N. and D." as equally-sharing beneficiaries; so that in the event of such intestacy, as hereinbefore intimated, no taxable succession would have existed; yet the decedent did not die intestate but left a will, by which it may be presumed he altered what would otherwise have been the legal effect of the policy. Quite aside from the evidence which the will furnishes as to the real intent of the testator in constituting the bank "trustee for M., N. and D."—and such evidence is always admissible to show the true and actual terms of a trust, notwithstanding the parol evidence rule, it is clear that the will at least has the effect of disposing of these proceeds in the beneficial sense otherwise than in accordance with what would have been the terms of the trust had there been no will. True, the testator might be said to be disposing of property that is not his own, in this view of the case. But where this is done, as it frequently is (for example, where a widow elects to take under the will instead of under the law; or where a debt is paid by a legacy—cases which have been dealt with in previous opinions of this department), the succession which actually occurs, if the will is carried out, is one that takes place "by will" and is therefore within the terms of the statute.

It is not meant to be intimated herein that in the case stated M., N. and D. would have any right of election. The other view is believed to be more sound, namely, that the will, together with other evidence that could probably be adduced, would show the true nature of the trust and disclose it as a testamentary one in its essence. Both views are stated merely for the sake of complete analysis.

In view of the fact that the conclusions reached are predicated in large part upon reasoning which has been more fully expressed in previous opinions of this department, it is felt that it is unnecessary to repeat herein the authorities by which that reasoning is sustained.

It should be added that the fact that in each case the trustee is also the executor of the will is not without its materiality as reflecting on the nature of the respective transactions. It is certainly consistent with the analysis which has been attempted herein.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2652.

INHERITANCE TAX LAW—IF PERSON DIES ON OR AFTER TAX LISTING DAY AND BEFORE OCTOBER 1st IN ANY YEAR—WHEN DETERMINING SAID TAX ON ESTATE THERE SHOULD BE DEDUCTED AS GENERAL DEBT TAXES FOR THAT YEAR ON PERSONALTY OF DECEDENT—TAXES FOR THAT YEAR ON REAL ESTATE OF DECEDENT SHOULD NOT BE DEDUCTED AS GENERAL DEBT.

1. *If a person dies on or after tax listing day and before October 1st in any year, the probate court when determining inheritance tax on the estate should deduct as a general debt the taxes for that year on the personalty of the decedent.*

2. *Under the same circumstances, the taxes for that year on the real estate of the decedent should not be deducted as a general debt.*

COLUMBUS, OHIO, December 2, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission requests the opinion of this department upon the following question:

> "If a person dies on or after tax listing day and before October 1st in any year, should the probate court when determining inheritance tax on the estate deduct as a general debt the taxes for that year on the personalty and real estate of such decedent?"

The answer to this question depends upon whether or not the liability to pay the property tax is a personal obligation of the decedent's estate. If it is such a personal obligation, then it is a preferred charge on the assets in the hands of his executor or administrator, and is to be regarded as coming in the same category as other debts incurred by the decedent, which are specifically or at least by necessary inference to be deducted from the estate for the purpose of fixing the value of the successions therein (see section 5339 General Code).

As to personal taxes the question seems free from doubt. Liability to pay such taxes flows from the obligation to return property for taxation. On the facts stated, the decedent either made a personal property return while in life or should have made one. In either event, the liability for the tax assessed on the basis of the return made, or which should have been made by him, is a personal obligation for which his executor or administrator is answerable. Indeed, while no opinion is expressed upon the point, it would seem that even if the decedent's death had preceded tax listing day, and if on that day the personal assets of his estate were in the possession and control of the executor or administrator, who under the statutes relative to the listing of personal property would thereby have come under the obligation to make the necessary return and pay the tax, the amount so charged against and paid by the executor or administrator would be a proper deduction—not in this case as a debt of the decedent, but as a charge imposed by law upon the executor or administrator, and hence as one of the costs of administering the estate.

