1704.

INHERITANCE TAX LAW—QUESTION AS TO WHETHER DEBTS APPORTIONED AS ON PERSONALTY ONLY OR SHOULD ENTIRE ESTATE BE CONSIDERED IRRESPECTIVE OF WHETHER IT CONSISTS OF PERSONALTY OR REALTY—METHOD OF APPORTIONMENT WHEN PART OF INDEBTEDNESS SECURED BY MORTGAGE ON NEW YORK REAL ESTATE.

As a general rule, the debts of the estate of a deceased person, if less in amount than the value of the personal estate, should be deducted from the value of that estate only, for inheritance tax purposes, and the value of the real estate belonging thereto should not be subjected to any deduction on account of such debts.

The same rule holds good in working out an apportionment of the indebtedness of the estate of a non-resident decedent for the purpose of arriving at the value of successions to property which are taxable in Ohio.

Inasmuch as according to the law of New York debts secured by mortgage on real estate must be discharged by the heir or devisee out of his own property, such debts of a resident of New York secured by mortgage on New York real estate should not be considered as deductions from the value of the gross personal estate of such decedent for the purpose of making such apportionment.

COLUMBUS, OHIO, December 11, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You request the opinion of this department on the following questions:

> "A dies a resident of New York leaving an estate having a gross value of $135,000.00 made up as follows:
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> | Real estate in New York | $60,000.00 |
> | Tangible personal property in New York | 50,000.00 |
> | Stock in Ohio corporations | 25,000.00 |
>
> The debts amount to $13,500.00, making a net estate of $121,500.00.
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> In arriving at the net value of the Ohio assets for inheritance tax purposes from what items of the estate should the debts be deducted? In other words, in apportioning the debts as between the property in New York and the property in Ohio, should the court disregard the real estate and make such apportionment as on the personalty only? Or should the entire estate be considered irrespective of whether it consists of personalty or realty? Would there be any variance in the method of apportionment if any part of such indebtedness were secured by mortgage on the New York real estate?"

The general rule certainly is that the debts of an intestate (as A. is assumed to be) are payable primarily out of his personal property. That is to say, this is the common law rule and the rule embodied in the statutes of most states. It appears to be the rule in New York, and is of course that in Ohio. Several New York cases have been examined, in which the principle of the apportionment of debts for the purpose of arriving at the value of the personal estate of a non-resident for New York inheritance tax purposes was established and applied, and while loose expressions are found in some of them, others explicitly refer to the personal estate and none has been found in which it has been decided, or even directly intimated, that the value of any real estate has entered into the gross

amount to be apportioned, where the debts do not exceed the value of the personalty.

It is the opinion of this department, therefore, that on the facts stated the amount of the debts should be deducted from the gross personal estate only and the apportionment of debts made as between Ohio and New York on that basis. This conclusion is, of course, unfavorable to the state of Ohio in a way, but there being nothing in the Ohio inheritance tax law which would alter the general principle above referred to and no authority having been found to justify a different rule the conclusion seems to be unavoidable.

The last question submitted by the commission requires a little more careful examination. It appears clearly to be the rule in New York that a debt secured by mortgage on specific real estate must be discharged by the inheritor of that real estate out of his own property. This, however, appears to be the result of the statute in that state. (See Chapter 41, New York laws 1902—now section 122 Decedents' Estate Law of New York). Accordingly, it is the law of New York that incumbered real estate is to be appraised for inheritance tax purposes according to the value of the "equity" of the decedent therein, that being the full measure of the beneficial interest of the successor. In previous opinions of this department the commission has been advised that beneficial interests only are to be taxed. Any expressions found in such previous opinions inconsistent with the view now to be expressed must be regarded as limited to the facts then under discussion; for in Ohio and in many states there is no statute altering the common law and general principles of equity whereby the executor or administrator may be called upon to pay out of the general or residuary personal estate, to the extent it may be sufficient for that purpose, all debts of the decedent, whether secured by mortgage on real estate or not. Under such a state of the law it is obvious that the successor to specific real estate acquires full beneficial interest therein, if the personal estate is sufficient to discharge the debts secured by mortgages thereon.

It also follows from the above statement that the Ohio taxing authorities must consult, in each instance like the one described in the commission's letter, the laws of the other state or states that may be concerned. In the particular case inquired about by the commission such indebtedness as may be secured by mortgage on the New York real estate may be subtracted from the indebtedness to be deducted from the value of the personal estate, inasmuch as under the law above referred to, sanctioned by numerous New York cases, such as Matter of Sutton, 38 N. Y. Supp. 277; 149 N. Y. 618; Matter of Skinner, 107 N. Y. App. Div. 217; 94 N. Y. Supp. 144, and others, such indebtedness would be a charge upon the New York real estate and would not be discharged out of the personal estate at all. It would therefore not be proper to take this indebtedness into account for any purpose in making the necessary apportionment. See generally: In re Fox, 159 Mich. 420, (where some of the questions involved in this opinion are carefully discussed); in re Handley's estate, 181 Pa. St. 339.

Respectfully,
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