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New Jersey State Library

Writ of Certiorari

WRIT OF CERTIORARI

New Jersey, ss.:

The State of New Jersey, to John McCutcheon, Comptroller of the Treasury of the State of New Jersey.

Greeting:

We being willing for certain reasons to be certified of and concerning certain transfer inheritance tax items of $640.00 and $680.00 (part of a total tax of $2377.56), lately imposed by you upon the Estate of Marie Kircheis, late of the County of Passaic, in the State of New Jersey, deceased, for, or by reason of, the erection of a certain mausoleum by William Zipper, Executor of the Last Will and Testament of said Marie Kircheis, deceased, pursuant to a provision of her said will, and upon certain real estate, said to be the sole property of the executor, do command you that the said tax, and all matters touching and concerning the imposition or assessment thereof, as fully as before you they remain or are under your control, you do certify and send under your seal, together with this writ, to our Justices of our Supreme Court of Judicature, at Trenton, on the 28th day of April, 1930, that therein may be done what of right and according to law ought to be done.

Witness, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, this 8th day of April, A. D. 1930.

Max P. Arlt, Attorney. Fred L. Bloodgood, Clerk.

I allow this writ, let it be sealed. Both parties may take depositions to be used on argument.

Chas. C. Black,
Justice of New Jersey Supreme Court.

Dated: April 8th, 1930.

Return to Writ

(Filed April 28, 1930)

NEW JERSEY SUPREME COURT

William Zipper, Executor of the Last Will and Testament of Marie Kircheis, Deceased, Prosecutor, v. John McCutcheon, Comptroller of the Treasury of the State of New Jersey, Respondent.	On Certiorari

RETURN TO WRIT

In obedience to the command of this writ to me directed, I, John McCutcheon, Comptroller of the Treasury of the State of New Jersey, do hereby certify and send, under the seal of the office of said Comptroller of the Treasury, to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the transfer inheritance tax assessment in the matter of the estate of Marie Kircheis, deceased, late of Passaic County, New Jersey, together with all papers touching and appertaining to said assessment as fully and entirely as before me they remain.

In testimony whereof, I, John McCutcheon, Comptroller of the Treasury, have hereunto set my hand, and caused the seal of said office of Comptroller of the Treasury to be affixed, this Twenty-sixth day of April, 1930.

John McCutcheon (signed),
Comptroller of the Treasury
State of New Jersey

(Seal)

Return to Writ

April 27, 1928.

Max P. Arlt, Esquire
East Crescent Avenue
Allendale, New Jersey
Dear Sir:

Your letter of April 25 in re estate of Marie Kircheis, deceased, late of Passaic County, New Jersey, received.

Herewith enclosed find a copy of analysis setting forth the method employed in arriving at the amount of the Transfer Inheritance Taxes chargeable. You will note from an examination of the analysis that the principal part of the tax chargeable against William Zipper is by reason of a specific devise of real property in the amount of $8,500.00.

Section 1 of the Transfer Inheritance Tax Act, copy of which is herewith enclosed, (subsection 5) specifically provides that all taxes imposed by the Act shall be at the respective rates hereinafter specified upon the clear market value of the property transferred. This section, after specifying the rates of tax in certain classes (at page 9), directs that property passing to every other transferee, distributee, or beneficiary not herein before classified shall be taxed at the rate of 8%. The section also makes specific provisions for exemptions and since the provision in the Will for the erection of a monument is not specifically exempted under the Inheritance Tax Act, it has

been determined to be a taxable transfer at the rate of 8%. This conclusion is reached when the Act is read in connection with the decision of the Prerogative Court in the matter of Gilchrist, 128 Atl. Rep., 876.

Very respectfully,
N. A. K. Bugbee,
Comptroller of the Treasury.
By
State Supervisor of the Transfer
Inheritance Tax Bureau.

Return to Writ

Max P. Arlt
Attorney at Law
East Crescent Ave.,
Allendale, N. J.

April 25, 1928

Transfer Inheritance Tax Bureau,
Trenton, N. J.
Gentlemen:

Re: Estate of Marie Kircheis, Passaic County.

I have your statement of February 14th, No. 237004. Will you kindly advise me how you arrive at the respective amounts?

In addition to this information, I would like you to point out under just what section of the law a tax is imposed upon the erection of a mausoleum.

Also explain to me how you arrive at the tax of $795 on William Zipper, as it seems to me that as residuary legatee he will probably receive next to nothing.

Thanking you for your reply, I am

Yours very truly,

(Signed) Max P. Arlt.

Return to Writ

Max P. Arlt
Attorney at Law
East Crescent Ave.,
Allendale, N. J.

February 13, 1928.

Transfer Inheritance Tax Bureau,
Trenton, N. J.
Gentlemen:

Re: Estate of Marie Kircheis, late of Clifton, N. J. Original schedule filed October 1927.

Kindly advise me whether you have passed upon this estate.

Most of the legatees and I might say the principal legatees reside abroad. It seems that all of them have been greatly impoverished since the World War. Under the provisions of the will, the Estate is not to be distributed for at least two years. These foreigners urge to find a way to distribute the Estate prior to that time, as they appear to be very much in need of money. The legatees residing in this country, all of whom are pretty well advanced in years, would not be adverse to such distribution.

I believe the mausoleum will be finished by the 1st, or latest by the middle, of May, so that there will be nothing in the way of distribution, and I think this can be done with the consent of all legatees and the approval of the court.

The principal object of the testatrix in deferring distribution was that she feared there would not be quite enough funds to meet all the provisions she had made in the will and that therefore the residue should remain where it would earn sufficient in interest to make up this deficit, but the foreign legatees advise me that they would

prefer a proportionate deduction rather than to wait the full two years. The domestic legatees would also be agreeable.

I therefore inquire whether there is any objection of an earlier distribution than provided in the will on the part of the State.

Yours very truly,

(Signed) Max P. Arlt

Return to Writ

STATE OF NEW JERSEY
Department of Comptroller of the Treasury
Transfer Inheritance Tax Bureau
Trenton
—237004—

Feb. 14, 1928.

William Zipper, Executor of the Estate of Marie Kircheis, late of Passaic County.

Max P. Arlt, residing at Allendale, N. J.

You are hereby notified that there is due the State of New Jersey by the above-named estate a transfer inheritance tax assessed pursuant to the laws pertaining thereto, amounting to $2,377.56.

(Erection of Mausoleum	$640.00
(William Zipper	795.84)
(Alfred Kircheis	72.44)
(Eliza Eck	72.44)
(Renata Rothermel	72.44)
(Annel Dollack	72.44)
(Wally Lindner	72.44)
(Gertrud Panzer	144.88)
(Ella Leupold	144.88)
(Millie Zeidler	144.88)
(Ferdinand Burgmann	144.88)

N. A. K. Bugbee,
Comptroller.

Decedent died September 27, 1927.

If paid subsequent to September 27, 1928, add interest at rate of 10% per annum from said date to date of payment.

Return this statement to this office with certified check for amount due. Make checks payable to Treasurer, State of New Jersey.

Return to Writ

This receipt must not be detached.
Office of State Treasurer

$_____ Trenton, N. J., _____

Received from _____

_____

_____ Dollars

in settlement of account as above set forth.

Countersigned: Treasurer

Comptroller.

This tax was assessed on the value of property of decedent disclosed to the State in accordance with the statute. The State does not waive its right to any tax on property not disclosed.

