when it purchased the stock of goods, and the purchase was made prior to the day preceding the second Monday of April.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1021.

INHERITANCE TAX LAW—PARTNERSHIP—WHERE DEATH OF PARTNER OCCURS WHOSE PARTNERSHIP AGREEMENT SPECIFICALLY PROVIDES AGAINST DISSOLVING OF FIRM BY DEATH OF PARTNER—SUCCESSION TAXABLE.

In the event of the death of a partner in a firm whose partnership agreement specifically provides that the partnership shall not be dissolved by the death of a partner, a taxable succession under the inheritance tax law occurs in respect of the interest of the deceased partner on either of two hypotheses:

1. *That the partnership agreement merely prevents the dissolution of the partnership without providing for any particular disposition of the interest of the decedent.*

2. *That the partnership agreement goes so far as to dispose of the interest of the decedent to the surviving partner or partners.*

In either event, the taxable succession consists of an interest in partnership property, and funds of the partnership on deposit in a bank are subject to the provisions of section 5348-2 G. C.

COLUMBUS, OHIO, February 26, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date requesting the opinion of this department upon the following question:

> "In the event of the death of a partner in a firm whose partnership agreement specifically provides that the partnership shall not be dissolved by the death of a partner, may a bank permit continued control by the surviving partner or partners of the contents of a safe deposit box standing in the name of the partnership? Or must the consent of this commission be obtained under the provisions of section 5348-2 of the General Code?"

Section 5348-2 G. C., in so far as material in connection with this question, declares that a custodian of

> "assets or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons," shall not "deliver or transfer the same to any person whatsoever whether in a representative capacity or not, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay any taxes or interest which would thereafter be assessed thereon under this subdivision of this chapter, and unless notice of the time and place of such delivery or transfer be served upon the tax commission of Ohio and the county auditor at least ten days prior to such delivery or transfer."

A word requiring construction here is "decedent". This is defined in section 5331 to include "a testator, intestate, grantor, assignor, vendor or donor."

Without discussing the preliminary point which arises here further, and referring to other opinions of this department in which similar questions have been considered, it is sufficient to observe that section 5348-2 is not intended to apply to cases in which no taxable succession has taken place; and that, conversely, it is intended to apply to and govern the duties of the custodian in all cases in which a taxable succession has taken place and the tax may have accrued.

Your communication does not set out the language of the partnership agreement to which you refer. Conceivably, it may have either of two legal effects, both of which would modify the ordinary incidents of the death of a partner, viz.:

(1) The agreement may have the effect *ipso facto* of transferring to the surviving partner all the equitable interest of the deceased partner upon the death of the latter. Though the efficacy of a partnership agreement to work such a result has never been decided in Ohio, and decisions elsewhere are somewhat conflicting on the point, yet it would seem that section 8092 G. C. recognizes the power of partners to make an agreement having such effect when it provides that

> "When the original articles of a partnership in force at the death of a partner, or the will of a deceased partner dispenses with an inventory and appraisement of the partnership assets, and with a sale of the deceased partner's interest therein, and such article or will provides for a different mode for the settlement of such interest, and for a disposition thereof different from that provided for herein, such interest shall be settled and disposed of in accordance with the provisions of such articles or will."

This section seems to give to partnership articles like efficacy with a will of the deceased partner by way of disposing of the deceased partner's interest after his death, and preventing the ordinary rules of law and equity from applying to the case that would arise in the event of the death of a partner.

(2) The partnership agreement may not attempt to dispose of the interest of the deceased partner to the survivor or suvivors, but may have the effect of binding the personal representatives of the deceased partner as partners in respect of transactions occurring after the death, and this preventing the winding up of the partnership as an incident of death.

20 R. C. L. 991.

In that event, of course, the beneficial interest belonging to the deceased partner will pass to such persons as his will or the statutes of descent and distribution may indicate.

In either event it is the opinion of the Attorney-General that a taxable succession takes place in respect of the beneficial interest in the fund represented by the deposit.