Without citing the statutes, therefore, this department feels no hesitancy in advising that when a person dies on or after tax listing day, and before October 1st in any year, the probate court when determining inheritance tax on the estate should deduct as a general debt the taxes for that year on the personalty of the decedent.

The question as to the real estate taxes is involved in considerable difficulty. Some of the difficulty may be avoided, however, by assuming, without deciding, that there is a personal obligation to pay taxes assessed upon real estate. That such personal liability exists was held in *Creps* vs. *Baird,* 3 O. S. 277. That case, however, throws no light upon the present problem, which may be restated as follows:

> On whom does the personal liability to pay taxes assessed on real estate rest under circumstances like those stated in the commission's letter?

In *Creps* vs. *Baird* the sheriff sold the plaintiff's property on execution on July 1st; from the proceeds of the sale there was paid to the treasurer of the

county a certain sum described in the petition as "back taxes." Both in the syllabus and in the opinion, which is by Thurman, C. J., occurs the following language:

> "Taxes due upon lands are a personal debt of him in whose name the lands stand listed when the taxes accrue, as well as a lien upon the lands."

Yet the court held that the order for the payment of the tax out of the proceeds of the sale was erroneous, notwithstanding the existence of the lien. The point was that the plaintiff should have been held to answer for the taxes at the election of the county treasurer in direct proceedings against him personally for that purpose, and if the county treasurer had seen fit to rely upon the lien and collect the taxes from the purchaser at the execution sale the purchaser could not have compelled the judgment debtor to pay them.

This case, however, involved "back taxes" and there is no showing in the report that the taxes which became a lien in the year in which the sale was made, but the amount of which had not yet been determined, were in anywise in controversy.

The case just cited may be regarded as authoritative at the present time, though some of the statutes referred to in the opinion have been repealed. The following sections, however, still remain the statute law of this state:

> "Sec. 2658. When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to *the person charged with such taxes,* if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken, the time and the place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs."

Doubt has been expressed as to whether this section, which is the forerunner of several other sections of similar character, applies to personal taxes, in view of the different form of expression used in certain other sections when real estate taxes are clearly intended. See *State ex rel.* vs. *Gibson,* 1 N. P. (N. S.) 565.

For example, section 2667 refers to real property taxes as "charged against lands or lots or parcels thereof upon the tax duplicate"; and sections 5678 and 5679 of the General Code refer to real estate taxes as "charged against the land."

There is therefore some warrant for the doubt as to whether or not under present statutes there is any personal liability at all for taxes assessed on real property in spite of the decision in *Creps* vs. *Baird, supra.*

Section 2656 General Code, however, seems to be a little broader than the sections providing the specific machinery for distraint when it provides that:

> "When one-half of the taxes charged against any entry on a tax duplicate in the hands of a county treasurer is not paid on or before the twentieth day of December next after being so charged, or when the remainder of such tax is not paid on or before the twentieth day of June next thereafter, the county treasurer shall proceed to collect it

by distress or otherwise together with the penalty of five per cent on the amount of tax so delinquent, which penalty shall be paid into the treasurer's fee fund."

The phrase "any entry on a tax duplicate" seems to be broad enough to include both real estate taxes and personal taxes.

Moreover, numerous sections in the chapter on collection of taxes seem to impose specific personal obligations upon owners of property to pay real estate taxes. The following may be quoted:

"Sec. 5680. Each person shall pay tax for the lands or town lots of which he is seized for life, or in dower, or which he has care of as guardian or executor. He shall also pay tax for the lands or town lots which he has care of as agent or attorney, if he has sufficient funds of the principal in his hands."

"Sec. 5681. Each person holding lands shall pay the tax assessed thereon each year, but an agent or attorney shall not be required to pay such taxes, unless sufficient money of his principal is in his hands to pay them."

"Sec. 5685. Each person being seized or having the care of lands, as executor, and neglecting or refusing to pay the taxes thereon, in manner aforesaid, shall be liable to the devisee or devisees of the person whose executor he is, for any damage occasioned by such neglect."

