or 710-150, or 710-151, or 710-152, or 710-154. What steps would bring it within such provisions are not considered in this opinion.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1819.

INHERITANCE TAX LAW—WHEN BEQUESTS TO CEMETERIES TAXABLE—WHEN NOT TAXABLE.

1. *A bequest to a township or municipal corporation for the purpose of embellishing or maintaining a public cemetery is exempt from the inheritance tax.*

2. *A bequest to a public corporation or private cemetery association for the purpose of maintaining the testator's burial lot is allowable as a deduction from the gross estate by way of expenses of administration, under the express authority of section* 10832 *G. C., at least if the amount is not unreasonable, having regard to all the circumstances.*

3. *The testator directed that of his estate the sum of* $12,500, *or more or less if necessary, be expended for the purchase of a burial lot and the erection of a suitable vault. The executor was allowed as expenses the sum of* $16,150 *for such purposes: HELD:*

That without a showing of other facts, such expenditure may be deducted from the gross estate in determining the value of the taxable successions therein, and is not itself a taxable bequest.

4. *A bequest to a private cemetery association for the general benefit of the cemetery conducted by it is taxable under the inheritance tax law.*

COLUMBUS, OHIO, January 26, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—By letter under date of December 20, 1920, the commission requested the opinion of this department as follows:

> "In connection with the estates of persons who have died testate bequests are frequently met with providing for the payment of sums of money to cemetery association. In some cases the cemetery in question is owned by a municipality or township and in some it is under the control or management of trustees who are elected by the votes of persons who have purchased and owned burial lots therein. In some cases again the will specifies the particular lot in which the decedent or some of his relatives are buried, while in others the terms are more general, so that the bequest can be used for any purpose connected with the cemetery.
>
> Will you advise the commission as to what general rules are to be observed in determining whether or not such bequests are subject to or free from inheritance tax?"

This request was supplemented on January 6 by a statement of facts upon which the commission requests a specific opinion, as follows:

> "K died leaving a will of which the following is one of the items:

'I request and direct that of my estate, twelve thousand five hundred dollars or more or less if necessary, be expended for the purpose of purchasing a suitable burial lot in Holy Cross cemetery, now in or near the city of Akron, Ohio, and for building thereon a suitable vault.'

In the process of administration of the estate the schedule of debts filed for deduction from the gross estate before the determination of inheritance tax contains the following item of expense:

'Burial vault, etc., $16,150.00.'

As supplementary to your opinion requested as above will you be good enough to give us your views as to whether or not this item which presumably was the expenditure authorized by the item of the will quoted, is a proper deduction to be made before determination of inheritance tax?"

It has been suggested that the first or general question be considered under four possible forms of bequests:

"(1) To a township or muunicipal cemetery for the care of the specific lot of the testator.

(2) To a similar cemetery with the bequest couched in more general terms so that the proceeds can be used for the maintenance of the cemetery as a whole.

(3) To a cemetery controlled by the lot owners where the bequest is for the benefit of the lot of the testator.

(4) To a similar cemetery where the language permits a more general use."

In reality it is believed that the purpose of the bequest is controlling under the exemption section of the inheritance tax law, which provides as follows:

"Sec. 5334. The succession to any property passing to or for the use of the state of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively public purposes, or public institutions of learning, or to or for the use of an institution for purposes only of public charity, carried on in whole or in substantial part within this state, shall not be subject to the provisions of the next preceding section. * * * "

That is to say, the mere fact that the property passes to or for the use of a municipal corporation or other political subdivision is not enough; it must also pass for "exclusively public purposes" before the bequest is exempt. This statement leads to a rearrangement of the four classes and renders the differences between classes (1) and (3) immaterial. In both cases the specific purpose of the bequest is the benefit of the testator's lot, though it may be an incidental benefit to the cemetery as a whole and therefore to the township or municipality.

In reality, therefore, there are three cases which must be considered:

(1) Where the bequest is to a township or municipal cemetery in terms general enough to justify the application of the bequest or its income to the maintenance of the cemetery as a whole.

(2) Where the bequest is for the purpose of maintaining the lot of the testator.

(3) Where the bequest is to a privately owned and controlled cemetery in terms general enough to permit its application to the maintenance and embellishment of the cemetery as a whole.

It is believed that the first of these three classes is within the very words of section 5334. It is "to or for the use of a municipal corporation or other political subdivision * * * for exclusively public purposes." The general upkeep or embellishment of the public cemetery is a purpose exclusively public. Such a bequest is therefore exempt from taxation.

