2073.

INHERITANCE TAX LAW—GENERAL BEQUEST TO INSTITUTION CONDUCTING UNDER SAME MANAGEMENT AN ORPHANAGE, TAXABLE—BEQUEST FOR ORPHANS IN ORPHANAGE NOT TAXABLE—HOW TO DETERMINE WHETHER BEQUESTS TO INSTITUTION ARE TAXABLE—USE OF PROPERTY RATHER THAN CHARACTER OF INSTITUTION GOVERNS.

A general bequest or devise to an institution conducting under the same management an orphanage, to which needy children are admitted without discrimination, and also a school in which instruction is given in the Christian religion looking towards preparation of young persons as missionaries of a particular sect, is subject to inheritance taxation.

A bequest to the same institution, the fund to be used for the benefit of the orphans in the orphanage, is exempt from inheritance taxation.

For the purpose of determining the question of the exemption of a bequest to an institution, its charter powers, if it is incorporated, are always material where the bequest is general. If the purpose of the bequest is one of public charity only, the charter is material only to the extent of determining the capacity of the institution to take the bequest; and the actual method in which the institution is operated may be looked to, to determine whether or not it conducts a distinct activity the purpose of which is one of public charity only.

If the institution is not incorporated, and the bequest is general, the general objects of the institution can be ascertained by examining the deed of trust, testamentary trust, articles of association, constitution and by-laws, or other documents under which it conducts its operatoins. If the bequest is specific, the actual method of conducting the institution may be looked to, to ascertain whether or not there is a distinct branch of its work which is devoted only to public charity.

COLUMBUS, OHIO, May 12, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of the commission's letter submitting the following questions for the opinion of this department:

> "An institution in this state conducts under the same management an orphanage, to which needy children are admitted without discrimination as to creed or race or other qualifications and also a school in which instruction is given in the Christian religion looking towards preparation of young persons as missionaries of a particular sect. To this institution two legacies are given. In connection with one no restrictions are imposed as to how the bequest shall be spent. The other will directs that the fund shall be used for the benefit of the orphans in the orphanage. Are these bequests subject to inheritance tax?
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> What effect is to be given to the word 'only' where it appears in the phrase 'or to or for the use of an institution for purposes only of public charity' where the same is found in section 5334 of the General Code?
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> In determining whether or not an institution belongs to the exempt class mentioned above, if it is incorporated, is its charter alone the determining factor, or may the court look beyond the charter to the actual method in which the institution is operated? If the institution is not incorporated what factor is to be considered other than the actual method of operations?"

The language of the statute requiring interpretation is as follows:

"Sec. 5334. The succession to any property passing to or for the use of * * * a municipal corporation or other political subdivision thereof for exclusively public purposes * * * 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 preceding sections of this subdivision of this chapter. * * * "

It is necessary first to determine whether the phrase "for purposes only of public charity" is used in this section as descriptive of the nature of the "institution" or as descriptive of the nature of the gift. In other words, are we to read the section:

"The succession to any property passing to or for the use of an institution (which is established) for purposes only of public charity?"

Or are we to read it:

"to or for the use of an institution (the property to be used) for purposes only of public charity (by such institution)?"

At the outset it may be stated that we are dealing here with a question of local policy, and that the exemption sections of the inheritance tax laws of the several states differ so widely and manifest such variant ideas of local policy, that decisions from other states are not of much service in the interpretation of our section. The local policy which we have in Ohio on the subject of exemptions from taxation generally was critically examined and exhaustively expounded in the cases of *Myers* vs. *Rose Institute,* 92 O. S. 238, and *Rose Institute* vs. *Myers,* 92 O. S. 252. The language there under examination was "institutions of purely public charity"—a phrase in which manifestly the qualifying words "of public charity" modified the word "institutions"; that is to say, there was no question of grammatical construction as is afforded by section 5334 of the General Code. Notwithstanding this language, the court gave to it a construction which is exemplified by the following quotations from the opinion:

"In the first place, it has been constantly recognized and held by this court that the phrase 'institutions of purely public charity' is a broad one, and that the term may be applied by the legislature to the organization which administers the charity or to the establishment where its operations are carried on." (Citing cases)

Johnson, J., in Myers vs. Rose Institute, supra, p. 242.