The sections just quoted are typical merely of a more numerous group. It is to be observed, however, that while a personal obligation is thus created, the person upon whom it is fastened is not pointed out with sufficient certainty for the purposes of the present question. As of what time is the ownership or possession of which sections 5680 and 5681 speak to be determined? That is the question raised by the commission's letter, and these sections, nor any others in the group of which they are a part, furnish no answer to that question. The answer to this question is not furnished by section 5671, which declares simply that:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. * * *."

This section merely establishes a lien; it does not create any personal liability.

Certain decisions in this state have dealt with the problem now under consideration, but have left it in rather unsatisfactory condition.

See Estate of O'Brien, 2 N. P. (N. S.) 421;
Loomis vs. Von Phul, 2 N. P. (N. S.) 423.

It is believed that the answer must be sought in a careful analysis of the sections providing for the enforcement of personal liability. Let us see then how the county treasurer, who is the collector, would proceed to collect from a person a tax assessed upon real estate.

First, he might proceed by distraint. If so, he would have to proceed against "the person charged with such taxes" (section 2658). His duplicate would afford him the only information on this point. As a matter of fact his duplicate would be the warrant for the distraint which he would have to make.

Should he proceed by civil action under section 2667 and succeeding sections of the General Code, there is some question whether he would be entitled to a personal judgment or only a judgment of sale and distribution (see section 2670 General Code). At any rate, the proper party defendant would be the owner of the land at the time, inasmuch as the proceeding is the enforcement of a lien.

The sale of the land for the taxes need not be considered, as this proceeding is obviously in *rem*.

From a consideration of these sections, then, it appears that personal liability for taxes must be predicated upon an entry made on the tax duplicate. In the case of personal property, this entry is made on the basis of the returns made on or about tax listing day. It remains to be considered as to how the duplicate is made up and what it shows with respect to real estate.

The source of the real estate duplicate may be either the duplicate for the preceding year or an assessment made in the current year. In neither event, however, is there any particular inquiry as to the ownership of the land which is assessed. The auditor gets the information as to who is the owner from the books in his office. See section 5548 General Code, which provides the machinery for making the former duplicate the basis of the new duplicate; section 5548-1, which applies to partial reassessments after an initial reappraisement has been made under section 5548; and sections 5553, 5554 and 5555, which regulate the method of appraisement by the auditor in the years in which appraisements are made. The assessment is initiated in all cases by the auditor, and he is not even directed to make special inquiry as to who the owner may be. This he finds from the books in his office. See also section 5551 of the General Code, providing for the making of tax maps. See also section 5560, General Code.

It is evident, therefore, that official determination on the question as to who is the "owner" of a tract of land is no part of an assessment of real estate; yet, of course, if there is to be a personal obligation, such as the statutes relating to the collection of taxes apparently contemplate, and if that obligation attaches to the person whose name appears on the tax duplicate, there must be some method of furnishing the necessary information. If it is not furnished at the time the valuation or revaluation is made and as a part of that official act, we must look for it elsewhere.

The next step in order of time, however, is the making up of the tax list and duplicate. This is provided for by section 2583 of the General Code, which provides as follows:

> "Sec. 2583. On or before the first Monday of August annually, the county auditor shall compile and make up, in tabular form and alphabetical order, separate lists of the names of the several persons, companies, firms, partnerships, associations and corporations in whose names real or personal property has been listed in each township, city, village, special district, or separate school district in his county, placing separately, in appropriate columns opposite each name, the description of each tract, lot or parcel of real estate, the value of each tract, lot or parcel and the value of the improvements thereon, if any, and in a separate list the aggregate value of the personal property as listed therein and revised by him, or the county board of revision, as the case may be, and the number of dogs, and the value, if given by the owner. If the name of the owner of any tract, lot or parcel of real estate or of any item of personal property is unknown, the word 'unknown' shall be entered in the column of names opposite said tract,

lot, parcel, or item. * * * * The copies prepared by the county auditor shall constitute the auditor's tax list and treasurer's duplicate of real and personal property for the current year. * * *"

This section assumes that there has been a listing of real estate, whereas that is not the case, as has been shown.