Return to Writ

STATE OF NEW JERSEY

Department of Comptroller of the Treasury
Transfer Inheritance Tax Bureau
Assessment

Estate of Marie Kircheis of Passaic County. Late Resident of Clifton. Date of death—Sept. 27, 1927. Amount of estate: Personal $29,370.07; Real, $8,500.00. Total $37,870.07

Debts, Expenses, &c. 7,697.40

Net Estate for Distribution $30,172.67

Exempt Interests 452.78

Taxable Interests $29,719.89

Will pro rata .905531. Tax 8%. $2,377.56.

Assessment dated 2|8|28; assessed by Zaber. Re-audited by B.

Beneficiaries and Bequests	Value of Devise or Bequest	Relationship	Exempt	Taxable
1. Payment of debts				
Erection of mausoleum		None		
2. Leg.	8,000.00			8,000.00
				640.00
William Zipper		None		
3. Dev. (specific)	8,500.00			
3. Beq. (specific)	1,448.00			9948.00 / 795.84
	9,948.00			
Alfred Kircheis		Bro.-in-law		
4. Leg.1000 (abated)	905.53			905.53
				72.44
Eliza Eck		Sis.-in-law		
4. Leg.1000 (abated)	905.53			905.53
				72.44
Renata Rothermel		Sis.-in-law		
4. Leg.1000 (abated)	905.53			905.53
				72.44
Annel Dollack		None		
5. Leg.1000 (abated)	905.53			905.53
				72.44
Wally Lindner		None		
5. Leg.1000 (abated)	905.53			905.53
				72.44
Gertrud Panzer		Niece		
6. Leg.2000 (ab'td)	1,811.06			1811.06 / 144.88

10 20 30

Return to Writ

STATE OF NEW JERSEY

Department of the Comptroller of the Treasury
Transfer Inheritance Tax Bureau
Assessment

Estate of Marie Kircheis of Passaic County. Late resident of Clifton. Date of death—Sept. 27, 1927.

Analysis of Estate

Beneficiaries and Bequests	Value of Devise or Bequest	Relationship	Exempt	Taxable
Ella Leupold		Niece		
6. Leg.2000 (ab'td)	1,811.06			1,811.06
				144.88
Millie Zeidler		Niece		
6. Leg.2000 (ab'td)	1,811.06			1,811.06
				144.88
Ferdinand Burgmann		Nephew		
6. Leg.2000 (ab'td)	1,811.06			1,811.06
				144.88
Katherina Kniesler		None		
7. Leg. 500 (abated)	452.78		452.78	
			452.78	29,719.89
				2,377.56

In the Matter of the Estate of
Marie Kirchies,
Deceased,
Late of Passaic County, N. J.

REPORT OF EXAMINER

The only question now at issue in this case is the reasonableness of certain funeral expenses claimed as a deduction. The cost of burial includes the following items:

Funeral expenses	$ 951.00
Cost of Plot	1,680.00
Mausoleum	10,000.00
Total	$12,631.00

As to the disbursement of $951.00 for the actual burial expenses of the decedent, the Department does not question the reasonableness of the same. While the cost of the burial plot, amounting to $1,680.00, appears somewhat high it has been concluded to pass this item without further discussion in view of the fact that the decedent left no immediate family and a reduction in the amount would only slightly affect the taxes in any event, which brings us to a consideration of the claim for a mausoleum in the amount of $10,000. The Special Investigator advises the Department that the actual amount expended for this item was $9,000 and that the claim is therefore amended to this extent. The Transfer Inheritance Tax Act (Chapter 294, Laws fo 1926) provides

that in determining the clear market value of the property of a decedent subject to tax there shall be allowed as a deduction "a reasonable sum for funeral expenses and last illness." It is to be particularly noted that the Statute provides for the allowance of a "reasonable" sum. It is, of course, only as to the reasonableness of the present claim that the Department's inquiry is directed.

Certain expenditures by an executor or administrator are looked upon as funeral expenses even though, strictly speaking, they are perhaps not absolutely essential to interment of the body of the deceased. For instance, the purchase of a monument is generally considered as a part of the funeral expense. ***Griggs v. Geghte, 47 N. J. Eq., 179; In re Mansell, 41 N. J. Law Journal, 275.*** So also a trust for the perpetual care of decedent's burial plot. ***In re Gilchrist, 3 N. J. Adv. Rep., 905,*** adopting the decision of the Supreme Court of New York ***in re Maverick's Estate, 119 N. Y. Supp., 914,*** which reversed the Surrogate's Court ***in re Fay's Estate, 116 N. Y. Supp., 423.*** See also ***Matter of Viont's Estate, 7 N. Y. Supp., 519.*** To the contrary, however, it has been held that a bequest for the saying of Masses cannot be treated as a part of the funeral expenses. ***In re McAvoy's Estate, 98 N. Y. Supp., 437.***

The allowance of these items at all times depends, however, upon the condition that the sum so expended be reasonable with reference to the means of the estate and suitable to the station in life and circumstances of the decedent. ***Griggs v. Veghte, supra, 11 R. C. L. p. 226, 24 Corpus Juris, 301.*** Where the amount is unreasonable or

the estate insolvent then a claim for other than the absolute necessities of burial would quite likely be disallowed. ***DeLisle v. Reeves, 1 N. J. Misc. Rep., 449.***

There is a general principle which appears to be pretty well established to the effect that the decedent is recognized as the best judge of what is a reasonable amount to be expended for funeral expenses and particularly respecting the cost of the erection of a monument or the care of a burial plot.

Gleason & Otis, 4th Edition, p. 617.

Morrow v. Durant, 140 Iowa, 437.

For instance, ***Gleason and Otis*** on this point at p. 617, says:

> "When the expenditure is provided for in the will the rule seems to be that the testator is the best judge of what he can afford to spend on himself when he dies."

The Supreme Court of Iowa in the case of ***Morrow v. Durant, supra,*** applies this rule and in the course of the opinion expresses its views on the subject as follows:

> "* * In the absence of the superior rights of creditors or of persons having some legal claim upon the decedent, ***it would seem reasonable to say that this provision of the will raises a presumption of reasonableness*** as far as the duties of the executrix are concerned. It is a matter of common observation that there are some people who prefer that their remains after death be laid in a 'tomb,' rather than in a grave. We cannot say that such a prefer-

ence or desire is unreasonable as a matter of law or fact. Nor can we say, without evidence, that a suitable tomb for such purpose could be built for a substantially less sum than $2,000."

While it might be generally accepted that the testator's directions with respect to the amount to be expended for the purchase of a monument or the care of a burial plot should be accepted where an attack upon the will is involved, still for the purpose of determining what is a "reasonable" amount for funeral expenses in a Transfer Inheritance Tax proceeding, this rule should have no application. It seems certain that the question of whether or not a sum is or is not reasonable must depend upon all of the facts in the case, taking into consideration the solvency of the decedent, ***his station in life and*** whether he has any ***immediate family to inherit his property,*** and not by merely applying the principle that where the decedent names a specified amount for such purpose that he is to be the only judge of its reasonableness, all facts to the contrary notwithstanding. Such a construction would obviously defeat the plain intentions of the Statutes and would be contrary to the intimations to be taken from the decision of the Prerogative Court ***in re Gilchrist, 3 N. J. Adv. Rep., 905,*** wherein it is specifically stated that the expenses of the funeral must in all events be "reasonable" having in mind of course the decedent's financial and social status. ***This case clearly intimates that the whole matter is one of fact and that each case must be decided on its own merits.*** If this be the rule, obviously a testator cannot make an "un-

reasonable" sum for the purchase of a tomb a "reasonable" sum merely because he designates the amount in his will. If the amount to be spent for funeral expenses is unreasonable or is for the funeral expenses of others than the decedent, then the amount should be scaled accordingly.