"The plaintiff in error maintains that the case must turn upon the interpretation to be given the words 'belonging to,' and that the test is no longer one of the actual occupancy or use of the property, but simply one as to whether the institution administering the charity is the owner thereof.
* * *

The all but universal deliverances along the line have had the effect of confining the exemption to such property as is directly used and employed by the institution in the actual carrying on of the business of the charity.
* * *

We gather from these * * * cases * * * these two general and controlling rules of interpretation:

1. It is the use of the property which renders it exempt or nonexempt, not the use of the income derived from it.

2. The exemption is not a release *in personam* but a release *in rem*, and the *res* to which the release applies must be found and identified by the officer or no exemption can be recognized."

Nichols, C. J., in Rose Institute vs. Myers, supra.

We have here, then, a strong intimation that it is not the character of the institution, as such, and as the owner which determines the exemption of the property from taxation, but the use to which the owner puts the property that entitles such property to exemption from such taxation. The decisions cited deal, of course, with property taxation and are, strictly speaking, not in point. They do show, however, the trend of judicial thought on the general subject, which is in the direction of attaching more importance to the use than to the ownership.

Coming now to the section of the inheritance tax law under examination, we find therein certain internal evidence which suggests the answer to the question raised and now under discussion. Thus, the two clauses in the section most nearly alike are those which have been quoted, in one of which the taker or successor is a municipal corporation and the other an "institution." Property passing to a municipal corporation or other political subdivision of the state of Ohio is not on that account exempt. This is clear. The clause reads:

"The succession to any property passing to or for the use of * * * a municipal corporation or other political subdivision thereof *for exclusively public purposes* * * * shall not be subject, etc."

In other words, in order to apply the exemption section to a devise or bequest to a municipal corporation, we must go beyond the mere fact that the municipal corporation is the successor and inquire as to the purpose of the gift.

The framework of the clause dealing with public charities is very similar to that dealing with political subdivisions. The most natural interpretation, therefore, to give to the clause under examination, based upon the intrinsic evidence to be found in the statute itself, is to regard the clause "for purposes only of public charity" as descriptive of the nature of the gift rather than the nature of the institution itself.

Of course, where the institution exists solely for the purpose of administering a public charity, and the bequest or devise is general, the purpose of the gift, being the same as the purpose of the institution, is determined by the charter powers or general objects of the institution itself. But where the purpose of the institution as an organization is not exclusively public or charitable, yet the purpose of the gift is of that character and the institution, though not limited to the administration of public charity, is competent to undertake such an activity, then under the interpretation which has been favored we are not to stop with the discovery that the institution itself is not limited in its objects to public charity, but are to inquire what may be the purpose of the gift.

This principle is consistent with the trend of all the authorities in this state on the subject of exemptions from property taxation. It is consistent with the most natural meaning of the section under consideration. It is only slightly different from another form of expression which has been used in dealing with the statutes relating to exemption from property taxation, and in cases which have held that an organization like the Roman Catholic church, for example, which in and of itself is not an institution of purely public charity, may, nevertheless, foster and support activities like parochial schools, which are institutions of purely public charity. In order to arrive at this result the courts have regarded the school as an institution distinct

from the church itself, though perhaps existing within it. This it was necessary to do in order to apply the property tax exemption statutes, which, as has been seen, were differently phrased from the one under consideration in this opinion. But to intrepret the inheritance tax law as has been suggested herein would, though by a slightly different course of reasoning, produce the same practical result, which is that a definite object or purpose within the capacity of an institution may be publicly charitable, though the institution itself as a whole is not exclusively devoted to such ends.

Merely for its cumulative effect, the phrase "carried on in whole or in substantial part within this state" may be referred to. This phrase obviously modifies the word "purposes," and emphasizes, though it does not in and of itself make absolutely clear, the choice between the two possible interpretations of the preceding clause which has been indicated in this opinion.

Coming now to the specific questions submitted by the commission, it is the opinion of this department that the institution described by the commission as an institution is not an institution whose purposes are exclusively charitable. Therefore, a legacy to this institution upon which no restrictions are imposed is not exempt from the inheritance tax. This follows because, no restrictions being imposed upon the gift, it may rightfully be used in furtherance of any of the purposes which the institution itself is authorized to pursue. Therefore, it may be devoted to objects which are not of a publicly charitable nature. In this way the broad purposes of the institution determine the nature or purpose of the gift itself.

