

1623.

INHERITANCE TAX LAW—FUNDS SET ASIDE UNDER WILL OF
 GEORGE H. MARSH, VAN WERT COUNTY, OHIO, IN TRUST FOR
 MARSH FOUNDATION, NOT SUBJECT TO SAID TAX—PURPOSE
 OF INSTITUTION OF PUBLIC CHARITABLE NATURE.

A bequest to trustees for the purpose of establishing a foundation for the conduct of a children's home and school, coupled with elaborate provisions for the conduct of the business of such foundation and the manner in which its concerns shall be operated, is made to an "institution," and if the purposes of the institution are of a public charitable nature the bequest is not subject to the inheritance tax.

COLUMBUS, OHIO, October 20, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your letter of recent date enclosing a copy of the will of George H. Marsh, late of Van Wert county, in which the testator makes a certain residuary devise and bequest for a charitable purpose. Noting that the bequest is made to three persons and their successors, and not to any incorporated or otherwise previously existing organization, and referring to the opinion of a former Attorney-General given on March 14, 1916 and found in Volume I of the Opinions of the Attorney-General for that year, p. 466, you submit the question as to whether the succession arising by virtue of this disposition of the testator's residuary estate is subject to inheritance tax.

The charitable enterprise of the testator is clearly "public" in the sense in which that word is repeatedly used in the inheritance tax law. The only point at which a question arises is that which is suggested by the use of the word "institution" in the inheritance tax law, section 5334 of the General Code as amended. The exact language of that section, which enumerates the successions which shall be exempt from taxation is

"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."

The following excerpts from the will of the testator will show the exact nature of the trust created by the residuary devise and bequest:

"ITEM 7: I give, bequeath and devise, in trust and not otherwise, in perpetuity, to M. C. and K. and to their successors in office, for the sole use and benefit of the trust to be known as The Marsh Foundation, whose purposes and objects are fully set forth in the text hereinafter."

"ITEM 9: I direct that the board of trustees from said trust funds establish and maintain a home and school in Van Wert county, Ohio."

"ITEM 10: When said executors shall have (settled the estate otherwise) they shall * * * forthwith transfer and set over to the board of trustees of The Marsh Foundation all my property of every kind and character."

"ITEM 13: * * * Such trustees shall give their joint bond in the sum of fifty thousand (\$50,000.00) dollars, the premiums therefor to be paid out of the trust funds, which bonds in said sum shall be continued from year to year by said trustees and their successors in office, premiums

always to be paid in like manner, * * * the obligee being The Marsh Foundation."

"ITEM 14: The board of trustees shall keep a full and accurate record of their doings, * * * in a book to be known as 'The Record of the Board of Trustees of The Marsh Foundation.' * * *"

"ITEM 15: * * * the governing principles for The Foundation are declared to be as follows, all matters of policy and administration to be controlled thereby:

A.

The board of trustees of said Foundation, as soon as practicable, shall proceed to erect the necessary buildings for a home and also for a school. Such buildings shall be located on my land east of my present residence, on the north side of the Ridge road, * * *.

B.

I authorize and direct the board of trustees to receive orphan children of Van Wert county and such other children who need training as are referred to in paragraph D, into the home and school or into the school alone. * * *

C.

No child shall be excluded from the Foundation's home or school on account of race or color, nor on account of his or her religious training or the want thereof, and under no circumstances shall sectarianism or politics be permitted to enter into the management, teaching or control of the home or school.

The principles of honesty, truth, sobriety, industry and frugality shall govern the Foundation and such principles shall ever be instilled into the pupils. * * *.

D.

If from time to time the capacity of the school warrant the admission of pupils of Van Wert county, other than orphan children thereof, the board may admit such, and the board may also admit orphan or other children from other counties of Northwestern Ohio, * * *.

In no event, however, shall the amount paid by or for any pupil ever exceed the actual cost of such pupil's maintenance or instruction, as the case may be, for it is always to be understood that the purpose of the foundation is not gain or profit, and nothing shall ever be done for gain or profit by or through the Foundation.

F.

The school of the Foundation shall have a curriculum at least equal to the requirements from time to time obtaining in the common schools of this county, and, in addition thereto, thorough and practical instruction shall be given in farming, stock raising and horticulture. * * *.

It is not my purpose to establish an institution for higher education.