In re Gilchrist, supra
In re Saunders, 137 N. Y. Supp., 438

In the instant case the decedent left a gross estate which, at best, cannot exceed $40,000, and it seems clear that the expenditure of approximately one-quarter of this sum by the second clause of her will for the erection of a mausoleum is disproportionate to the decedent's financial and social status in life and should be pared down accordingly for the purpose of reaching a "reasonable" amount to be allowed as an expenditure for funeral expenses pursuant to the terms of the Statute. This appears to be substantially what the Surrogate's Court did ***in re Saunders, supra,*** and what our Prerogative Court suggested should be done ***in re Gilchrist, supra.***

The opinion in the ***Saunders case*** shows that the deceased left an estate in excess of a million dollars and by the first clause of his will directed that the Saunders' family burial plot should be repaired and certain improvements made thereon requiring substantially $5,000. with further provisions should the other parties interested in the plot not agree with the decedent respecting the improvements to be made. The Surrogate, in the course of his decision, does not dispute the rule that a reasonable amount for a burial plot, monument, etc., is to be allowed as an expenditure in a Transfer Inheritance Tax proceeding but he does

state that in his opinion the provision for the improvement to this lot in the amount of $5,000 is excessive. The Surrogate expressed the view that if the $5,000 was to be expended in erecting a monument upon the plot of the testator alone, considering the fact that he had left over a million dollar estate and with no immediate family, that it would have been entirely reasonable but that as the plot was owned by three (decedent and his two brothers) and was as much the plot of one as the other for which each should pay his proportionate share, that he must decide to allow as an exemption out of the estate only one-third of the cost, namely, $1,666.67.

In the instant case a reasonable amount for the erection of a monument for the decedent, considering that she had no immediate family, would appear to be not in excess of $1,000 and that a deduction in this amount should be included in Schedule "D" of the affidavit and the balance of the amount to be expended for the erection of the mausoleum taxed at the rate of eight per cent. This conclusion upon the part of the Department is not to be taken in any way to attack the validity of the will respecting the expenditure of $10,000 for a mausoleum but merely to express what, in the Department's view, is a reasonable amount to be deducted for funeral expenses in the Inheritance Tax proceeding. In reaching this conclusion only one phase of the case has presented any difficulty which has to do with this particular point; namely, the decedent directed that a mausoleum should be provided for the interment of her body and not merely that $10,000 should be expended for the erection of a monument to

mark her last resting place. It is conceivable that $10,000 for the erection of a monument might in many instances, even in a very large estate, be quite unreasonable, but it is generally understood that a mausoleum is an expensive structure and it is highly improbable that a satisfactory one could be obtained for any less than the sum of $9,000, the amount to be expended in the present instance. This presents the problem as to whether or not the provision for the purchase of a mausoleum to cost $10,000 should be considered a "reasonable" expenditure, while a provision for the purchase of a monument to cost the same amount should be considered "unreasonable." In other words, is the conclusion to be different merely because the decedent directs a different means of interment? It is expressed by the Court in the case of ***Morrow v. Durant, supra,*** that some people prefer to be buried in a "tomb" rather than a grave but is this situation to in any way affect the question of the reasonableness of the amount to be expended for burial? It seems certain that in contemplation of the law the burial means nothing more than the final disposition of the remains, whether it be by deposit in the ground or in a tomb, and that the sum to be expended for the disposition of the remains must depend upon the size of the estate and the social status of the decedent without regard to the method of burial. Surely a $10,000 estate should not escape the provisions of the Act by a mere direction in the will that it is to be expended for the purchase of a mausoleum for the deceased, or the purchase of an extravagant casket in that amount, while, on the other hand, an estate of the same amount where the decedent provides that $10,000 shall be

used for the erection of a monument shall be liable for the tax. Based on this argument the Department has reached the conclusion that the mere fact that in the present instance the sum is for the purchase of a mausoleum and not a marker for the decedent's grave does not seriously affect the situation insofar as the Inheritance Tax is concerned.

It has been suggested at this time that perhaps the Inheritance Tax Act should be amended so as to avoid the difficult problem of determining whether claims for funeral expenses are "reasonable" by establishing either an arbitrary figure in the Act to be allowed on account of funeral expenses or by providing that all sums expended therefor shall be allowed as a deduction, reasonable or otherwise. Perhaps it is true that the State would stand to lose little, if anything, by any provision, in the Act which would direct the allowance of all expenditures for burial, monument, grave, care of lot, etc., but even in face of this provision it is quite possible that difficult problems would still arise making the situation little better than it is at present. A cursory examination of the Statutes of the most important of the other jurisdictions shows that they have attempted to take no definite steps in this direction. The fact is that few of even the outstanding of the States have any provisions at all with respect to deductions.

In California the Act merely provides that "expenses of funeral and last illness" shall be allowed. Colorado has a similar provision which directs that "such amount for funeral expenses, administration expenses * * *" shall constitute a proper deduction. Iowa merely directs that "rea-

sonable funeral expenses" are to be deducted. Pennsylvania is the only one which appears by Statute to make provision for an expenditure in the case of a monument. By the Pennsylvania Act it is directed that "reasonable and customary funeral expenses, * * * reasonable expenses for the erection of monuments or grave stones, etc. * * *" shall be allowed.

Under these circumstances it appears inadvisable at this time to make any change in the provisions of the Act with respect to deductions on account of funeral expenses, etc. It seems certain that under any suggested change to the Act there would arise objections when attempted to be applied in specific cases. It is seldom that the problem arises under our act; at least to such an extent as to be considered serious, which perhaps suggests the conclusion that the present situation is not so bad. In any event it is not advisable to be continually amending and supplementing the Act. If a revision becomes necessary it should be the result of an accumulation of instances wherein the act should be altered rather than by yearly acts making only minor changes.

A. K. Neeld (signed)
Examiner.

Return to Writ

Max P. Arlt
Attorney at Law
East Crescent Ave.
Allendale, N. J.

October 20, 1927.

Hon. Robert J. McDermott,
Paterson, N. J.

Re: Estate of Marie Kircheis

Dear Sir:

Answering yours of the 18th, regarding the third paragraph of her will, referring to "an undivided half interest in real property," at the time this property was purchased, the question of joint ownership was fully explained to both parties, and the title was purposely placed in the joint names for the reason that William Zipper is travelling a great deal of the time, and that in the event that he met with some accident, there should be no question regarding the ownership of the home, and that she could remain in undisturbed possession.

When preparing her will this joint ownership was again brought to her attention, but she insisted upon the insertion in the will of the language she did for the reason that her next of kin were living in a foreign country (Czecko-Slovakia) and did not understand our laws, and that there should be no possible ground to cast suspicion upon her foster-son William Zipper if there was no reference made to the real estate, as when visiting abroad she had mentioned the fact of joint ownership of real property and as it was explained to her, and they seemed to be unable to understand that when the property is in the names of two persons, the survivor should take without any further question or proceeding. In

other words, it was purely a precautionary measure which she insisted upon having inserted.

