2084.

INHERITANCE TAX LAW—PROPER METHOD OF ASSESSING TAX UNDER CERTAIN WILL.

The proper method of assessing inheritance tax under certain will considered.

A bequest to A. for life or until B. if living, would have attained the age of forty years, and then to the heirs of A, to be ascertained as of the time when B would have arrived at the age of forty years, should as to the interest of A, whose expectancy of life exceeds the period of time intervening between the death of the testator and the date when B, if living, would have arrived at the age of forty years, be regarded for inheritance tax purposes as an estate for years. The remainders over should be immediately taxed at the highest possible rate, inasmuch as they are not presently vested and a single person remotely related to the testator might succeed. A's expectancy of life is to be ignored in assessing the remainders and determining the highest possible rate.

COLUMBUS, OHIO, May 18, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission requests the opinion of this department on the following questions:

"Isaac W. R. died testate. By will he devises his residuary estate to his executors to be held in trust by them with the following directions:

'Out of the income from my estate my executor shall pay annually to my sister, Frances R, the sum of four thousand dollars, free of income or other taxes, all of which shall be paid for her out of my estate.

The net income from my estate remaining each year after the payment from the entire income of four thousand dollars to my said sister and all other prior charges, shall be paid to my nephews, Addison S., William B., Francis R., and my niece, Elinor R., in the proportions of four-fourteenths thereof to Addison S.; three-fourteenths thereof to William B.; one-fourth thereof to Francis R.; and one-fourth thereof to Elinor R.; for so long during their natural lives, or the natural life of the survivor of them, until my said niece Elinor shall have attained the age of 40 years, or if living would have attained such age; but if my sister Frances R. be then still living the said annuity to each of the said four named persons shall continue for so long during his natural life as my said sister shall live. If during the time hereby fixed for the continuance of said annuities any of the said annuitants should die, his share of such annuity shall be thereafter payable to his heirs at law, excepting in the case of Addison S., whose share shall be paid to his children.

At the expiration of the time herein fixed for the continuance of said annuities, my executor shall then divide and distribute all of my estate not hereinbefore specifically disposed of to Addison S., or in case he be then dead, to his children, four-fourteenths thereof; to said William B., or in case he be then dead, to his heirs at law, three-fourteenths thereof; to Francis R., or in case he be then dead, to his heirs at law, one-fourth thereof; and to Elinor R., or if she be then dead, to her heirs at law, one-fourth thereof; the heirs at law in each case to be ascertained as though the death of the original donee had occurred at the time herein fixed for such distribution.'

At the death of the testator the ages of the beneficiaries named above were as follows:

Frances R., 80 years
Addison S., 60 years
William B., 52 years
Francis R., 25 years and
Elinor R., 23 years.

Will you be good enough to advise us as to the manner in which the different successions created by this devise should be determined for inheritance tax purposes?"

The expectancy of life of the testator's sister, Frances R., who was eighty years of age when the testator died, is so brief that it is believed the stipulations as to the limited estates created by the second paragraph of the will as above quoted, to the effect that if Frances R. is living at the time Elinor R. would arrive at the age of forty years, if living, the limited estate shall continue during the life of Frances R., should be ignored. In other words, these limited estates are for years or for the life of Frances R., and inasmuch as Frances R's expectancy of life is less than such number of years, the former limitation should be ignored.

That the estates are for years severally appears from the fact that they are to continue, not until Elinor R. attains the age of forty years, but until she, if living, would have attained such age. She was twenty-three years of age at the death of the testator, and therefore the duration of the limited estates is between sixteen and seventeen years.

There are four of these limited estates. The one to Addison is equitably devised to him and his children. The other three are to the first takers and their heirs at law. An ambiguity arises in this will at this point, viz., is the share of Addison, in case of his death before the expiration of the sixteen year period, to be paid to the surviving children or to his children and their legal representatives? The will is not clear. By subsequent letter, however, the commission has advised this department that the probate court has made a tentative determination in which the will is construed on this point, and that interpretation of it is followed which makes the limitation over vested and not contingent.

It has been stated that these limited estates are to be regarded as estates for years. This is true if the expectancy of life of any one or more of the takers exceeds sixteen years at the death of the testator. This appears to be the case as to all of them excepting Addison.

From all the foregoing it is apparent that the one of the first takers whose expectancy of life is less than sixteen years takes an estate for life, and those whose several expectancies of life are in excess of sixteen years take estates for years.

Upon the estate of Addison vested remainders are limited to his children for the period of time between the expiration of his life and the end of the sixteen year period. There is, indeed, a contingency, viz., that these estates will not arise at all because Addison may live more than sixteen years.

It is impossible to treat the limited estate of Addison as a mere estate for years, ignoring his expectancy of life, because the intention of the testator seems to be to give a life estate in the share of the income to him and an equitable remainder to his children. That is to say, it would be impossible for him to alienate his share of the income for the full period of sixteen years, regardless of his expectancy of life. He has no control apparently over the payment of the income after his own death. The rule in Shelley's case being inapplicable under the statute to the will, we are therefore forced to take cognizance of the intermediate estate which has been under discussion.