I desire, however, that the Foundation's activities shall expand with the needs of the years and commensurate with the income available, but it is always to be remembered that the school primarily is for pupils who have no expectation of receiving collegiate or university training.

J.

Vacancies occurring on the board of trustees, whether by death, resignation or otherwise, shall be filled by appointment.

I ask that the appointee be designated by the persons who at the time are the judges of the court of appeals of the judicial district of Ohio of which Van Wert county may then be a part. * * *

K.

(Regulating investments to be made by the trustees).

M.

All bills before payment shall be presented for allowance, and upon allowance by the board of trustees the treasurer shall pay same by check. All receipts or vouchers shall be kept on file permanently in the office of the Foundation.

N.

Said board of trustees from time to time shall select and employ a superintendent, a matron and such other employes as may be necessary. The board shall make all necessary rules and regulations for the government and conduct of the Foundation's home and school, and as well the rules and regulations to obtain in the admission of pupils.

O.

Said board of trustees, * * * shall make a full and complete itemized account of its doings * * * and of its receipts and disbursements, which report shall be sworn to by the treasurer, and its correctness certified to by the other members of the board. Said statement * * shall be published either in whole or in summarized form, in such newspapers as the board may deem necessary.

CONCLUSION.

I invite others who may feel so disposed, by gift, bequest or devise or in such other manner as the donors may deem appropriate, to make said Foundation the beneficiary thereof, always provided that neither the name, purpose, scope or character of the Foundation thereby may be changed, nor the provisions and restrictions herein contained be impaired.

I depart this life in the hope that the Foundation shall become an instrument of enduring and ever increasing benefit to mankind."

Two questions will be considered:

- (1) Does the fact that the foundation referred to in the will was not

in existence at the death of the testator in the form in which the will describes its organization prevent it from being an "institution" within the meaning of section 5334; or, stated in another way, does the institution referred to in the statute have to be an existing institution?

(2) Does the fact that the foundation referred to in the will is an unincorporated trust prevent the statute from operating upon the succession to it?

There is nothing in section 5334 that expressly or by implication requires the institution to be in existence and forbids a testator from providing for the future creation of the kind of institution to which he desires to make his charitable devise or bequest at peril of subjecting same to inheritance taxation.

Without discussing this part of the question fully, it is concluded that an institution to be organized in the future is as much within the scope of the exemption provisions of section 5334 as an existing institution would be. The discussion in the opinion referred to really answers the second question. No more authoritative decision as to the meaning of the word "institution" could be found than that quoted therein from *Humphreys vs. Little Sisters of the Poor*, 29 O. S., 201, wherein the court said:

"By the term institution is to be understood an organization which is permanent in its nature, as contradistinguished from an undertaking which is transient and temporary."

In *Gerke vs. Purcell*, 25 O. S. 229, 244, the court in its opinion said:

"The term 'institution' is sometimes used as descriptive of the establishment or place where the business or operation of a society or association is carried on; at other times it is used to designate the organized society."

To these authorities and the definitions from the lexicons referred to in the former opinion the following may be added:

In *Humphreys vs. State*, 70 O. S., 67, 78, Price, J., arguendo said:

"Learned counsel for plaintiff in error ask in their brief, 'Where are these institutions if not in Ohio? Where were the *institutions* before charters were granted? for they were in existence long prior to the dates of the charters.'

It is perhaps true, that these institutions now operating under charters, may have had another form of existence prior to the date of the charters, but in the wisdom of the General Assembly of the church, it was decided to organize them under charters and it selected the state under whose laws it should be done. It is not a new proposition, that the home of the corporation is the state of its incorporation, and when so incorporated under the laws of a state selected for that purpose, it has also selected its abiding place, and no longer can be recognized as homeless, or as abiding in every state where they have agencies carrying forward their work of benevolence and charity."

It will be observed that the argument was not answered by the statement that it would be impossible for an organization to be an "institution" unless incorporated, but only by the statement that when incorporated it acquired a fixed situs or domicile in the state of incorporation.