Regarding the cemetery plot, Mrs. Kircheis had been diggering to buy a mausoleum already erected, but as she delayed, the mausoleum was bought by some one else, and she then selected two plots in Mount Hebron Cemetery, one of which was quoted to her at $1,000. and the larger plot at $1,600, and it was her wish that the mausoleum should be erected on either one of these plots. But again the matter of purchase was delayed as she probaly had no idea that she would pass away as soon as she did. In the meantime, the smaller plot, namely the $1,000 plot, was sold, and Mr. Zipper therefor purchased the larger plot, for which he was obliged to and did pay the sum of $1,680., trying to carry out her wishes as expressed during her life time.

Trusting the above will answer your inquiry, I remain

Yours very truly,
(Signed) Max P. Arlt.

Return to Writ

William P. Seddon
Counsellor at Law
Paterson, N. J.
9 Colt Street.

January 5, 1928

Hon. N. A. K. Bugbee,
State Comptroller,
Trenton, N. J.

Attention Wm. D. Kelly, Esq., Supervisor Transfer Inheritance Tax Dep't.

Re Estate Marie Kircheis

Dear Sir:

Under the Statutes of New Jersey the deed conveying premises known as 28 Washington Avenue, Clifton, N. J., to Marie Kircheis and William Zipper did not create a joint tenancy in common so that Marie Kircheis owned an undivided one half of said premises at her death. This arises from the provision in the Statute of New Jersey known as Section 16 of the act concerning conveyances, Compiled Statutes 1538.

"No estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate that it was or is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common, any law, usage or decision heretofore made to the contrary notwithstanding."

I have examined the deed which conveyed the property to Mrs. Kircheis and Mr. Zipper and find that there is no express language therein stated that it was intended to create an estate in joint tenancy.

Return to Writ

I have examined this property and inquired in the neighborhood concerning its value and report that the market value of said premises at the date of decedent's death was $17,000 and one half of the same or $8,500 should be added to the taxable value of this decedent's estate.

Decedent's will under the Third Paragraph construed the conveyance to her and William Zipper as creating an estate in common as she devised her "undivided one half interest" in the property to her foster son, William Zipper. William Zipper was no relation to decedent and is taxable as a non-relative.

I have read the Huggins case, 125 Atl. 27 cited by counsel but find that there was an express agreement providing for a joint tenancy and that the owners were not tenants in common. This case is authority for joint-tenancy when such facts arise as to create a joint tenancy with its survivorship but I find that decedent and Mr. Zipper were tenants in common and not joint tenants and that Mr. Zipper acquired an undivided one half interest in said premises under decedent's will which constituted a taxable transfer under our Act.

For some time Mr. Zipper had had control of the property of Mrs. Kircheis which she received from her husband's estate. Mr. Zipper invested same for Mrs. Kircheis and paid for the household expenses etc., from the joint funds of himself and his foster mother. Mr. Zipper has been successful himself and has acquired considerable estate of his own. In June 1927 as decedent became dangerously ill she sent for Mr. Arlt to prepare her will. When asked what estate she desired to dis-

pose of she submitted a statement from Mr. Zipper showing all of the funds which he held in his own name but as Trustee in reality of Mrs. Kircheis. This list consisting of mortgages and expenses paid was submitted and a copy made which is attached hereto. With interest added from June 15 to the date of her death it is a correct list of the items comprising the funds of $27,413.21 which were in the hands of Mr. Zipper.

The claim of Dr. H. Drew for $2,184 was paid.

The contract for the mausoleum I have examined and respectfully report that same will cost $9000 and should be allowed as an expense pursuant to the will. The cemetery plot purchased at Mt. Hebron Cemetery was paid for October 12, 1927, and cost $1440 to which should be added $240 paid for perpetual care of same, total $1680 which should be allowed as a deduction authorized as an expenditure by the Second Paragraph of the will. The second paragraph directed an expenditure of $11,000 and only $10,680 has been actually spent.

Respectfully submitted,
(Signed) Wm. Seddon.

Account Between
Marie Kircheis and William Zipper
As of June 15, 1927
Mortgages

Owner	Amount	
Francesco Calubro, 2770 Cropsey Ave. Brooklyn	$ 3,750.00	65.00
Accrued Interest	46.25	
Treselmina Co. Inc. Surf Ave. & West 27th St., Brooklyn	2,400.00	41.60
Accrued Interest	65.60	
Neptune Home Co. 3207, Neptune Ave., Brooklyn	3,000.00	52.00
Accrued Interest	82.00	
Mary Schneider, 1356—55th St., Brooklyn	12,250.00	212.33
Accrued Interest	151.08	
Williams & Goldstein, Bradfird St. near New Lots Road, Brooklyn	7,000.00	120.60
Accrued Interest	86.33	
Arker Realty Co. 56th St. & 7th Ave., Brooklyn	1,000.00	17.33
Accrued Interest	12.33	
	$29,843.59	508.86

Contra

Money advanced on European trip and for hospital	$ 2,430.38
Balance on hand	$27,413.21
	508.86
	$27,922.07

Return to Writ

December 29, 1927.

Mr. Arlt, Attorney of the estate of Marie Kircheis, appeared before Mr. Seddon today and produced the following records.

Receipt No. 1349 from the Mt. Hebron Cemetery Association produced for lot 20 Birchlawn Section. Consideration $1440. Deed in the name of William Zipper. Dated October 12, 1927.

Also receipt dated October 12, 1927 for $1440 being purchase price of lot No. 20 Birchlawn Section and an additional $240 for perpetual care of the plot.

Contract produced dated November 16, 1927 between Presbsey Leleland Company and William Zipper for the erection of a mausoleum on the Zipper plot at Mount Hebron Cemetery for $9000.

Deed for lot 28 Washington Avenue, dated April 12, 1920 between Cyrus A. Draper et al to William Zipper and Marie Kircheis recorded in Book I-28, page 48. Revenue stamps attached $9.50 and subject to a mortgage of $4500 now on the property making the total purchase price of approximately $13,500—$14,000. Full Covenant Warranty Deed, said party of the second part being the two persons above referred to and there is no recitation in the deed as to their respective interest of either party so under our statute covering jointly held property there would be an undivided one half interest owned by each.

Mr. Arlt produced two checks dated April 10, 1920, one for $6,000 signed by William Zipper and certified by the First National Bank of Garfield, payable to Syrus Drapers and Bertha M. Drapers and another check dated April 3rd and certified by the Continental Bank of New York

for $3,000 signed by William Zipper and payable to Syrus Drapers and Bertha M. Drapers. Another check was also produced for $142.81 dated April 14, 1920 payable to Syrus Drapers and Bertha M. Drapers. This was for insurance adjustments on closing title.

The mortgage of $4,500 referred to in the deed was cancelled of record on September 15, 1920 and the check is produced dated September 13, 1920 for $4,635.00 signed by William Zipper and certified by the First National Bank of Garfield and payable to the mortgagees Henry Gabell and Louise Gabell.

The residence has a value of $15,000 or $16,000 possibly as a full market value was paid at the time of the purchase and the valuations have not advanced since.

The bill of Dr. Drew amounting to $2,184.00 has been paid.

