

5128.

APPROVAL—PAPERS IN CONNECTION WITH THE CONVERSION OF THE FIDELITY BUILDING ASSOCIATION AND LOAN COMPANY OF DELAWARE, OHIO, INTO FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF DELAWARE.

COLUMBUS, OHIO, January 31, 1936.

HON. WILLIAM H. KROEGER, *Superintendent of Building and Loan Associations of Ohio, Columbus, Ohio.*

DEAR SIR: I have examined the various papers submitted by you in connection with the conversion of The Fidelity Building Association and Loan Company of Delaware, Ohio, into Fidelity Federal Savings and Loan Association of Delaware, and find the papers submitted and the proceedings of said The Fidelity Building Association and Loan Company, as disclosed thereby, to be regular and in conformity with the provisions of Section 9660-2 of the General Code of Ohio.

All papers, including two copies of the charter issued to the said Fidelity Federal Savings and Loan Association, are returned herewith to be filed by you as a part of the permanent records of your department, except one copy of the charter which the law provides shall be filed by you with the Secretary of State. The law further provides that such filing with the Secretary of State shall be within ten days after the requirements of said Section 9660-2 have been complied with by The Fidelity Building Association and Loan Company, and that your approval shall be endorsed on the copy so filed. You will find on the copies of the charter, form of approval for your signature.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5129.

TAX AND TAXATION—CERTAIN SECURITIES NOT SUBJECT TO INTANGIBLE AND PERSONAL PROPERTY TAX LAW UNDER PECULIAR PROVISIONS OF TESTATOR'S WILL.

SYLLABUS:

Where testator by his last will and testament devises the property of his estate consisting principally of stocks, bonds and other securities, to his executors in trust for the benefit of his wife during her life, and further provides in such last will and testament that if after the payment of all

necessary expenses in the administration of the trust and of the amount to be paid to his wife annually out of the income of the trust there should remain in the possession of the executors unexpended moneys of such income, the executors are authorized, if in their opinion it is fit and proper to do so, to pay to one or more of the children of the testator such sums of money as the executors deem fit and proper, from the unexpended net income of the estate, such provisions in the will do not give to the testator's children an enforceable equitable interest in the securities constituting the corpus of the trust for purposes of taxation under the Intangible and Personal Property Tax Law of this State.

COLUMBUS, OHIO, February 1, 1936.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: Some time ago during the course of an oral discussion of certain questions arising under the Intangible and Personal Property Tax Law, participated in by representatives of your department, the question was presented as to whether certain distributions of net income made to the children and legatees of one Robert M. Gilleland of Pleasant Valley, West Virginia, were taxable with respect to such of his children as are residents of Ohio and receive their distributions of this income in this State.

The question thus presented is one arising under the last will and testament of Robert M. Gilleland which was executed in Wheeling, West Virginia, under date of December 29, 1917. After first making disposition of his residence property and of the furniture, household goods and other effects therein, the testator by this instrument devised all of the residue of his property to his executors therein named to be held and used upon certain trusts therein stated. The property thus devised to his executors in trust as aforesaid consisted of both real and personal property and as to such property thus devised and bequeathed to the executors, the will of the testator by a separate clause thereof provided as follows:

“(a) I hereby authorize and empower my said executors to sell and convey, by proper instruments of conveyance, any and all of my real estate of which I may die seized, or any and all personal property which I may leave, and to reinvest the proceeds thereof, and to change said investments, from time to time, in such manner and form as they may deem for the best interests of my estate, hereby giving and granting unto my said executors as full and complete power and authority to deed, convey, control, manage and deal with my estate as I now personally possess, it being my express wish and direction that my executors shall not

be individually liable for any losses which may occur to my estate in changing any of my investments and reinvesting the proceeds thereof."

I am advised that most of the property which thus passed to these executors consisted of stocks and bonds and other securities property classed under the Intangible and Personal Property Tax Law of this State as investments and, as I understand, the distributions here in question were of income which the executors received from investments which they held and possessed under this will.

The trusts declared and provided for in said will were:

(1) That during the lifetime of the wife of the testator the executors are to pay to her out of the net income of the testator's estate, the sum of eight thousand dollars annually, the payments to be made quarterly in the sum of two thousand dollars each.

(2) That after the payment of the necessary expenses connected with the preservation and maintenance of the estate and after the payment of the aforesaid sum of eight thousand dollars, annually, to his wife, the executors were to pay to the testator's daughter, Dorothy, the sum of three hundred dollars, annually, until her marriage and such further sums of money as the executors might deem necessary and proper for the education of said daughter.

