom, 56 O. S. 701), descended and was subject to distribution as intestate

property which passed to the daughter as sole heir at law and distributee (Patton vs. Patton, 39 O. S. 590). The invalidity extends, of course, only to the residuary devise and bequest, so that the life estate in the dwelling house and surrounding premises given to K. by Item 1, the bequest of the household goods given to her by Item 2, and the absolute bequest of the bonds of $300,000 par value, to be selected by her, given to her by Item 3, passed to her under the will. She being the sole heir at law and distributee, it is clear, therefore, that by will as to these items, and by intestacy as to the property covered by Item 7 and succeeding items of the will, K. becomes successor to practically the entire estate and subject to inheritance tax thereon as a single unit of valuation under the first clause of paragraph 1 of section 5331 G. C., providing that:

> "The words 'estate' and 'property' include everything * * * which passes to any one person, * * * from any one person, whether by a single succession or not.",

unless the effect of the contract is such as to withdraw some part of such aggregate succession from the operation of the inheritance tax law.

For the purpose of the discussion of this question it will be assumed that the contract is valid, although this question is open to serious doubt, especially as regards that portion of it which deals with the disposition of the bonds; for the statute does not merely avoid express trusts; it extends also to secret trusts not appearing on the face of the instrument making the devise or bequest. But, as stated, this whole question will be avoided by assuming that the contract is valid and enforcible against K. by the trustees in behalf of the foundation.

This assumption does not, directly at least, affect the correctness of the assertion above made, to the effect that K. is the successor by will or under the statutes of descent and distribution to all of the estate, save the small specific legacies. She certainly acquired the legal title thereto by one or the other of these modes. She also acquired the beneficial interest therein. That this is true results, it is believed, from the following reasoning:

The testator did not divest himself of anything by his contract. He retained the legal title to all that he had, of course. He did not bind himself to make a will leaving to K. any particular property. That is to say, K. would have had no right of action either in law or in equity had the will referred to in the contract never been made. The contract is entirely unilateral, and in its essence merely concerns things that K. is to do in the event that the will is made and proves to be invalid. Nor would the trustees (who are not even named in the contract) have any right to enforce the contract as against the testator. In fact nobody had any right to enforce anything against the testator during his lifetime, as all persons concerned were mere volunteers. Therefore, it is clear that the testator died seized of the legal and equitable interest in everything referred to in the contract.

At the testator's death was there a separation of the legal and the equitable interests that were in him? His will aimed to effect that object as to the subject-matter of the residuary bequest, which disposed of the legal estates to the trustees and the equitable interest to the charity. But this item of the will was void and is not to be taken into account at all. Therefore, so far as the will itself is concerned there is no separation of the legal and equitable interests, and the bequest to K., and her succession by intestacy to the property not disposed of by will vests in her prima facie the entire beneficial interest in the property the legal title to which thus passed to her.

Does the contract give rise to property rights as such, either legal or equitable, in the foundation? The execution of the contract in and of itself created no

equitable right in any one. This matter has already been discussed. If any such equitable right is created it is in the nature of a constructive trust. Such constructive trust in turn would grow out of K's possible breach of the contract which is to convey such interest as may not pass to the trustees of the proposed foundation. It is very clear that without this act on the part of K., or the order of the court in an action to compel K. to perform it, no beneficial interest will vest expressly in anybody excepting K.

It is of course not meant to be generally intimated that constructive trusts are not to be recognized for inheritance tax purposes. For example, if a decedent had property which *in his hands* was impressed with a constructive trust, the amount of such property really constitutes no part of his estate for inheritance tax purposes. But here no constructive trust arose until the death of the testator.

Moreover, there are in reality two classes of circumstances which may give rise to a trust. These circumstances are discussed in an opinion of this department under the former collateral inheritance tax law given under date of July 18, 1918, and found in Volume I, Opinions of Attorney-General for that year, p. 987. In that opinion these two kinds of circumstances are defined as follows:

> "First: Those in which the trust arises because of the act or promise of the person who will be held as trustee; and
>
> Second: Those in which the trust arises because of the directions of one other than the person upon whom the transaction ultimately casts the obligations of a trustee."

Where the trust arises under the first set of circumstances the person to be held as trustee must have the beneficial interest. The obligation under which he comes is to deal with that beneficial interest, and it can have nothing upon which to operate unless such interest vests in him.

In the opinion cited the question concerned the effect of an absolute devise to a trust company with a contract between the trust company and the testator as to the use of the property. The testator adopted this arrangement for the purpose of avoiding the possible application of section 10504, but he did not in fact die within the year. In substance, therefore, though perhaps not technically, the arrangement amounted to a secret trust which could be engrafted upon the will. This fact made the question very much more difficult than the question which is now to be determined, and furnished the basis for one of the decisions commented upon therein.

See *People* vs. *Schaefer,* 266 Ill. 334. This case attempts unsuccessfully and erroneously to distinguish *In re Edson,* 159 N. Y. 568, affirming 38 N. Y. App. Div. 19; 56 N. Y. Supp. 409. In both of these cases the testator by valid devises or bequests left property to designated beneficiaries upon secretly declared trusts. The New York court held the testamentary disposition taxable, though the secret trust was in favor of an exempt institution and a direct relative, whose succession would not have been taxable. The Illinois court regarded the result as a separation of the legal and the beneficial interests and imposed no tax. There was no substantial difference between the two statutes, and the cases cannot be reconciled. On authority the New York decision should be followed in Ohio because of the very great similarity between the present Ohio inheritance tax law and the New York law on the same subject. Indeed, one might say with perfect accuracy that the Ohio law is copied after the New York law. That being the case, if the question now under consideration were like that involved in the cases cited, the bequest would have to be held taxable, it is believed. The former Attorney-General did not decide the point; but he was dealing with the old Ohio collateral inheritance tax law, which was unlike the New York law, and his reasoning makes it appear that if he had been

dealing with a similar question arising under the present inheritance tax law he would have felt obliged to follow the New York decision, which he conceded to be "technically" correct.