Mr. Arlt explaining the money in hands of William Zipper stated to be $27,413.21 makes the following statements: I have known him for the last fifteen years and he knew Mr. Kircheis as well as Mrs. Kircheis. That William Zipper was no relative to either of them but was considered what they call a foster son who was not legally adopted. Mr. and Mrs. Kircheis had no children. Mr. Kircheis had an old friend in Brooklyn who was in the investment business and who had invested most of Kircheis money for him. As these investments became due they were reinvested and finally put in Mr. Zipper's name so that he could take better care of them. In June 1927 Mrs. Kircheis was advised by her physician that her physical condition was very poor and that her affairs

should be arranged in case of her death. Mr. Arlt was called in and re-drew her will and at that time a statement was carefully prepared showing the amount of money which William Zipper had in his name of investments but belonging to Marie Kircheis. The statement as then prepared (copy is submitted herewith showing the balance in his hands on June 15, 1927 amounting to $27,413.21). The item for money advanced on Europe trip and hospital were for expenses incurred and paid by William Zipper for services and operations in the hospital performed upon Mrs. Kircheis and for a trip by Mrs. Kircheis herself to Europe. The interest on this amount will possibly be increased by adding accrued interest from June 15 to September 27th at 6%, Mrs. Kircheis had no checking account or bank account for some years prior and William Zipper paid all of the expenses and deducted the same from the moneys in his hands belonging to Mrs. Kircheis.

(Signed) Wm. Seddon.

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Max P. Arlt
Attorney and Counselor at Law
Suite 706-8
15 Park Row New York

December 30, 1927.

William P. Seddon, Esq.,
9 Colt St.,
Paterson, N. J.

Re: Estate of Marie Kircheis

Dear Sir:

In reference to the real property mentioned in the will of the deceased, the Inheritance Tax Act as amended by Chapter 294 of the Laws of 1926, Subdivision 5 of Section 1, provides:

> "Excepting therefrom such part thereof as may be proved to the satisfaction of the Comptroller of the Treasury by the surviving joint tenant or joint tenants, person or persons, to have originally belonged to him or them, and ***never to have belonged to the decedent.***"

In Huggins Estate, 125 A. 27, decided May 7, 1924, Vice-Chancellor Buchanan uses the following language:

> "As a matter of fact the "succession" of the surviving joint tenant, I take it, is not a transfer by, or a succession from the deceased joint tenant at all, any more than the succession of a remainder man is a transfer by or succession from the prior life tenant. The change of interest which takes place on the death is in no wise the act of decedent, nor a succession by operation of law, but is the act of the original

creator of the estate. The additional interest which the survivor gains on the death of his co-tenant comes to him not from the co-tenant, but from the original grantor."

"Let us now turn to the question of consideration. It is clear, I think, from the history and purpose of the legislation on the subject that by this taxing statute, the legislature intended to tax only transfers of a donative nature, and so far as I know or can recollect, ***there has never been any attempt made in this State to levy a tax on any contrary theory.***"

The entire purchase price for the real estate, the mortgage, and all improvements made to the real estate since it was purchased by William Zipper, was paid by him. The decedent has not contributed one dollar toward the purchase, or upkeep of this real estate.

The object of putting the real estate in the joint names at the time of purchase was, that William Zipper was at that time, not in the best of health, and by reason of his business was compelled to travel a great deal, and fearing that something might happen to him, he wanted his foster mother to have an interest in the title to the real estate, because he wanted her, above everything else, to have a permanent home.

The decedent for many years prior to the death of her husband, in 1918 or 1919, and up to the time that she became afflicted, took care of her own investments, and only in late years, did she

gradually turn over the care of her affairs to her foster-son, William Zipper.

I find that she maintained a check account with the Northern Trust Company of Philadelphia for a good many years, and which account she closed this year.

The household expenses were borne by William Zipper even before the death of Mr. Kircheis. The income and part of the corpus of Mrs. Kircheis' investments were used by her for her own personal expenditures, including her travelling expenses, gifts to her relatives or friends, and her hospital, doctor and nursing bills. But in no wise did she ever contribute one dollar toward the purchase or upkeep of the real estate in question.

Under those circumstances, the doctrine laid down in the "Huggin's Estate" applies, and I respectfully submit that the real estate is not subject to inheritance tax.

Very truly yours,

(Signed) Max P. Arlt.

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Dec. 16, 1927.

William P. Seddon, Esq.,
Second National Bank Bldg.,
Paterson, N. J.

Dear Sir:

Enclosed herewith find affidavit and will in the estate of Marie Kircheis, deceased, late of Passaic County, New Jersey.

It is suggested that you ascertain what interest the decedent had in the real estate referred to in item three of the will. Apparently this property was held jointly and is taxable under section 5 of the Act.

Advise how William Zipper became possessed of $27,413.21 belonging to the decedent. Also advise whether the claim of Dr. H. Drews amounting to $2,184.00 has been paid.

Also obtain full and complete data with reference to the claim for a mausoleum amounting to $10,000. and claim for plot selected by the decedent for the mausoleum amounting to $1,680. It appears that this claim is similar to that involved in the case of Gilchrist, 3 N. J. A. R. 905.

Very respectfully,
N. A. K. Bugbee,
Comptroller of the Treasury,
By
State Supervisor of Transfer
Inheritance Tax Bureau.

RZ:D

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STATE OF NEW JERSEY

Department of Comptroller of the Treasury
Transfer Inheritance Tax Bureau
Trenton

Resident Decedent.
Received Jan. 6, 1928, Comptroller's Dept.
Received Nov. 2, 1927, Comptroller's Dept.

In the matter of the estate of Marie Kircheis, late of Clifton, Passaic County.	Affidavit of Executor William Zipper

County of Passaic,
State of New Jersey, } ss.

William Zipper, Executor of the estate of the above-named decedent being duly sworn, deposes and says:

Decedent died, testate, September 27th, 1927, leaving a last Will, copy of which is hereto attached.

Name and address of attorney or other representative to whom all correspondence should be mailed, Max P. Arlt, Allendale, N. J.

That the decedent died possessed of an interest in the following described property located in the State of New Jersey:

Schedule "A"

The real property located in the State of New Jersey should be described by lot and block number or street and street number or by a general description, with a reference to the record of the

conveyance by which the decedent took title; also statement of encumbrances upon each parcel at death of decedent.

1 plot, Mount Hebron Cemetery, Upper Montclair, "North-third, No. 52, Section CC," Estimated Market Value, $250.00.

(Signed) William Zipper.

By Department, ½ int., No. 28 Washington Ave., Clifton, N. J., estimated market value $17,000. — Caution, $8,500.

That the decedent died possessed of an interest in the following described personal property:

Schedule "B"

Cash in Hand and on Deposit, Bonds and Mortgages, promissory Notes, Claims, Insurance, Corporate Bonds and Stocks and all Other Personal Property Wherever Situate.

	Estimated Market Value	Caution
Interest		$ 508.86
Money in hands of William Zipper	$27,413.21	27,413.21
Household furniture and personal effects	1,448.00	1,448.00
Total	$28,861.21	$29,370.07

(Signed) William Zipper.

Schedule "C"

All property transferred by the decedent within two years prior to the date of death without having received an adequate, valuable consideration.

All property transferred by the decedent in contemplation of death or intended to take effect in enjoyment at or after death.

All property passing by decedent's exercise of any power of appointment vested in him under the will, deed or other instrument of another.

None.

That the debts chargeable against the estate of the decedent are as follows:

Schedule "D"

If notes, brokerage accounts or other claims are secured by collateral, describe the collateral pledged with its value as of the date of death of the decedent and state whether or not said collateral is included among the assets disclosed in Schedule "B". If collateral is not pledged, state after each loan "no collateral pledged."