It is equally obvious that section 5334 of the General Code does not apply to the second general question. That is to say, the bequest as such is not technically exempt. However, it may be otherwise treated so as to produce the same practical result.

Section 10832 of the General Code provides as follows:

"The court in settlement, also may allow as a credit to the executor or administrator, a just amount expended by him for a tombstone or monument for the deceased, and for a just amount he has paid to a cemetery association or corporation as a perpetual fund for caring for and preserving the lot on which the deceased is buried. It shall not be incumbent on an executor or administrator to procure a tombstone or monument or to pay any sum into such fund."

This section has the practical effect of making such expenditures "costs of administration" and while there is no express provision for the deduction of costs of administration, yet the inferences from the sixth subdivision of section 5332 (dealing with the compensation of the executors or testamentary trustees), and the uniform practice in all states having inheritance tax laws, and in this state under the former inheritance tax law, sustain the deduction (rather than the exemption) of costs of administration.

The courts of other states have been very liberal in allowing expenditures of this kind as costs of administration, even when stipulated for by a specific bequest in the will.

The leading case is *Morrow* vs. *Durant,* (Iowa) 118 N. W., 78; 23 L. R. A. (N. S.), 474. In that case the testator directed his executrix to "build for me in the cemetery * * * a tomb which shall not exceed the cost of $2,000 and pay for same out of my estate, * * *."

In proceeding to collect the inheritance tax on the estate it was asserted by the state that the amount of the bequest had not in fact been expended within fifteen months of the date of the death of the testator, as ordinary costs of administration were required to be expended; that the sum of $2,000 was not a reasonable sum for a tomb in an estate of the valuation of that of the testator (the total of which was less than $6,000), whereas the statute of the state (similar to that of Ohio apparently) only allowed a "reasonable amount" for that purpose; and that the purpose of the bequest was "of a purely personal and selfish nature" and therefore not *exempt,* as well as being "void and against public policy." As the court said in summarizing these contentions:

"Plaintiff's theory is that the cost of erecting a tomb is a part of the funeral expenses, and that under the statute it is classified as a 'debt,' and that it can be only for 'a reasonable sum,' and that it must be allowed

'within fifteen months from the death of decedent, unless otherwise ordered by the judge or court of the proper county.' He contends that the reasonableness of the sum is to be determined by the amount of the estate, and that the amount provided by the will and ordered by the court in this case is unreasonable, in view of the size of the estate."

Referring to these contentions the court held, in part, as follows:

"Whether the amount reserved for the erection of a tomb is 'reasonable' is a question of mixed law and fact, to be determined in the light of all the circumstances of the case. No evidence is presented to us in this record, * * *. A ruling on a demurrer can only present a question of law, and this question before us necessarily involves fact as well as law. If the burden was upon the defendant to show affirmatively that the sum reserved was 'reasonable,' it may be that the question could be raised by demurrer. An important fact in this case, * * * is that the will of the decedent expressly provided for this expenditure. In the absence of the superior rights of creditors * * * it would seem reasonable to say that this provision of the will raises a presumption of reasonableness as far as the duties of the executrix are concerned. * * * We cannot say that such a preference or desire is unreasonable, as a matter of law or fact. Nor can we say, without evidence, that a suitable tomb for such purpose could be built for a substantially less sum than $2,000. * * *

Appellant bases his contention upon the express terms of the statute. We do not think the statute will bear the construction contended for. So far as applicable to this case * * * (the Iowa Inheritance tax law) may be read as follows: * * * 'a tax of 5 per centum of its value above the sum of $1,000 after the payment of all debts.' The word 'debts' as herein used, is defined in Sec. 1467a as follows: '* * * shall include * * * a reasonable sum for funeral expenses * * *.' * * *. The evident purpose of this latter section is that an estate whose value is near the dividing line shall not be carried into the exempt class by extraordinary charges under the guise of funeral expenses (which may properly include a monument, as plaintiff contends), or by the presentation of stale or fictitious claims which are not allowed within fifteen months. No such question is involved in this controversy.