But in the case now under consideration the constructive trust, if any, does not attach to the will as such; it arises rather as a consequence of the invalidity of part of the will, and the resultant devolution of the property covered by the invalid portions of the will upon the testator's daughter as intestate property. Had the will not been invalid in part, no such trust would have arisen, and in fact the contract would have nothing on which to operate. Hence, there is no constructive trust which is engrafted upon the will as such, save with respect possibly to the daughter's promise to dispose of the bonds by will in the event of the invalidity of the remaining portions of the will. In fact it is difficult to see how there is any trust at all, except in the sense that any valid contract to convey property, made under such circumstances and with respect to such property as that it may be specifically performed by a court of equity, can give rise to a trust. Now, if a person should die intestate seized of real property which he had by valid contract agreed to convey, a different question would arise, though even here, for reasons which need not be stated, it is doubtful whether those questions would affect the inheritance tax chargeable on account of the estate of the decedent. But such a case would at least present an instance wherein the decedent's legal estate was in his hands subject to an equity, so that when he died a separation of the beneficial and legal interests in the property had already taken place. In the present case, however, the testator died seized and possessed of full beneficial interest in the property. His will was irrevocable until the last, and by revoking it and making some other disposition of his property he might have swept the foundation from under the contract.

Such beneficial interest as may exist in the present case, therefore, is one that springs from the promise of the daughter. If there is any separation of legal and beneficial estates, it is she who has made it. In order to be empowered effectually to deal with the beneficial estates and make that separation, such beneficial interest or estate must have vested in her. It did not so vest prior to the death of the decedent, as nothing vested in her until that time. It must therefore have vested in her, momentarily at least, at his death.

In order to illustrate what appears to be the true legal situation, let it be supposed that the contract instead of being made with the decedent had been made with a third party; and that the daughter had made either a valid promise to dispose of what she might receive from her father's estate (if that be possible), or have made a declaration of trust of what she might so receive. Assuming such a promise or declaration on her part to be enforcible, would it produce a subtraction from the succession which she might actually receive from her father? To make the case even plainer, suppose that the promise was to convey for a valuable consideration to a purchaser: would it not be perfectly obvious that such purchaser could in no sense be regarded as a successor to any part of the father's estate?

This last way of putting it suggests what may be a helpful method of stating the situation as it actually exists. The inheritance tax law defines the word "succession" as follows:

> " 'Succession' means the passing of property in possession or enjoyment, present or future."

For the reasons above suggested, which are more fully stated in the previous opinion referred to, it is the opinion of this department that no property of the decedent passed beneficially or legally from him to the trustees of the foundation under the facts stated. Whatever rights or interests such trustees have in the

property which formerly belonged to the decedent passed to them, not from him, but from his daughter. She has made such transfer, if any, as has given rise to their rights or interests. She herself has succeeded to all the property of her father, both in law and in equity. That she may have bound herself equitably to deal with that property in a certain way does not affect the extent or value of her succession.

Accordingly, it is the opinion of this department that K., the daughter of the decedent, the inheritance taxation of whose estate is now in question, is liable for inheritance tax on the whole amount of that estate not specifically disposed of to other persons by valid items of the will.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1885.

COUNTY AGRICULTURAL SOCIETY—REAL ESTATE TRANSFERRED TO SAID SOCIETY FOR FAIR SITE SUBJECT TO MORTGAGE—SOCIETY MAY TRANSFER ITS TITLE TO COUNTY—HOW MONEYS PAID FROM COUNTY TREASURY FOR IMPROVEMENTS TO SUCH REAL ESTATE—HOW SAID REAL ESTATE SOLD.

1. *Where real estate has been transferred to a county agricultural society for a fair site, and is subject to a mortgage, said society may transfer its title to said real estate to the county.*

2. *Under such circumstances the county commissioners, under the provisions of section* 9887 *G. C., may pay from the county treasury an amount equal to that paid by the society, to be applied upon improvements of said premises and upon the payment of the encumbrance. However, under the provisions of section* 5660 *G. C., the commissioners may not enter into a binding obligation in this respect until a levy for such purpose has been placed upon the tax duplicate for collection.*

3. *Under the provisions of section* 9898 *G. C., when a county society is dissolved or ceases to exist, where payments have been made by the county for the purchase or improvement of real estate or for the liquidation of indebtedness for the use of such society, the real estate belonging to said society vests in fee simple in the county. County commissioners may sell such real estate under the provisions of sections* 2447 *G. C. et seq., or may hold the title to such premises for the benefit of the county.*

COLUMBUS, OHIO, March 2, 1921.

Department of Agriculture, Bureau of Fair Administration, Columbus, Ohio.

GENTLEMEN:—You request an opinion upon a statement of facts submitted to your department by the prosecuting attorney of Henry county, which may be restated as follows:

> A fair ground has been owned by a corporation, the entire stock therein having been transferred to the agricultural society, and after liquidation there is a mortgage upon said premises equal to one half of the appraised value of said fair ground. The buildings on said property have been totally destroyed and improvements in general are necessary.
>
> The county commissioners allow up to $2,000 out of the treasury of the