

Inheritance Tax, Property Liable for. Taxes, Property Liable for Inheritance.

A person inheriting real estate not subject to taxation, and also inheriting personal property in excess of \$7,500.00, cannot use the proceeds from such personal property to pay off mortgages on the real property, or to complete the purchase of real property, and thereby reduce the amount of personal property inherited.

Helena, Montana, December 8, 1909.

Hon. Sharpless Walker,
County Attorney,
Miles City, Montana.

Dear Sir:

I am in receipt of your letter of December 4, regarding the inheritance tax, if any, due from the estate of A. B. Clark, deceased, in which you enclose a statement of fees in such case, prepared by Mr. Farr, attorney for the executrix, and you desire to know whether the facts, as stated by Mr. Farr, would in any way modify the opinion heretofore rendered you regarding the inheritance tax of this estate on May 13, 1909.

In the opinion given you on May 13, 1909, we understood that the mortgages to be distributed to the widow and children were mortgages on real estate held by the deceased at the time of his death and which were now to be distributed by the executrix to the heirs. It was on this theory that said opinion was rendered, and we have no occasion to change or modify the same at this time.

However, from the facts submitted in your letter, it now appears that the mortgages which were to be distributed to the heirs were not owned by the deceased, but are mortgages taken by the executrix to secure the payment of the purchase price for real estate sold by the executrix in the course of the administration of the estate. This presents an entirely different question from that considered in the former opinion.

If the deceased left a will expressly directing the executrix to sell

the real property and convert the same into money, then under section 4784, revised codes, such real estate and all its proceeds must be deemed personal property from the time of the testator's death. On the other hand, if the will contains no such express direction, or if there was no will, and the sale of the real estate was therefore made by the executrix in the due administration of the estate for the purpose of paying debts, or for any other reason sufficient to authorize them to sell the same, then, in our opinion, the proceeds from the sale of such real estate still is, for the purpose of inheritance tax, to be considered as real estate, and such proceeds, when distributed to the widow and children, are entitled to the exemptions allowed by section 7724; that is, the widow and children are entitled to take such proceeds the same as they would have taken the real estate itself, free from any inheritance tax.

In *re Sutton's Estate* 38 N. Y. Supp. 277,
which opinion was affirmed by the supreme court of New York in:
44 N. E. 1128;

DeGraff's Estate, 53 N. Y. Supp. 591.

The inheritance tax law of this state is copied very closely from the New York law, and therefore decisions of that court are particularly applicable to the law of this state.

The opinion in the case of *re Sutton's Estate* presents another question which should be considered at this time. In that case the court had occasion to construe a statute of New York, which was in effect the same as section 4750, revised codes of this state, and the court said:

"It is true that, under the will now before the court, the real estate is not specifically devised, nor is there any direction for the payment of the mortgages. The whole estate is transferred to the executor in trust for the benefit of the testator's children and grandchildren, and it is discretionary with the trustee to discharge the mortgages from either the real or personal estate. No conflict can therefore arise upon the question from which class of property the mortgages shall be paid. If the property had been transferred directly to the beneficiaries either by will or the intestate laws of the state, the real estate would be compelled to bear the burden of the mortgages, and the transferee would have no right to have such debts discharged from the personal property. The same result must follow the devise in the will before us. It is of no importance to the executor or beneficiaries, except for the purpose of determining the tax, from which fund the mortgages shall be paid; and they cannot be permitted to be paid from the personal estate for the sole purpose of increasing the exemption of real estate, or decreasing the amount of the tax to be paid. The testator has transferred his whole estate as a single fund, for the use and benefit of his children. In holding that, for the purpose of determining the tax, the real estate owned by the testator at the time of his death must be treated as such, we could not extend that exemption beyond the value of the testator's interest therein. It was such interest only that was transferred, and which will

be held for the use of the beneficiaries, and such only that can be held to be exempt."

The statement of facts enclosed by you does not show whether there were any mortgages against the real estate of deceased at the time of his death. If there were any such mortgages they, of course, were a lien upon such real estate, and the heirs took such real estate subject to the equities of such mortgages; or, if any of such real estate was held by the deceased under contract of purchase, upon which a balance still remained to be paid before the title vested in him, the heirs received only the deceased's equity in such real estate; in other words, the real estate the heirs received upon the death of the deceased would by the value of the real estate less the mortgage, or other valid incumbrances against the same, or the real estate less the amount of purchase money still due thereon. On the other hand, the personal property, and the proceeds received from the sale of personal property after paying all the debts and expenses of administration, other than the liens against the real estate, or purchase money due on contracts for real estate, would be subject to the inheritance tax, provided such balance was \$7,500.00 or more. And as was held in said case of *In re Sutton's Estate* the executrix would have no authority to use the proceeds received from the sale of the personal property to pay the mortgage for the purpose of reducing the amount of personal property distributed to the heirs. In other words, the balance of the personal property, after paying all debts and expenses, other than liens upon real estate and purchase money due on contracts of purchase is received as personal property for the beneficial interests of such heirs, and if such balance was \$7,500.00 or more it would be liable to the inheritance tax, notwithstanding the fact that the executrix saw fit in the administration of the estate to use the proceeds from such personal property to pay off the mortgages, or to pay up the balance of the purchase price on the contracts. The executrix would have the right to so use the money, but at the same time she would be liable for the inheritance tax due on such personal property.

Of course, we cannot tell from the facts submitted whether any such condition of affairs exists, and simply make the above suggestions for your guidance in the event that you find that the proceeds from the personal property were, in fact, used to pay off mortgages, if any, against the real estate, or to pay up the balance of the purchase price on contracts for the purchase of real estate.

Very truly yours,

ALBERT J. GALEN,

Attorney General.