3. It will be observed * * * that the property subject to tax is that "which shall pass * * * to any person * * *.' The fund reserved in obedience to the will of decedent will not pass 'to any person.' On the face of the statute, therefore, plaintiff is not entitled to recover a tax upon it. * * * It has heretofore been held by this court that the constitutionality of our collateral inheritance tax law can be sustained only on the ground that it is not a tax on the property itself, but upon the right to succession to property; and that a tax on the property itself, on the ground that it was acquired by collateral inheritance * * * would be a violation of the constitution. * * *

4. We do not overlook the fact that, if the amount to be expended for a tomb were reduced, the amount remaining would pass under the residuary clause to collateral heirs, and would thereupon become subject to the operation of the statute; but, in the absence of fraud or collusion on the part of the residuary legatees, this does not furnish to the plaintiff a ground of complaint. It has been held by this court that a legacy to a collateral relative may be waived or renounced in its entirety. Upon such

renunciation the right of the state to collect the collateral inheritance tax fails with the legacy itself. * * * In the case at bar * * * the residuary legatees concede the propriety and reasonableness of the fund reserved for erecting a tomb to the testator * * *."

Rather full quotation has been made from the opinion of the court because of the somewhat exhaustive consideration which the court has given to the question. One point is worthy of note, namely, that no beneficial interest passes to the executor or to the cemetery association or public subdivision in case of a bequest of the kind under consideration. The real beneficiary of the bequest, if any must be found, would be the testator's estate itself. In one sense, therefore, it is arguable, as the court seems to argue, that there is no succession which can be taxed unless the residuary legatees, or other persons entitled to object to the amount of the bequest for such purpose, had made their objection and had prevailed, so as to add a part of the sum thus set aside to their respective interests. The Iowa court seems to hold squarely that the state is not in a position to object, but that the reasonableness of the sum, or, as the Ohio statute (section 10832 G. C.) puts it, the "justice" of the amount is a question between the executor or administrator and the successors to the estate. However this may be, it is certain that the Iowa case stands for the proposition that the reasonableness or "justice" of the amount cannot be determined merely by comparing the amount with the gross amount of the testator's estate.

The view thus exemplified by the Iowa case seems to be generally sustained. See

In re Vinot, 7 N. Y. S. 517;
In re Fleck, 35 Pittsb. L. J. N. S. 67;
In re Edgerton, 54 N. Y. Supp. 700, affirmed 158 N. Y. 671;
Re Liss, 39 Misc. 123; 78 N. Y. S. 969;
In re Maverick, 155 App. Div. 44; 119 N. Y. Supp. 914; affirmed 198 N. Y. 618.

The cases are unanimous in this view where there is no testamentary provision, and the question is as to whether the executor or administrator has exercised a fair discretion in appropriating money from the estate for such purposes.

Certain earlier New York cases attempt to make a distinction between such cases and cases like those immediately under consideration wherein there was a testamentary provision by way of direction to the executor, in which event these cases hold the whole bequest to be taxable.

In re Fay, 116 N. Y. Supp. 423.

But this seems to be overruled by a later case in the same jurisdiction.

In re Maverick, supra.

See, in addition to the authorities previously cited:

State ex rel. vs. Probate Court, (Minn.), 164 N. W. 365; L. R. A. 1918a, 776.

The case last cited refers to *Kroll* vs. *Close*, 82 O. S., 190, in which the supreme court of this state discusses the criteria of reasonableness of an expenditure for funeral expenses. In that case the value of the whole estate was less than $800 and the administrator claimed credit for over $200 paid for funeral expenses; the item

chiefly contested was that for a casket costing $150. The attitude of mind of the court can be appreciated by the following quotation from the opinion of Davis, J., at p. 197:

> "The deceased was an old man, with no immediate family surviving, and in his later years, with no stated income or occupation. He had been a sailor on the lakes and an engineer in small steamers. His tastes and habits were simple and his expenditures modest and economical. A short time before his death he had been an inmate of the Odd Fellows' Home at Springfield, Ohio * * *. A committee of Odd Fellows assumed charge of the funeral, and this committee and some of the disappointed relatives (who had received nothing under his will) proceeded to order the funeral and select the casket. * * * The administrator called in the plaintiff in error (the sole legatee) and * * * it is not denied that she did object to (the purchase of the casket) as inappropriate and unnecessarily expensive. The administrator * * * was not bound to listen to the desires and importunities of persons who desired to be liberal with money which was not theirs to spend. * * * According to the testimony of the undertaker himself, a decent and respectable burial, with broadcloth covered casket, mounted with silver handles and name plate, may be had for seventy-five dollars and even less. In view of all of these circumstances, and especially of the fact that the cost of this funeral was made to be one-fourth of the entire estate, we think that the amount allowed by the court * * * should be reduced to one hundred dollars * * *."

