

of course, disappear. Such a view does not seem correct in Ohio, however, for the reasons stated.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

1543.

INHERITANCE TAX LAW—FOREIGN EXECUTOR HAS RIGHT TO MARSHAL ASSETS OF ESTATE SO AS TO APPROPRIATE ASSETS IN OHIO TO PAYMENT OF GENERAL LEGACIES IN SUCH A WAY AS TO PRODUCE SMALLEST POSSIBLE TAX IN THIS STATE—MINORITY RULE ALSO DISCUSSED.

*By the weight of authority, a foreign executor has the right so to marshal the assets of the estate as to appropriate assets in Ohio to the payment of general legacies in such a way as to produce the smallest possible tax in this state. The minority rule is supported by better reasoning, but the history of the Ohio statute is such as to suggest the likelihood of the application of the majority rule to that statute.*

COLUMBUS, OHIO, September 1, 1920.

*Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—You have requested the opinion of this department upon the following question:

“T, a non-resident of Ohio, at the time of his death owned shares of stock in an Ohio corporation to the amount of \$8,000.00. The total of his estate, including the Ohio property, is \$90,000. There are no debts. By his will he bequeaths \$10,000 to S., \$20,000 to H. and his residuary estate to R. There is no specific devise of the Ohio property or of any of the assets.

In the determination of Ohio inheritance tax, has the executor the right to designate the Ohio property as passing to S. or to H. or as being included in the residuary devise to R? Or should it be apportioned among all three in accordance with the value of the bequest to each?”

The Ohio inheritance tax law lacks specific provision for a case such as that found in subdivision 3 of section 220 of the inheritance tax law of New York, as follows:

“Whenever the property of a \* \* \* non-resident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in such decedent’s will, including all transfers under a residuary clause of such will.”

Such a provision as this would, of course, have answered the question put by the commission. In New York prior to the passage of this statute it was held that

a foreign executor had the right so to marshal the assets of the estate as to produce the lowest possible tax in New York.

Matter of James, 144 N. Y. 6;  
Matter of McEwan, 107 N. Y. Supp. 733.

Followed in

Memphis Trust Co. vs. Speed, 114 Tenn. 677;  
People vs. Kellogg, 268 Ill. 489, 501.

The reasoning of these cases is that it is the duty of the executor to pay the legacies, and that for this purpose he can apply such assets as come into his possession; and that the legatees can have the right to accept payment of their legacies out of any assets coming into the hands of the executor. Inasmuch as the inheritance tax law as applied to non-resident's estates relates only to the assets subject to the jurisdiction of the state, the exercise of such rights by the executor and the legatees so operates as to point out and in effect make specific with respect to the local assets the various bequests in the will of the testator. Therefore the foreign executor has the right in the case you put so to appropriate the various assets of the estate as to assign the Ohio property exclusively to the payment of the bequest to S., for example.

A contrary rule obtains in Massachusetts on the persuasive ground that the rights of all parties for the purpose of inheritance taxation become fixed at the death of the testator, so that the interest of the legatee is perfectly vested in interest at that time, though subject to an accounting through the appropriation of specific assets. At that time, too, the rights of the state become fixed, and it is not lawful to charge specific debts and general legacies against particular assets so as to alter the result with respect to the tax.

Kingsbury vs. Chapin, 196 Mass. 533.

On principle the reasoning of the Massachusetts case is to be preferred, as it accords with the ruling spirit of the inheritance tax law, which is that all rights become fixed for inheritance tax purposes as of the death of the testator. In previous opinions of this department dealing with the going into effect of the inheritance tax law it has been pointed out that the rights of distributees and legatees vest for inheritance tax purposes as of the death of the testator, though the estate is not settled for some time thereafter, and they acquire no specific right in rem to any assets of the estate until settlement and distribution. However, the authority of the New York cases would seem to be very persuasive. It is well known that the Ohio statute is closely modeled after that of New York. In point of fact, paragraph 3 of section 220 of the New York law occurs in a section of that law very similar to section 5332 of the General Code of Ohio. Both sections constitute the most important operative provisions of their respective statutes. The omission of paragraph 3 of the New York law from the Ohio law could hardly be looked upon by a court taking cognizance of the history of the Ohio statute otherwise than as manifesting an intention on the part of the general assembly of Ohio to reject definitely the rule embodied in that paragraph. The rejection of such a rule would logically leave the Ohio statute subject to the same interpretation as the New York statute had been given in that state without paragraph 3 of section 220 thereof in it.

It thus appears that the question submitted by the commission is to be answered in one way on principle and in another way on authority. The question must

therefore be regarded as doubtful, and if of sufficient importance in a particular case might best be settled in the due course of litigation. This department having no other function than to advise what, in the opinion of the attorney general, the law is, does not feel called upon nor authorized to make what might be termed a "ruling" in the matter, involving a choice between the two views which have been suggested. In so far as administrative authority exists, such authority is vested in the commission and this department can do no more than to advise the commission with respect to the state of the law as aforesaid, and recommend that the commission promulgate such administrative ruling or recommendation in the premises as may fairly raise the question; or be guided by the weight of authority as indicated by the above cited decisions, as the commission deems best.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

1544.

ROADS AND HIGHWAYS—WHEN FUNDS ACCRUING FROM LEVY UNDER SECTION 6926 G. C. ARE SUBJECT TO USE BY COUNTY COMMISSIONERS FOR PAYMENTS AUTHORIZED BY SECTION 1208-5 G. C. TO MAKE REIMBURSEMENTS OF ROAD CONTRACTORS.

*Funds accruing from levy under section 6926 G. C. to the extent that no contractual obligations exist against them, are subject to use by county commissioners for payments which the commissioners are authorized by sections 1208-5 G. C. (108 O. L. Pt. I, page 550) to make in reimbursement of road contractors.*

COLUMBUS, OHIO, September 1, 1920.

HON. VICTOR L. MANSFIELD, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your letter of recent date is received, reading:

"The county commissioners of Defiance county under the provisions of section 6926-1, Vol. 108, Part I, Laws of Ohio, submitted the question of exempting from all tax limitations the levy of one and four-tenths mills for the purpose of paying the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, maintaining and repairing county roads. There is still a large sum of money raised by this method, which is unappropriated for any purpose. The question now arises whether or not the board of county commissioners would be authorized to use the above funds for the purpose of making payments to reimburse contractors on contracts entered into prior to May 25, 1918, as provided in section 1208-5 of the General Code, Vol. 108, Part I, 1919, Laws of Ohio, page 550. It is provided in this section that payments shall be made from any funds available for the construction, improvement, maintenance and repair of roads, highways, streets or bridges created by general taxation and against which no contractual obligations exist.

Will you please render an opinion as to whether or not the board of county commissioners may use funds raised under sections 6926-1 for the purpose of reimbursing contractors as provided in section 1208-5 of the General Code?"