Section 2585 is more consistent with the actual machinery of the assessment of taxes when it provides as follows:

"Sec. 2585. After receiving from the auditor of state and from other officers and authorities legally empowered to determine the rates or amounts of taxes to be levied for the various purposes authorized by law, statements of the rates and sums to be levied for the current year, the county auditor shall forthwith proceed to determine the sums to be levied upon each tract and lot of real property adding the taxes of any previous year that have been omitted, and upon the amount of personal property, moneys and credits listed in the county, in the name of each person, company or corporation which shall be assessed equally on all real or personal property subject to such taxes, and entered in one or more columns, in such manner and form as the auditor of state prescribes."

Note that this section speaks about the sums "to be levied upon each tract and lot of real property * * * and upon the amount of personal property * * * listed in the county in the name of each person." This is believed to be an accurate expression.

Section 2595, General Code, provides as follows:

"Sec. 2595. On or before the first day of October each year, the county auditor shall deliver to the county treasurer a true copy or duplicate of the books containing the tax list required to be made by him for the year."

We have it, then, that the original tax list and the treasurer's duplicate are to be made up in August and turned over in October. In practice these time requirements are not rigidly observed.

As yet we have no real light on how the auditor proceeds to ascertain who is the owner of real estate.

Section 2768 relates to the duties of the county recorder; yet it is believed that it sheds some light upon the problem now under consideration. It provides as follows:

"Sec. 2768. The county recorder shall not record any deed of absolute conveyance of land or any conveyance, absolute or otherwise, of minerals or mineral rights until it has been presented to the county auditor, and by him indorsed 'transferred,' or 'transfer not necessary.' Before any real estate the title to which shall have passed under the laws of descent shall be transferred, as above provided, from the name of the ancestor to the heir at law or next of kin of such ancestor, or to any grantee of such heir at law or next of kin; and before any deed or conveyance of real estate made by any such heir at law or next of kin shall be presented to or filed for record by the recorder of any county, such heir at law or next of kin, or his or their grantee, his agent or attorney, shall present to such auditor the affidavit of such

heir or heirs at law or next of kin, or of two persons resident of the state of Ohio, each of whom has personal knowledge of the facts, which affidavit shall set forth the date of such ancestor's death, and the place of residence at the time of his or her death; the fact that he or she died intestate; the names, ages, and addresses, so far as the ages and addresses are known and can be ascertained of each of such ancestor's heirs at law and next of kin, who by his death inherited such real estate and the relationship of each to such ancestor and the part or portion of such real estate inherited by each, which such transfers shall be made by the auditor in accordance with the statement contained in such affidavit, and such auditor shall indorse upon such deed or conveyance the fact that such transfer was made by affidavit. Such affidavit shall be filed with the recorder of the county in which such real estate is situated at or before the time when such deed or conveyance shall be filed with such recorder for record and shall be by him recorded in the record of deeds, and such affidavit of descent shall be by him indexed in the general index of deeds, in his office, in the name of such ancestor as grantor and in the name of each of such heirs at law or next of kin as grantees in the same manner as if such names occurred in a deed of conveyance from such ancestor to said heirs at law and for such indexing and recording the recorder shall receive the same fees as are provided by law for the indexing and recording of deeds. * * *"

Sections 10526 and 10527, General Code, provide as follows:

"Sec. 10526. When a will is admitted to probate which devises real estate situated in the county where it is recorded, or when the certified copy of a will is filed in the probate court, as hereinafter provided in this chapter, which devises real estate in the county where it is recorded, upon recording such will, the court shall immediately transmit to the recorder of the county in which the will is recorded, a certificate containing the fact of such filing and probate, the name of the testator, the name of the devisees of the real estate, and a description of such real estate as the will contains, and separately state with each parcel the names of the devisees thereof, together with the volume and page of the record of the will."