Debt or Claim of	Nature of Same	Amount	Caution
Timothy C. Lucas,	Funeral expenses	$ 951.00	$ 951.00
	Administration expenses (estimated)	300.00	300.00
	Counsel Fees	500.00	500.00
	Executor's or Administrator's Commissions (Commissions must not be estimated and claimed unless a final account is to be filed with the Surrogate.)	1,443.00	767.40
(Detail Other Debts)			
Dr. H. Drews, Lexington Ave., Passaic, N. J.		2,184.00	2,184.00

Nurses, household help, etc.	165.00	165.00
Mausoleum	10,000.00	1,000.00
Cost of plot selected by deceased for Mausoleum	1,680.00	1,680.00
Mt. Hebron Cemetery Co., moving body of Mr. Kircheis from present burial place to mausoleum when completed, including new casket as per agreement	150.00	150.00
Total	$17,373.00	$7,697.40

(Signed) William Zipper.

That the following named beneficiaries are entitled to share in the estate of the decedent:

Schedule "E"

Beneficiaries, Relationship, Survived Decedent, state yes or no; Age of life tenants or annuitants at death of decedent, and Interest of Beneficiary in estate.

Alfred Kircheis, brother-in-law, yes, 60 years, legacy $1,000.

Eliza Eck, sister-in-law, yes, 58 years, legacy $1,000.

Renata Rothermel, sister-in-law, yes, 56 years, legacy $1,000.

Annel Dollack, niece by marriage, yes, 32 years, legacy $1,000.

Wally Lindner, niece by marriage, yes, 35 years, legacy $1,000.

Gertrud Panzer, niece, yes, 32 years, legacy $2,000.

Ella Leupold, niece, yes, 34 years, legacy $2,000.

Millie Ziedler, niece, yes, 30 years, legacy $2,000.

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Ferdinand Burgmann, nephew, yes, 28 years, legacy $2,000.

Kathrina Kniesler, no relation, yes, 58 years, legacy $500.

(Signed) William Zipper.

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LAST WILL AND TESTAMENT OF MARIE KIRCHEIS

Know All Men By These Presents, that I, Marie Kircheis, of the City of Clifton, Passaic County, New Jersey, being of sound and disposing mind and memory, do make, publish and declare this my Last Will and Testament, hereby revoking any and all wills and codicils by me heretofore made.

First: I direct my executor hereinafter named to pay all my just debts and funeral expenses as soon after my demise as convenient.

Second: I hereby order and direct my executor hereinafter named to purchase or acquire a suitable plot, at a cost of approximately One Thousand ($1,000) Dollars, in Mount Hebron Cemetery, at Upper Montclair, New Jersey, and to erect or cause to be erected on said plot, a suitable mausoleum for a final resting place for the remains of my beloved late husband and myself and at a cost of approximately Ten Thousand ($10,000) Dollars, unless such a plot has been purchased and a mausoleum erected thereon by me before my demise.

Third: I give, devise and bequeath to my beloved foster-son William Zipper of the City of Clifton, Passaic County, New Jersey, and his heirs forever, my undivided half interest in our homestead known as No. 28 Washington Avenue, in the City of Clifton, which property is at the present time in our joint names; also all my furniture, household goods and personal effects of whatever kind or nature contained in this our homestead; also my plot in Mount Hebron Cemetery, at Up-

per Montclair, N. J., known as "North-Third, Number 52, Section C C," containing 144 square feet, and conveyed to me by deed dated July 10, 1919; also the additional plot in Mount Hebron Cemetery purchased or to be purchased, together with the mausoleum erected or to be erected thereon, as hereinbefore provided, and should said William Zipper so desire, his remains may also be interred in said mausoleum.

Fourth: I give and bequeath to my brother-in-law, Alfred Kircheis, to my sister-in-law Eliza Eck, and my sister-in-law Renata Rothermel (widow), all of Philadelphia, Pa., to each of them or their respective heirs, the sum of One Thousand ($1,000) Dollars.

Fifth: I give and bequeath to Mrs. Annel Dollack (nee Lindner), and to Miss Wally Lindner, nieces of my late husband, both residing at Asch, Bohemia, Czecko-Slovakia, to each of them or their respective heirs, the sum of One Thousand ($1,000) Dollars.

Sixth: I give and bequeath to Gertrud Panzer, (nee Burgmann), Ella Leupold (nee Burgmann) and Millie Zeidler, (nee Burgmann), and to Ferdinand Burgmann, all of them children of my deceased sister Ida Burgmann, all residing at Asch, Bohemia, Czecko-Slovakia, to each of them, or their respective heirs, the sum of Two Thousand ($2,000) Dollars.

Seventh: I give and bequeath to my old and good friend, Mrs. Kathrina Kniesler of Imlaystown, New Jersey, the sum of Five Hundred ($500) Dollars. In the event that she should not survive me, then the said Five Hundred ($500) Dollars should be paid to her son, Ludwig Knies-

ler, Jr., in case he is living at the time hereinafter set for distribution.

Eighth: All the rest, residue and remainder of my estate, real, personal or mixed, of which I may die seized and possessed or to which I may be entitled at the time of my death, I give, devise, and bequeath to my beloved foster-son William Zipper and his heirs forever.

Ninth: I hereby order and direct that there shall be no hurry about the settling and distribution of my estate, and no matter what delays there might be, or for whatever reason, all income from the estate shall become a part of the residuary estate and the other beneficiaries herein named shall, at the time of distribution, receive only the net sums mentioned herein; and I further order and direct that there shall be no distribution of any part of my estate for two (2) years after my death; but this order does not apply to paragraphs "First," "Second," and "Third," of this my Last Will and Testament, and does not apply to the bequest made to Mrs. Kniesler in paragraph "Seventh."

All matters regarding the settling, distributing, and managing of my estate, as set forth herein, shall be left exclusively to the sound discretion of my executor hereinafter named and his decision in all these matters shall be final.

If any of the beneficiaries shall contest or attempt to contest this, my Last Will and Testament or shall commence any legal action or proceedings against my executor in connection therewith, then the provision herein made for him, her or them shall forthwith become null and void and of no

effect and his, her or their bequest shall become a part of the residuary estate.

Tenth: I hereby nominate and appoint my beloved foster-son William Zipper, sole executor of this my Last Will and Testament with full power and authority to buy, sell, mortgage or otherwise trade in real or personal property, and to give full and sufficient deed therefor, and I further direct that he shall not be required to give bonds for the faithful performance of his duties. In the event that the said William Zipper is unable or unwilling to take up the duties of executor herein imposed upon him, then and in that case I nominate and appoint my friend Max P. Arlt, of Allendale, New Jersey, as my sole executor, of this my Last Will and Testament with like power and authority and I direct that he, likewise, shall not be required to give bonds for the faithful performance of his duties.

In Testimony Whereof, I, the said Marie Kircheis, have to this, my Last Will and Testament, contained on four sheets of paper and to every sheet thereof, subscribed my name, and to this the last sheet thereof I have subscribed my name and affixed my seal in the presence of these witnesses this Eleventh day of June, One Thousand Nine Hundred and Twenty-seven.

Marie Kircheis (L. S.)

Witnesses:

Max P. Arlt,

Ernest W. Arlt.

