Inheritance Taxes—Taxes—Transfers—Wills—Death.

Whether a transfer is made in contemplation of death is a question of fact depending upon age, condition of health, consideration, et cetera.

State Board of Equalization, May 8, 1925.
Helena, Montana.

Gentlemen:

You have submitted to me a copy of the will of Francis K. Armstrong, together with a statement showing transfers made by him by deeds, executed more than two years prior to his death and have requested my opinion as to whether there is an inheritance tax due to the state of Montana by reason of such transfers.

Subdivision 3 of section 1 of chapter 150, laws of 1925, provides as follows:

> "(3.) IN CONTEMPLATION OF DEATH. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within the state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without a fair consideration in money or moneys worth shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section."

From the statement of facts contained in your inquiry it appears that the transfers in question took effect in possession and enjoyment at the time of the execution of the deeds and that the grantees have enjoyed the rents, issues and profits of the property covered by such transfers ever since the execution of the deeds.

It then remains to determine whether such transfers were made in contemplation of the death of the grantor, within the meaning of the above quoted section. Under that section of our statutes had the transfers been made within two years prior to the death of the grantor they would have been deemed to have been made in contemplation of death and the burden of showing the contrary would have been upon those contending otherwise.

The transfers having been made more than two years prior to the death of the grantor the burden is upon the state to show that they were made in contemplation of death. (State vs. Thompson, Wis. 142 N. W. 647.)

Ordinarily, it is a question of fact, depending upon the circumstances of each case, as to whether a particular transfer is made in contemplation of death. (People vs. Kelly (Ill.) 75 N. E. 1038.)

What is meant by the expression "in contemplation of death" has been well defined by the supreme court of Wisconsin in State vs. Pabst, 121 N. W. 351, where it said:

> "It is manifest the words were intended to cover transfers by parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplish transfers of the property of decedents in the nature of a testamentary disposition. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it upon those whom they regard as entitled to their bounty. This accords with the general objects and purposes of the law, namely, the imposition of a tax upon the devolution of property involved in the demise of the owner."

The cases of Rosenthal vs. People (Ill.) 71 N. E. 1121 and Conway's Estate (Ind.) 120 N. E. 717 have given the expression practically the same meaning.

In considering the question whether a transfer was made in contemplation of death it is proper to take into consideration the adequacy of the consideration for the transfers (Abstract & Title Guarantee Co. vs. State, Cal., 101 Pac. 264), the age of the grantor (Panson's Estate, Cal. 199 Pac. 331), and his physical condition at the time (Williams vs. Guile, N. Y., 22 N. E. 1071; Re Estate of Benton, Ill., 84 N. E. 1026).

It appears from the statement of facts submitted by you that the transfers were without consideration, save love and affection, and a nominal sum of money—usually $10.00.

Though some of the deeds were executed in 1918 none of them were recorded until about a year before the execution of the will.

The will recites, among other things, the following:

> "I, Francis K. Armstrong, do hereby make this my last will. Having made a partial distribution of my estate to my wife Lora Armstrong and to my two daughters Lena A. Brown and Edith A. Oliver, and to my grandson Francis A. Brown respectively, by and of conveyance to certain real estate situated in the county of Gallatin, state of Montana, as evidenced by certain deeds of conveyance which they now hold respectively. * * *
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> "It is my desire that the distribution made by me at any time prior to my death be approved by my wife and daughters aforesaid."

These facts tend strongly to indicate that the transfers were made in contemplation of death. However, as above pointed out, the question is one of fact depending upon all of the facts and circumstances existing at the time.

You have not suggested what the age of deceased was at the time of the transfers, nor have you indicated the condition of his health at

that time. These, in my judgment, are important factors to be taken into consideration and, in my opinion, slight evidence of an impaired condition of health on the part of the deceased at the time of making the transfers, or advancement in years, coupled with the want of consideration and the intent as expressed in the will, would be ample evidence to show that the transfers were made in contemplation of death.

Very truly yours,

L. A. FOOT,

Attorney General.