"Sec. 10527. Upon receipt of such certificate, the recorder shall record it in the books provided for the recording of deeds and index such records in the name of the testator as grantor and the devisees as grantees, in the index provided for the record of deeds."

Section 2573 completes this scheme of legislation, as follows:

"Sec. 2573. On application and presentation of title, with the affidavits required by law, or the proper order of a court, the county auditor shall transfer any land or town lot or part thereof or minerals therein or mineral rights thereto, charged with taxes on the tax list from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent or otherwise. * * * The auditor shall indorse on the deed or other evidences of title presented to him that the proper transfer of the real estate therein described has been made in his office or that it is not entered for taxation, and sign his name thereto."

Some questions arise upon consideration of these sections, the answers to which are somewhat obscure. For example, it is not clear whether the certificate of the probate judge issued under section 10526 of the General Code can be recorded without transfer on the books of the auditor.

Certain things seem reasonably clear, however. In the first place, in the event of the sale of land after the day preceding the second Monday of April in a given year, and the immediate giving of a conveyance to the vendee, such vendee, in order to have such a conveyance recorded, would be required to have it transferred on the books of the auditor. The only tax book then in the auditor's possession would be the tax duplicate made up in the preceding year. The name would be changed on that book. Now comes another question which is not explicitly covered by statute, and that is as to whether or not a corresponding change is to be made in the treasurer's duplicate for that year. Section 2588, providing for the correction of errors, declares that the original tax list and the treasurer's duplicate shall always correspond exactly with each other; yet section 2573 does not require the auditor to give a certificate of transfer to the treasurer, nor has any section been found which has this effect, unless it be section 2592. It provides as follows:

> "The county auditor shall keep a book of 'additions and deductions,' in which he shall enter all corrections of the duplicate made after the delivery thereof to the treasurer, which either increase or diminish the amount of a tax or assessment, as stated in the duplicate. In addition to the marginal corrections provided for in section twenty-five hundred and eighty-eight, he shall in each case give to the treasurer a certificate of the correction."

This section does not dispose of the question because it is not clear that a transfer is a "correction" within the meaning of the last sentence thereof. At any rate, however, the auditor's books will be changed and will become the basis of the new tax list and duplicate which he is to make up between the August and October following. The only name that will appear on those new tax books will be the name of the grantee in the deed. In the event, therefore, that the taxes assessed on the real estate are not paid in the December and June following, and steps are taken by the treasurer to collect the tax from the "owner," the conclusion is irresistible that the only person against whom he can proceed is the grantee who purchased the real estate after the lien date. The treasurer has no other basis on which to go; he does not know from any record in his office whether the land changed hands before the day preceding the second Monday of April or after that day; he has no warrant to collect the tax from any person other than the person in whose name the lands are listed for taxation, and that person, in the case supposed, purchased the land and became its owner after the day preceding the second Monday of April.

This course of reasoning seems to establish beyond question the conclusion that the lien date in and of itself is an immaterial factor in the problem now under consideration.

But when we come to apply the same course of reasoning to the case of transfer by death new difficulties are encountered. It is true that under the statutes of wills and descent and distribution the succession takes place immediately at death; yet the auditor's tax books are not automatically changed. They may be, indeed, and if they are the new duplicate will be made up on the basis of the information that has come officially into the auditor's office; but if no affidavits of descent are presented, or if the will is not filed for pro-

bate, or, being admitted to probate and the probate judge's certificate issued, the order of the probate court is not offered to the auditor for transfer (as to which there seems to be no positive requirement), then it would seem that there is no positive requirement of law that the auditor should either take steps to ascertain whether the former owner has title or not, much less to ascertain who has succeeded him in ownership under the statutes of descent and distribution or under a will. Possibly, if the auditor does make up his new duplicate on the basis of information informally coming to his knowledge, the entry will be correct and proper in law, but even this seems doubtful.