Let the cases supposed be taken up in the inverse order. There can be no doubt that if the effect of the partnership agreement is merely to provide that the personal representatives of the deceased partner shall continue to be partners, an inheritance has taken place in every sense of the word and that this inheritance pertains to and amounts to an interest in the partnership assets. It would seem that no discussion of this question is necessary.

In the case of a partnership agreement which has the effect of disposing of the interest of a deceased partner to his survivor or survivors, different questions arise. In such case it is arguable that the partnership agreement, if it is given such binding effect, must be supported by a valuable consideration: and also that the thing which has the effect of vesting beneficial ownership in a survivor is an act *inter vivos*, i. e., the partnership agreement itself; for in this case the partnership agreement determines the trans-

fer, whereas in the other case supposed the partnership agreement merely preserves an interest which becomes the subject of a transfer which is effected through intestacy or by will.

In the case now under discussion, therefore, the question arises as to whether or not the fact that the transfer which is determined by the partnership articles is one effected by act *inter vivos*, supported by a valuable consideration, is sufficient to take the case out of the operation of the statute. The case has been put in this form because after all there is clearly a succession taking place at death, so that, broadly speaking at least, the inquiry might be accurately described as a search for reasons, if any, why the law should not operate rather than as a search for reasons why is should operate.

It must be admitted that if the scope of the inheritance tax law were strictly limited to successions arising by will or intestacy, the conclusion would be forced that the case now under discussion would not be subject to such a statute, for the succession is not by intestacy nor by will but by virtue of a contract *inter vivos*. However, the Ohio inheritance tax law, in common with many others, is not so limited in its scope. As previously pointed out, the term "decedent" includes a grantor or donor, and one of the taxable successions is expressly defined as follows: (Sec. 5332, par. 3)

> "When the succession is to property from a resident, or to property within this state from a non-resident, by * * * sale, assignment or gift, made without a valuable consideration substantially equivalent in money or money's worth to the full value of such property:
>
> (a) In contemplation of the death of the * * * vendor (or) assignor * * *
>
> (b) Intended to take effect in possession or enjoyment at or after such death."

Partnership articles to be effective in the case now under discussion must amount to mutual assignments of the interest of the decedent to the survivor in the event of the death of the former. The mutuality of such correlative promises would constitute sufficient consideration in law to give binding force to the articles; but such consideration would not be "substantially equivalent in money or money's worth to the full value of" the property covered thereby. In substance, though perhaps not in legal effect, the provision for the surviving partner is in the nature of a gift; and it is only saved from being a gift in legal effect by the fact that it was supported originally by a like promise on the part of the donee, should he have been the decedent instead of the survivor.

These considerations point to the conclusion that a taxable succession has occurred if the partnership articles are of the type just supposed. Authority supporting such a conclusion is found in *Matter of Orvis*, 223 N. Y., 1. In that case two partners had entered into an agreement that the survivor should take two funds aggregating one million dollars. The surrogate held that there was no tax if the agreement was upon a consideration and did not come within the terms of the statute. The Appellate Division (179 App. Div. 1) reversed the surrogate. Speaking to the question of consideration, Scott, J., of the Appellate Division, used the following language:

> "That this does furnish a sufficient consideration to support the agreement as between themselves I do not question, but I do not consider that that fact alone establishes the nontaxability of the transfer. Mutual promises may furnish a sufficient consideration for a promise to convey in the future, but if there be no other consideration the conveyance when it takes place is, in effect, a voluntary one.
>
> Section 220 of the Tax Law imposes a tax upon a transfer by 'grant, sale or

gift * * * intended to take effect in possession or enjoyment at or after such death,' * * *"

"This language seems to fit exactly the present case. Whether the transaction be considered a sale or a gift, it was clearly intended to take effect only on the death of the vendor or donor, and not then unless the vendee or donee should outlive the vendor or donor. * * *

The effect of the transaction is precisely as it would have been if each brother had made a will leaving to the other his interest in the accumulated and funded profits, providing such brother survived. In such a case no one would doubt that the transfer was taxable."

It will be observed that the Ohio law is less open to interpretation on this point than the New York law, in that the former expressly provides that the consideration, if there be such, for the sale or assignment *inter vivos* must be the substantial equivalent in money or money's worth to the value of the property which passes by virtue of such sale or assignment.