It will be observed that while the court does give some weight to the proportionate amount of the expenditure, many other circumstances, not the least of which is the attitude of the persons who would be in a position to object, are taken into consideration.

The cases cited cover all sorts of "funeral expenses," including such items as the particular quality of service of the undertaker, the cost of the casket, the erection of a monument or tomb, and provision for the care of burial lots, which is the exact question under consideration. The principal Iowa case above cited especially discusses the expressed preference of the testator for a tomb or vault instead of a simple grave with headstone, and intimates that such preference should be allowed controlling weight, unless all the circumstances of the case show that the amount necessary for this purpose would be unreasonable.

The principles developed in the discussion of the above cases lead to the following conclusions on the second of the three general questions now under consideration and the specific question submitted by the commission's supplementary letter:

In the absence of a showing that the amount is excessive for the purpose stipulated (in which event the excess should be either added to the residuary legatees' share or treated as a beneficial bequest to the township or municipal cemetery—and therefore exempt, or to the privately operated cemetery—and therefor treated as in the third general class hereinafter to be considered); and in the absence of a showing that under all the circumstances of the case the testator's estate would not stand an expenditure of this character, having regard to his station in life, the gross amount of his estate, the situation of the beneficiaries, etc., the amount of the bequest should be deducted from the gross amount of the estate as a funeral expense and therefore an expense of administration.

So far as the general questions submitted by the commission under this head are concerned, the statement may be made that without such qualifying circumstances the deduction should be made, and that the state is scarcely in a position,

no one else objecting, to raise the question as to the existence of such qualifying circumstances.

Coming now to the specific question submitted in the commission's supplementary letter, we have the authority of the Iowa case for holding that the mere fact that the testator desired a burial vault to be erected on his lot is not of itself an evidence of injustice, unreasonableness or extravagance. No facts are shown in the commission's letter to indicate whether the expenditure of $16,150 by the executor in carrying out this purpose of the testator was otherwise unreasonable, having regard to the total amount of the estate, the station in life and personal tastes, etc., of the decedent, the attitude of the other beneficiaries, etc. If the court has allowed the expenditure, without any objection on the part of the other beneficiaries, it is difficult to see how the state is in a position to object. This question, however, is not determined, as it is desired to leave open the question as to whether the state may object to a grossly and palpably extravagant provision of this kind, even when the beneficiaries under the will make no objection. The holding merely is that on the face of the facts submitted by the commission to this office no evidence of unreasonableness appears, except the mere fact that the testator desired and the executor constructed a burial vault instead of a mere grave with headstone, and that the vault seems to have been an expensive one. Without other facts, these facts in themselves do not appear to be controlling.

The third general question does not seem to admit of any doubt as to its solution. The beneficiary in the case supposed is the cemetery association. If the association is privately managed and controlled, it is clearly not an exempt successor. This statement is made in spite of the provisions of sections like 10105, exempting all burial grounds from taxation and authorizing the appropriation of property for burial purposes by private associations, and section 5350 which extends limited exemption from property taxation to "lands used exclusively as graveyards * * * except such as are held by a person, company or corporation with a view to profit, or for the purpose of speculating in the sale thereof." These exemptions from property taxation are without weight in connection with the present question because Article XII, section 2 of the Constitution expressly authorizes the exemption of "burying grounds" as such. The inheritance tax law, however, contains no similar provision. The only clause of that law which could possibly apply so as to warrant an exemption is "to or for the use of an institution for purposes only of public charity * * *." It is clear that a private cemetery or a cemetery operated by a cemetery association, even though not for profit, is not an enterprise that is carried on for "purpose of public charity." The very framework of Article XII, section 2 of the Constitution itself demonstrates this when it makes separate enumeration of "burying grounds" and "institutions used exclusively for charitable purposes." The distinction which has been drawn between a bequest to an association of this sort for the upkeep of the testator's burial lot and a like bequest for the general embellishment or maintenance of the cemetery is drawn in *Long's Estate,* 22 Pa. Sup. Ct. 370; and *Hurst* vs. *Caernarvon Cemetery Association,* 1 Lancaster Law Rev. 60.

It is accordingly the opinion of this department that where there is a bequest to a cemetery association, or other private corporation, organization or persons for the benefit of a cemetery of this class, as distinguished from the maintenance of the testator's own lot therein, such bequest is taxable.

Respectfully,
JOHN G. PRICE,
Attorney-General.