All these doubts can be resolved, in the opinion of this department, by regarding as done that which in the due and orderly course of affairs ought to be done. That is to say, for inheritance tax purposes it ought to be assumed that the proper transfer will be or has been made, and that persons who have succeeded on the death of the former owner to parcels of real property will appear on the duplicate to be made up and delivered in October as the owners of the respective tracts. Then it would have to be presumed that if the taxes should become delinquent, and personal process for their collection should be instituted, that process would be directed, not against the executor or administrator of the estate of the decedent, but against the heirs or devisees. To be sure, under certain circumstances the executor or administrator might rightfully pay the taxes, but in that event he would be entitled to recoup himself, or, rather, the estate represented by him, out of the rents and profits of the real estate, if collected by him, or by proceeding against the heirs or devisees personally.

Warner vs. York, 16 C. C. (N. S.) 369.

The principles, then, upon which this opinion proceeds may be restated as follows:

(1) Personal liability to pay a tax assessed upon real estate can be predicated only upon the fact that the name of the person appears on the treasurer's duplicate as the owner of the real estate.

(2) The person whose name would appear on the duplicate as the owner of real estate in the orderly course of events is the person who becomes the owner thereof before the tax list and duplicate are made up by the auditor and delivered to the treasurer.

(3) It follows, therefore, that where an owner of real estate dies on or after the day preceding the second Monday of April in any year, and prior to the first day of October in that year, the taxes which become a lien on the lands of such deceased person on the day preceding the second Monday of April are, nevertheless, to be regarded as a personal liability of him, or them, who succeed by intestacy or will to his ownership.

(4) Though an executor or administrator may rightfully pay taxes on lands of his decedent which he controls in either capacity, yet such payments are not proper charges against the estate as such, but should be charged to the heirs or devisees by the executor or administrator.

(5) In determining inheritance tax no account should be taken of real property taxes which became a lien before the decedent's death, where the personal obligation to pay such taxes rests upon the heir or devisee. Such taxes are imposed upon the heir or devisee, as the case may be, because the land is his, and do not rest upon him as a burden created by or during the life of the decedent.

The principle which applies here is well stated in Gleason and Otis on Inheritance Taxation, as follows:

"General taxes and assessments * * * are allowed as a deduction if they were a debt of the decedent; so, when they are so far complete that the name of the person assessed as the owner cannot be changed or altered by the assessment officers, they are to be deducted. * * *"

"Taxes due at death of decedent are payable out of his personal estate, and taxes accruing subsequently are chargeable to the land. * * *"

It is concluded, therefore, that the commission's questions should be answered as follows:

(1) If a person dies on or after tax listing day and before October 1st in any year, the probate court when determining inheritance tax on the estate should deduct as a general debt the taxes for that year on the personalty of the decedent.

(2) Under the same circumstances, the taxes for that year on the real estate of the decedent should not be deducted as a general debt.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2653.

ANTITOXIN—DISTRICT HEALTH BOARD REQUIRED TO FURNISH SAME WHERE FUND AVAILABLE—SEE SECTION 1261-29 G. C.—WHEN CITY HEALTH DISTRICT WITHOUT FUNDS, COUNTY COMMISSIONERS MAY PROVIDE SAME IN CASES OF INDIGENT PERSONS.

1. *Under General Code section* 1261-29 *G. C. the district health board is required to furnish antitoxin in all cases where it has a fund available for the providing of same.*

2. *When a city health district is without funds to provide antitoxin, the county commissioners may provide the same in cases of indigent persons.*

COLUMBUS, OHIO, December 2, 1921.

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

GENTLEMEN:—Your request of recent date received in which you ask the opinion of this department as follows:

Free Distribution of Antitoxin.

Section 1239-1 G. C., provides for the production of antitoxin by the state board of health and distribution of same in accordance with the rules and regulations of said board.

Section 1239-2 G. C. provides that any licensed physician or superintendent of any state or county institution shall be entitled to receive such antitoxin without charge for the treatment of indigent persons.

Section 1261-29 G. C. provides that the district board of health shall provide for free distribution of antitoxin.

Senate Bill 203 (109 O. L. 214), amends sections 2500 and 2501 G. C.,