By item three of the will, it was provided that upon the death of the testator's wife all of his estate, both real and personal, should go to his seven children and to their heirs and assigns in such manner that they each should share equally in his estate. However, the question here presented arises under a clause of the will which authorizes the executors to make distribution of the net income of the estate to testator's children during the life of his wife and before the termination of the trusts provided for in the will for her benefit and for that of his daughter, Dorothy. The provision of the will here in question reads as follows:

"(e) After the payment of all necessary expenses, and the provisions as to the payment to my wife, Nellie U. Gilleland, and any other expenditures, if there remains in the possession of my executors a sum of money unexpended, my executors are authorized, if in their opinion it is fit and proper to do so, to pay to any one or more of my children, hereinafter named, such sums of money as they deem best, fit and proper, from the unexpended net income. It is my wish that the principal of my estate be not increased, unless it is thought best by my executors."

Acting under the authority of this provision of the will, the executors

from time to time have made distributions of the net income of the estate derived from investments in the hands of the executors, to the children of the testator named in the will and, as above indicated, the question here presented is whether such distributions made to the children of the testator who reside in Ohio are taxable as income yield under the Intangible and Personal Property Tax Law.

In the consideration of this question, it is to be borne in mind that the tax provided for by the law above referred to is in no sense a tax upon income as such but is a property tax which as to certain kinds of intangible property is measured by the income yield of such property. Stocks, bonds and the other kinds of intangible property mentioned in Section 5323, General Code, are classified for purposes of taxation as investments whether the title to such property is held by legal or equitable ownership. As to investments held in trust, the incidence of the tax, with respect to beneficiaries residing in this State, is on the equitable interests of such beneficiaries in the corpus of the trust fund and is measured as to amount by the income yield to such beneficiaries.

It follows from the considerations above noted that the question whether the moneys paid from time to time to the children of Robert M. Gilleland during the lifetime of his widow and prior to the termination of the trusts provided for in his will, are to be considered taxable income yield with respect to such of his children as reside in this State, depends on the further question whether such children have an equitable interest in the corpus of the trust fund held by the executors of his estate. An equitable interest in property, real or personal, is one that can be sustained or made effective or available in a court of equity. *Provident Life and Trust Company v. McCaughn*, 245 Pa., 370. Or as stated in the case of *Avery v. Dufrees*, 9 Ohio, 145, 147, an equitable interest in property is one which can be enforced only in a court of chancery. As to this, it will be observed that although under the last will and testament of Robert M. Gilleland, his children therein named have a vested interest in the real and personal property of his estate which is to be distributed to them upon the death of the testator's wife, the only right or interest that such children or any of them have in this estate prior to the death of the testator's wife is that given by paragraph (e) of the second item of the will above quoted. Although by this paragraph of the will the executors of the estate are authorized to pay to any one or more of the testator's children such sums of money as they may deem fit and proper, from the unexpended net income of the estate, there is nothing in this paragraph or in any other provision of the will which gives to these children or to any of them any right to the income of the estate in the hands of these executors as trustees which these children can enforce by an action in equity or otherwise. In other words, prior to the death of the testator's widow and the termination of the trusts provided for by this will, the

testator's children have no rights which they can assert against either the corpus of the estate in the hands of the trustees or the income therefrom.

In this situation, I am quite clearly of the opinion that the children of Robert M. Gilleland, deceased, have no equitable interest in the stocks and bonds or other property classed as investments in the hands of the executors of this estate, and that for this reason the moneys that have heretofore been paid by the executors to these children out of the income of the estate are not taxable as income yield in the hands of such of these children as live in this State.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5130.

SUPERINTENDENT OF BANKS—NOT REQUIRED TO COMPLY WITH TERM "EMPLOYMENT" AS DEFINED IN FEDERAL SOCIAL SECURITY ACT, IN CONNECTION WITH LIQUIDATION OF STATE BANKS.

SYLLABUS:

Services performed in connection with the liquidation of state banks by employees of the Superintendent of Banks, are not within the term "employment" as defined by Sections 210(b), 811(b) and 907(c) of the Federal "Social Security Act" (42 U. S. C. A.; Sections 301 to 1305), and therefore the Superintendent of Banks is not required to comply with said act.

COLUMBUS, OHIO, February 1, 1936.

HON. S. H. SQUIRE, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR: You have requested my opinion as to the applicability of the *Federal "Social Security Act" (42 U. S. C. A., Sections 301 to 1305)*, to the Superintendent of Banks in possession of the business and property of a bank under Section 710-89, General Code of Ohio.

The Federal "Social Security Act" provides, among other things, for old age pensions and unemployment insurance supported by payroll taxes. Title II of the act relates to federal old age benefits and Title III provides for the administration of unemployment insurance laws.

For the purpose of providing funds for old age benefits, two types of taxes are levied under Title VIII. Under Section 801 there shall be levied an income tax upon employees, and under Section 804 an excise