It will not be necessary to pursue the subject further. It is clear that no court has ever defined the word "institution" as synonymous with "corporation." The word does import organization and establishment—an artificial entity, considered as a thing separate and apart from particular persons; but a trust is of this character where it is manifest that the trust is to be continued. From the above liberal quotations from the will it is apparent that the testator chose an apt term when he designated the beneficiary of his bounty as a "foundation," and provided in great detail for a perpetual organization established for a definite purpose. He did not do as was done by the testator whose will was considered in the former opinion, i. e., designate trustees who should apply the income of the bequest "in providing funds for hospital services rendered by any private hospital in said city to persons when required by said trustees." In that case the trustees were simply to dispense charity to individuals without maintaining any home or hospital or school or other agency for the accomplishment of the purpose. Indeed, it is very difficult to discuss the subject at all without using the word "institution" in describing what was in the testator's mind in the case now under consideration. He has himself used the word in certain items of the will, in the descriptive sense.

It is true that the organization set up in the testator's will is not the result of voluntary association of individuals. The question then simply is as to whether an organization which owes its existence to a trust, and is not to be formally incorporated, can be an "institution" under the inheritance tax law. The conclusion of this department is that such a result is possible and that the will now under consideration produces that result. *Gerke vs. Purcell, supra*, seems to be directly in point. In that case it was held, *inter alia*, that parochial schools constitute institutions of purely public charity within the meaning of the general property tax exemptions found in statutes passed under favor of Article XII, Section 2 of the Constitution. The statement of facts showed that such schools were not incorporated, nor were they conducted by any incorporated body; that the title to all the property used for such purpose was in the archbishop of the Roman Catholic Church for the diocese of Cincinnati, in trust for the use and benefit of the church and for its public schools.

Referring to this part of the case, White, J., used not only the language above quoted, but also the following: (p. 245) .

"If the property is appropriated to the support of a charity which is purely public, we see no good reason why the legislature may not exempt it from taxation, without reference to the manner in which the legal title is held, and without regard to the form or character of the organization adopted to administer the charity. To illustrate: If the organization by which these schools are maintained were incorporated, no question could be made as to the existence of authority to exempt their property from taxation. Now, if the property is appropriated to the same public uses, and the same ends are accomplished, we see no constitutional obstacle to prevent the legislature from exempting it as fully without incorporation as with it. What the legislature might accomplish indirectly, through the intervention of a corporation—a thing of its own creation—it may accomplish directly. Nor is it essential to the existence of an institution as an organization that it should be constituted under corporate or legislative authority."

These words were used in interpretation of the Constitution, which employs the term "institution." They are equally applicable here.

For all the foregoing reasons, it is the opinion of this department that the succession arising under the residuary devise and bequest of the will submitted by you is not subject to the inheritance tax.

You refer in your letter to other questions which may arise in this estate. You do not specifically request any opinion as to such other questions, and none is given.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1624.

SCHOOLS—SUPERINTENDENTS OF SCHOOLS REQUIRED TO ASSIST IN RECOMMENDATION OF TEXT BOOKS AND COURSES OF STUDY—BOARDS OF EDUCATION UNDER PROVISIONS OF SECTION 7645 G. C. MUST HAVE THEIR COURSE OF STUDIES APPROVED BY SUPERINTENDENT OF PUBLIC INSTRUCTION.

1. *Under the provisions of section 7706-2 G. C. it is the duty of superintendents employed under section 4740 to assist in the recommendation of text books and courses of study to the county board of education.*

2. *Under the provisions of section 7645 G. C. (108 O. L., 1283) all boards of education are required to prescribe a graded course of study for all schools under their control in the branches named in section 7648 G. C., but such courses of study are subject to the approval of the superintendent of public instruction.*

COLUMBUS, OHIO, October 20, 1920.

HON. FRANK CARPENTER, *Prosecuting Attorney, Norwalk Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department upon the following questions:

“1. Is it the duty of superintendents working under section 4740 G. C. to assist in the recommendation of such text books and courses of study to the county board of education as are most suitable for adoption?

2. May a board of education legally prescribe and use a course of study, which is not first approved by the superintendent of public instruction?

3. May a local board of education of a county school district legally prescribe and legally use a course of study which was not prepared by the use of the county course of study as a guide, where said course of study of the local board of education was not first approved by the superintendent of public instruction?”

Bearing upon your first question, section 4740, General Code, reads as follows:

“Any village or wholly centralized rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application to the county board of education before June 1st of any year be continued as a separate district under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct.” (107 O. L. 622)