Signed, sealed, published and declared by the said Marie Kircheis as and for her Last Will and Testament, in the presence of us, who, at her request, and in her presence and in the presence of

each other, have subscribed our names as witnesses hereto.

Max P. Arlt, residing at Allendale, N. J.

Ernest W. Arlt, residing at Clifton, N. J.

That as such administrator executor deponent is personally familiar with the affairs of said estate, the property constituting the assets thereof and their fair market value, and with the debts, expenses and charges properly and legally allowable as deductions therefrom.

That the decedent at the time of her death had no safe deposit box.

That Schedule A attached hereto and made part hereof sets forth fully and in detail all the real property in the State of New Jersey of which decedent died seized and possessed, or in which she had any right, title or interest at the time of her death. It also sets forth a statement of the liens and encumbrances upon each parcel of real estate at the date of death, giving in the case of mortgages the amount, date, place, liber and page of record thereof. It also sets forth in the marginal column the assessed valuation of each of said parcels and in the second marginal column the estimated market value thereof as of the date of death of said decedent, and in the third marginal column the value of the decedent's equity in said property.

That Schedule B attached hereto and made part hereof sets forth fully and in detail all the personal property wheresoever situated owned by the decedent or in which said decedent had any right, title, or interest at the time of her death. It also sets forth all of the moneys left by the decedent at the time of her death, whether in her

immediate possession, standing to her credit, or in which she had any right, title or interest, in banks of deposit, saving banks, trust companies, or other institutions, whether individually or in trust for or jointly with any other person, giving also separately the accrued interest thereon, if any, down to the last interest day prior to decedent's death in the case of savings banks, and down to the date of decedent's death in all other cases. It also sets forth all wearing apparel, jewelry, silverware, pictures, books, works of art, household furniture, horses, carriages, automobiles, boats, and any and all other personal chattels of whatsoever kind or nature left by decedent, together with the fairly estimated market value thereof. It also sets forth a statement of all bonds and mortgages held by decedent and of all claims due and owing decedent at the time of her death, and of all the promissory notes or other instruments in writing for the payment of money of which she died possessed, of whatever nature, with interest thereon, if any, giving the face values and estimated fair market values thereof, and if such estimated fair market values be less than the face value, setting forth in brief the reason for such depreciation as to each item. It also sets forth a statement of any and all moneys payable to the estate from life insurance policies carried by decedent. It also sets forth all the corporate stocks, bonds and accrued interest thereon to the date of decedent's death, or other investment securities owned by the decedent at the time of her death, with the market value thereof at such time, and in the case of rare and unlisted corporate securities, giving the State of incorporation

of the corporation issuing the same, its capitalization, the value and nature of its assets, it liabilities, its surplus, the book value of its stock, the dividends paid, and any other facts which may be pertinent affecting the value of said securities. It also sets forth the interest of decedent at the time of her death in any copartnership or business, stating the nature and location thereof, the total capital employed, the gross profits, expenses and net profits of the business for at least three years prior to decedent's death, and any other facts pertaining to such business as may be pertinent to a fair and just appraisal of decedent's interest in said business and good-will thereof. It also sets forth in itemized form, together with the fair market value thereof, any other property owned or left by the decedent of the time of her death.

That Schedule C. attached hereto and made part hereof sets forth all the property, real and personal, of which the decedent made any deed, grant, bargain, sale or gift in contemplation of her death or intended to take effect in possession or enjoyment at or after her death, or by reason thereof fell into or became part of the assets of this estate, by reversion, remainder or otherwise. It also sets forth the property, real and personal, of which the decedent made any deed, grant, bargain, sale or gift within two years prior to the date of her death and without an adequate valuable consideration. It also sets forth all the property, real and personal, which passed at decedent's death by virtue of the exercise by her of any power of appointment vested in her by the will, deed or instrument of another, together with the fair market value of each and every item

thereof and a statement in brief of the sources and derivation of such power, copies of which will, deed or other instrument are submitted herewith. It also sets forth all sums by way of commissions properly and legally chargeable against such property.

That Schedule D attached hereto and made part hereof sets forth the valid debts due and owing by decedent at the time of her death and allowed as just and fair by the Administrator Executor, together with any and all items claimed by the Administrator Executor as proper deductions herein. It does not include any claims as entered into the computation of decedent's interest in any copartnership or business. It also sets forth the funeral expenses, administration expenses, counsel fees paid or estimated.

That Schedule E attached hereto and made part hereof sets forth the names and addresses of all persons beneficially interested in this estate, at the time of the decedent's death, the nature of their respective interests, their relationship, if any, to the decedent, together with the ages at the time of decedent's death of all minors, annuitants and beneficiaries for life under decedent's will, if any. It also contains a statement showing which of the beneficiaries named in decedent's will, if any, died prior to decedent, the dates of their deaths, their survivors, and the relationship of such survivor to decedent.

That the deponent has made due and diligent search for property of every kind, nature and description left by the decedent and has been able to discover only that set forth in the schedules attached hereto and made part thereof, and that no

information of any other property of the decedent has come to his knowledge, and that he verily believes that decedent left no property except herein set forth. That all the sums claimed as deductions in the schedules hereto attached and made part hereof are lawful, just and fair. Deponent further says that wherever in any of the schedules the word "none" has been written in or wherever such schedule has been left blank, such word or omission is to be taken equivalent to an affirmative allegation by deponent that the decedent left no property of the kind to which said schedule relates.

(Signed) William Zipper.

Subscribed and sworn to before me this 10th day of October, 1927.

(Signed) Harry E. Cole,
Notary Public of N. J.

REPORT OF DISTRICT SUPERVISOR AND APPRAISER

To the Comptroller of the Treasury,
Trenton, New Jersey:

I, Robert J. McDermott, who was by a Certificate of Appointment of the Comptroller of the Treasury of the State of New Jersey appointed an employee and appraiser, and designated District Supervisor of Transfer Inheritance Tax and Appraiser, in pursuance of the laws in relation to Transfer Inheritance Tax, do respectfully report as follows:

Name of Decedent—Marie Kircheis.
Late of Clifton, County of Passaic, New Jersey.
Date of Death, Sept. 27, 1927.

Value of Personal Property	$29,370.07
Value of Real Property	8,500.00
Total Estate	37,870.07
Debts, Expenses, etc.	7,697.40
Net Amount of Estate for Distribution	$30,172.67

All of which is respectfully submitted this 18th day of October, 1927.

Robert J. McDermott,
District Supervisor and Appraiser.

Assessment Dated 2/8/28.
Assessed by ~~Gober~~. Gaber
Re-audited by B.

Reasons for Reversal

Filed, May 7, 1930
NEW JERSEY SUPREME COURT

William Zipper, Executor of the Last Will and Testament of Marie Kircheis, Deceased, Prosecutor, vs. John McCutcheon, Comptroller of the Treasury of the State of New Jersey, Respondent.	On Certiorari

REASONS FOR REVERSAL

The said Prosecutor, by Max P. Arlt, his attorney, comes and prays that the assessment of certain Transfer Inheritance Taxes made against him by the Hon. John McCutcheon, Comptroller of the Treasury of the State of New Jersey, in the matter of the Estate of Marie Kircheis, deceased, late of the City of Clifton, County of Passaic, State of New Jersey, may be set aside, reversed, and for nothing holden for the following reasons:

I.

AS TO ITEM OF SIX HUNDRED FORTY ($640.00) DOLLARS IMPOSED UPON THE ESTATE OF MARIE KIRCHEIS FOR THE ERECTION OF A MAUSOLEUM.