It is further the opinion of this department, however, that the second bequest, which directs that the property which constitutes its subject-matter shall be used for the benefit of the orphans and the orphanage, is exempt from the inheritance tax; for the support of the orphanage, being an exclusively public enterprise of a charitable nature and the purpose of the gift being limited to the support of the orphanage, the bequest is brought within the statute as it has been interpreted. The same result, of course, could be reached by the other course of reasoning intimated in this opinion, viz., by regarding the corporation or association which is to take the legal title (presumably) as the trustee and the orphanage itself as a separate "institution," like the parochial schools have been treated as separate institutions for property tax purposes. The "use" of which the inheritance tax act speaks would then be in the orphanage, as such, and making the separation indicated one would arrive at the same result by a different course of reasoning.

The commission inquires what effect is to be given to the word "only" in the statute. Obviously, this word has the effect of requiring the purpose of the gift to be exclusively related to public charity. In answering the two questions which have heretofore been considered, the word "only" has been given its proper effect; for the first of the two bequests about which inquiry is made is for a purpose partly pertaining to public charity, in that the proceeds of the gift *may* be used in support of the orphanage; but because the word "only" is in the section exemption must be denied to this bequest, since it is possible to use the bequest in whole or in part in support of activities which are not publicly charitable.

What has been said in answering the other questions submitted makes it necessary to observe, in approaching the commission's next question, that it is always material to determine whether or not the organization is in and of itself an institution of public charity only, since if it is determined that it is such an institution not authorized to administer or organized for the purpose of administering any activity other than one of a publicly charitable nature, no further inquiry need be made in case the bequest or devise is to the organization generally.

The commission inquires whether in making such determination the charter or articles of incorporation of an incorporated institution is alone the determining

factor, or whether the court may look beyond the charter to the actual method in which the institution is operated. In the opinion of this department, the charter alone is the determining factor as to whether the organization itself is exclusively devoted to publicly charitable activities, for if the request is general then it must be presumed that it will be used in any way in which the charter powers of the corporation permit it to be used.

However, at this point it is believed that for the further purposes of the section, viz., for the purpose of ascertaining whether or not the charitable activities of the corporation are "carried on in whole or in substantial part within this state," the actual method in which the institution is operated must be looked to. The charter of a corporation would not ordinarily disclose these facts.

Moreover, if the charter should disclose that the organization or corporation itself is authorized to conduct activities which are not publicly charitable, this, as previously pointed out, is not conclusive if the purpose of the bequest is limited to publicly charitable objects. Moreover, though the institution as a whole may be looked upon as devoted exclusively to charitable objects, the purpose of the bequest may be so limited as not to be exempt. Thus, a bequest might be made to a hospital for the purpose of establishing a bed for the use of patients who are ministers of a given denomination. The institution would doubtless be empowered to receive such a bequest, but the bequest itself, in the opinion of this department, would be taxable, despite the general publicly charitable nature of the corporation which was the immediate beneficiary.

If the institution is not incorporated (and that it need not be in order to be an "institution" has been held in a previous opinion of this department to the commission), then we are to look, in the first instance, to any articles of association or other documents which describe its purposes. These are to be looked to for the same purpose as the articles of incorporation of an incorporated institution are to be examined. Thus, the institution may, as previously decided by this department, exist under a deed of trust or a will. The provisions of such deed of trust or will are to be looked to to determine the objects which the institution may lawfully pursue. The other remarks made concerning the manner of arriving at the conclusions respecting bequests to corporations apply equally to the ascertainment of like facts with respect to unincorporated institutions.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2074.

DISAPPROVAL OF SYNOPSIS FOR REFERENDUM OF HOUSE BILL NO. 249, 109 O. L. 105, (REORGANIZATION ACT).

COLUMBUS, OHIO, May 12, 1921.

MR. WILLIAM W. DURBIN, *Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your letter of May 12th in which you request my approval of a synopsis you submit relative to House Bill No. 249, said synopsis to be used in connection with a referendum petition which you state yourself and others desire to file.

The act against which you propose to file a referendum petition is declared upon its face to be an emergency law necessary for the immediate preservation of the public peace, health and safety, with the reasons for such necessity set forth in the