As to the final distribution or equitable interest in fee of the corpus of the net estate, it is clear under the will that this distribution is not to be made until the end of the sixteen year period, and to persons to be ascertained "as though the death of the original donee had occurred at the time herein fixed for such distribution", except in the case of Addison's share, which will be hereinafter specially considered. A by no means remote possibility is that at the end of the sixteen year period all four of the first takers will be dead, and this possibility may be considered, though the expectancy of life of William, Francis and Elinor may exceed sixteen years. In such event, a by no means remote possibility would be that a person remotely related to the testator might be the single common heir at law, to whom distribution of the respective shares of William, Francis and Elinor would have to be made. As to Addison's share, the same question is encountered here, though in a slightly different form, as was met in dealing with the disposition of Addison's share of the income after his death. The court appears to have decided that the testator's intention was that the remainders to his children are to be vested, subject to be divested by the subsequent birth of children of Addison.

On the foregoing reasoning, the following disposition should be made of the proceedings for the determination of the taxes:

(1) The interest of Frances R. arising under the first paragraph should be taxed as an annuity for her expectancy of life.

(2) The interests in the net income arising under the second paragraph should be taxed as follows: the shares of William, Francis and Elinor, the several expectancies of life of each of whom exceed sixteen years, should be treated as estates for years, and the disposition of the income after their death but before final distribution should be ignored. The share of Addison, whose expectancy of life is between two and three years less than sixteen years, should be treated as a life estate.

(3) It being possible that one person remotely related to the testator will succeed to all the shares, excepting that of Addison, on final distribution, the remainder after such estates for years, etc., should be subjected to immediate taxation at the highest possible rate, which in this instance is the seven per cent basic rate.

(4) The court having so construed the will as to regard the estates of Addison's children as vested, subject to be divested by the subsequent birth of other children, if any, such estates, namely, the interest in the income intervening between the end of Addison's expectancy of life and the end of the period of years and the share in the corpus at the end of the period of years, should be considered together as single successions, the same persons being takers of both, regardless of whether the estates virtually merge or not. The inheritance tax law itself provides that a succession shall be an amount passing from one person to another person, whether by a single testamentary act or not; so that the interest of each child of Addison should be appraised virtually as a remainder after the life estate of Addison. These children, being grand nephews and nieces of the testator, are, of course, in the seven per cent class.

It is understood that counsel for the executors contends that the immediate taxation of the remainders, in the cases in which the expectancy of life exceeds the period of years, should be to the first takers themselves. It is understood that the argument is that because under section 5342 of the General Code life estates are to be appraised according to the expectancy of life, and because the highest possible rate section (which is section 5343) provides that the immediate or ad interim taxation therein provided for shall be "at the highest rate which, on the happening of any such contingencies or conditions, would be possible *under the provisions of this subdivision of this chapter,*" the two sections should be read together, and that only should be considered to be a "possibility" which is predi-

cated upon the normal expectancy of life. On this hypothesis it is arguable that William, Francis and Elinor are to be considered as the successors of their respective distributive shares when final distribution is made, because their expectancies of life run beyond the period of distribution.

This theory is believed to be incorrect. It is not sustained by any of the cases from other jurisdictions in which similar statutes are found, which cases have been frequently cited in other opinions to the commission.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2085.

NEWSPAPERS—WORD "CIRCULATION" AS USED IN SECTION 6251 G. C. CONSTRUED.

The word "circulation", as used in the proviso to section 6251 G. C., which prescribes rates of charges for legal advertisements, means the bona fide circulation of the issue of the newspaper in which the advertisement is published.

COLUMBUS, OHIO, May 18, 1921.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date relative to the meaning of section 6251 G. C., was duly received.

After conferring with Mr. Halbedal, one of your deputy supervisors, I understand that the question you desire answered is whether or not the word "circulation", as used in the proviso of the section, means the average daily circulation of the newspaper, or the circulation of the particular issue or issues of the paper in which the legal advertisement is published.

Section 6251 G. C. reads as follows:

> "Publishers of newspapers may charge and receive for the publication of advertisements, notices and proclamations required to be published by a public officer of the state, county, city, village, township, school, benevolent or other public institution, or by a trustee, assignee, executor or administrator, the following sums, except where the rate is otherwise fixed by law, to-wit: For the first insertion, one dollar for each square, and for each additional insertion authorized by law or the person ordering the insertion, fifty cents for each square. Fractional squares shall be estimated at a like rate for space occupied. In advertisements containing tabular or rule work fifty per cent may be charged in addition to the foregoing rates. Providing, however, newspapers having a circulation of over one hundred thousand shall charge and receive for such advertisements, notices and proclamations, rates charged on annual contracts by them for like amount of space to other advertisers who advertise in its general display advertising columns."

The statute, it will be observed, makes no attempt to restrict or limit the meaning of the word "newspapers" to any particular kind or class of newspapers. The word obviously includes any newspaper qualified to publish legal advertisements, whether it be published daily, semi-weekly, tri-weekly or weekly, and re-