In the Court of Appeals the following language was used by Collin, J., affirming the decision of the Appellate Division:

"The legislature did not intend that a purchaser who had paid full value for the property transferred should directly or indirectly pay the tax besides" * * *.

(In Ohio the question of legislative intent on this point is made clear by the express provisions of the statute itself as pointed out.)

"It was intended to tax all transfers * * * made or incepted prior to the death of the transferror in contemplation of or intended to take effect in possession or enjoyment after his death which are in their nature and character instruments or sources of bounty or benefaction and which can be classed as similar in nature and effect with transfers by wills or the intestate laws, because they accomplish a transfer of property, donative in effect, under circumstances which impress on it the characteristics of a disposition made at the time of the transferror's death. * * * The taxability does not depend upon fraud or an attempt to evade the statute; nor does it depend upon the purpose or inducement of the transfer; nor does it depend upon the form given the transfer. * * * If in truth, it, in effect, bestows, under the statutory conditions, a bounty or benefaction, and is not a transfer for money's worth, it is taxable."

This decision is squarely in point under a law substantially identical with the present Ohio law, and effectually disposes of the case under the supposition now under discussion. The opinion furnishes ample reasons for justifying the conclusion reached in this opinion with respect to the other case mentioned to the extent, if at all, that a provision in partnership articles that the partnership should not be dissolved but that the executors and personal representatives of a deceased partner should continue in the partnership might be regarded as having a disposing effect, rather than in the light in which it has been previously regarded in this opinion. It would still be the kind of a disposition which the court of appeals of New York has correctly held to be within the spirit and the letter of the statute.

For the foregoing reasons, then, and upon the hypotheses above discussed, it is the opinion of this department that where partnership articles provide against the dissolution of a partnership by the death of a partner and through the course of succession to the interest held by the deceased partner in the partnership assets and business, the death of a partner gives rise to a succession taxable under the inheritance tax law of Ohio; and such being the case, funds belonging to the partnership and on deposit

in bank are there held subject to the requirements and regulations of section 5348-2 G. C.

In connection with one of the hypotheses above discussed paragraph 5 of section 5332 G. C. may also be considered. It provides that

> "Whenever property is held by two or more persons jointly, so that upon the death of one of them the survivor or survivors have a right to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right by the death of one ot them shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the enhanced value of the whole property belonged absolutely to the deceased person, and had been by him bequeathed to the survivor or survivors by will."

This section would seem to apply. It has not been heretofore mentioned because it was also in the New York law considered in the *Orvis case*, supra (see Sec. 220, par. 7, last amended Chap. 26, Laws of 1919), and was not commented upon by the court in the case cited except to be characterized as "irrelevant."

Respectfully,
JOHN G. PRICE,
Attorney-General.

1022.

INHERITANCE TAX LAW—SAFETY DEPOSIT BOX—WHERE LEASED IN JOINT NAMES OF DECEASED HUSBAND AND SURVIVING WIFE—PACKAGES FOUND MARKED WITH NAME OF CORPORATION—HOW EXAMINATION OF BOX SHOULD PROCEED.

Where upon the examination of the contents oj a safety deposit box leased in the joint names oj a deceased husband and his surviving wife packages are jound marked with the names of the wije and oj a corporation in which the decedent was interested respectively, and the representative of the decedent's estate objects to breaking the seals on such packages so that their contents may be inspected, it is at least the better practice, and probably the only safe course in law, for the taxing authorities to use the machinery oj an appraisement or of a hearing in the probate court without appraisement, both of which involve the exercise oj power to subpoena witnesses and compel their attendance and the production oj books and papers, in order to ascertain what the contents of such packages actually were.

COLUMBUS, OHIO, February 26, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your letter of December 18th submitting for the opinion of this department the following:

> "In the administration of the inheritance tax act this commission has conferred powers on certain auditors in the larger centers of population to act for and represent the commission in granting consents for the transfer of assets unser the terms of section 5348-2. In this connection the auditor is frequently called upon to be present at the opening of safety deposit boxes. In one county which we have in mind, the practice is specifically as follows:
>
> The auditor's representative will go to the safety deposit box and have the