1. The purchase of a burial plot and the erection of a suitable monument or mausoleum comes properly within the item of funeral expense.

2. The testatrix is the best judge of what she can afford to spend on herself when she dies.

3. The amount set aside by the testatrix for the purchase of a plot and erection of a mausoleum is not excessive for a person in her station of life.

4. The amount set aside by the terms of the will for burial expense of the testatrix is not taxable under the Inheritance Tax Law.

5. An inheritance tax should be imposed only on that part of the decedent's estate which passes to the beneficial enjoyment of the beneficiary.

6. An inheritance tax should be construed strictly against the Government.

7. Said assessment of inheritance tax is in divers other respects, illegal and unjust and should be set aside and be for nothing holden.

II.

AS TO ITEM OF SIX HUNDRED EIGHTY ($680.00) DOLLARS IMPOSED UPON WILLIAM ZIPPER ON REAL ESTATE.

1. The provision of the statute (Compiled Statutes of New Jersey, page 1538, paragraph 15) defining joint tenancy and tenancy in common was not intended for the purpose of imposing inheritance tax.

2. The real estate was bought and paid for by the Prosecutor, William Zipper, and no part of the purchase price or upkeep was paid by the decedent.

3. The placing of the title in their joint names was Mr. Zipper's idea in case of his sudden death

of securing the home for his foster mother against possible attack from distant relatives in foreign lands, who do not understand our laws.

4. Including the item of real estate in the will of the testatrix was her idea or way of expressing herself to satisfy distant relatives in foreign lands that the real estate was to and should remain the property of Mr. Zipper.

5. The evidence submitted to the Comptroller of the Treasury is conclusive as to the real purchaser and ownership.

6. The additional interest which the survivor gained on the death of his co-tenant came to him not from his co-tenant, but from the original grantor, William Zipper.

7. The said devise is not of a donative nature and therefore not taxable.

8. The Legislature did not intend to confer upon the Comptroller of the Treasury arbitrary power to interpret the law.

9. The valuation placed on the real estate by the Comptroller of the Treasury is excessive, unjust and contrary to the evidence placed before him.

10. That the said assessment of inheritance tax made by the said Comptroller of the Treasury of the State of New Jersey, as aforesaid, is in divers other respects illegal, unjust, improper and should be set aside and be for nothing holden.

Max P. Arlt,
Attorney of Prosecutor.

Addison P. Rosenkrans,
Of Counsel with Prosecutor.

Receipt of copy of within Reasons for Reversal received this 6th day of May, 1930.

Wm. A. Stevens,
Attorney General of New Jersey.

Supreme Court Opinion

(Filed January 21, 1931)
NEW JERSEY SUPREME COURT
No. 217 October Term, 1930.

William Zipper, Executor of the Last Will and Testament of Marie Kircheis, deceased, Prosecutor,
vs.
John McCutcheon, Comptroller of the Treasury of the State of New Jersey, Respondent.

Submitted October 17, 1930; decided January 21, 1931.

Certiorari to the imposition of succession tax by the Comptroller.

Before Justices Parker, Campbell and Bodine.

For the prosecutor, Addison P. Rosenkrans.

For the respondent, William A. Stevens, Attorney-General.

Per Curiam: Two points only are raised in this case. The first is that the Comptroller should have allowed an exemption of the entire cost of a mausoleum directed by the deceased testatrix to be built to contain her body and that of her deceased husband, which cost amounted to $9,000; and the other point is that the Comptroller taxed a one-half undivided interest in a piece of real estate which had been owned by the executor and the testatrix as tenants in common and which undivided one-half, belonging to the testatrix, she

devised to the executor. The mausoleum item is within the language of the clause exempting "a reasonable sum for funeral expenses and last illness", P. L. 1926, page 490. It has been generally considered that a reasonable provision for the sepulture of the body of the deceased is proper. The argument is, however, first that the $9,000 spent for the mausoleum does not pass to any one either under the will or by the intestate law and, inasmuch as the tax is a succession tax and not a property tax, which, as such, would be unconstitutional, the $9,000 so spent is not taxable. However, the courts seem to have uniformly regarded any unreasonable provision for funeral expenses as taxable to the extent that it is considered unreasonable and no doubt on the theory that to the extent that it is unreasonable it deprives the next of kin or residuary legatees of property which would naturally come to him or them. Manifestly, this is so in a case where there is no provision in the will fixing the amount of such expenses and the executor undertakes to be extravagant in this particular. In such a case the interested parties may challenge the expenditure and the executor may be subcharged with it and be obliged to pay. The fact that the testator prescribes an extravagant amount would seem not to call for any difference in the application of the rule. We agree with the Comptroller that the expenditure of $9,000 for burial purposes out of an estate not exceeding $37,000 was unreasonable and that he properly taxed $8,000 of that amount.

The other point presents no difficulty whatever. This is not a case of tenancy by the entirety

or a joint tenancy, or any case in which there is ownership of two parties and one takes by right of survivorship. The lands were conveyed to the testatrix and the executor as tenants in common. If she had died intestate, her undivided one-half would have gone to her neirs-at-law. As it was, she devised that undivided half to the executor and clearly it was taxable and something that he would not have been entitled to but for that devise. It is intimated that the Comptroller placed too high a valuation on the one-half interest, but the argument does not seem to be pressed seriously and we do not find any substantial evidence to support it.

The writ will be dismissed.

NEW JERSEY SUPREME COURT
October Term, 1930—No. 217

William Zipper, Executor of the Last Will and Testament of Marie Kircheis, deceased, Prosecutor, vs. John McCutcheon, Comptroller of the Treasury of the State of New Jersey, Respondent.	On Certiorari

ORDER OF AFFIRMANCE

This cause coming on to be heard at the October Term, 1930, of this Court, and the Court having inspected the return to the writ of certiorari issued therein and having considered the reasons assigned for the setting aside of the transfer inheritance tax assessment by the Comptroller of the Treasury in the matter of the estate of Marie Kircheis, deceased, and the Court being of the opinion that said assessment should be affirmed, and the writ dismissed,

It is, on this 4th day of February, 1931, Ordered that the assessment of transfer inheritance taxes by the Comptroller of the Treasury in the matter of the estate of Marie Kircheis, deceased, late of Passaic County, N. J., as removed by the writ of

certiorari in this cause, be and the same is hereby affirmed and the writ of certiorari dismissed.
Entered: February 4, 1931,
On motion of William A. Stevens
Attorney General of New Jersey,
Attorney for Respondent.

A true copy

Fred L. Bloodgood,
Clerk.

Notice of Appeal

(Filed March 6, 1931)

NEW JERSEY SUPREME COURT

William Zipper, Executor of the Last Will and Testament of Marie Kircheis, deceased, Prosecutor, vs. John McCutcheon, Comptroller of the Treasury of the State of New Jersey, Respondent.	On Certiorari

NOTICE OF APPEAL

To: William A. Stevens, Attorney General of New Jersey, Attorney for Respondent.

Take Notice, that the prosecutor appeals from the whole of the judgment, or order of affirmance, entered in this cause on the following grounds: The Supreme Court erred in confirming the assessment of transfer inheritance taxes by the respondent in the matter of the estate of Marie Kircheis, deceased, late of the County of Passaic, in the State of New Jersey as removed by the writ of certiorari in this cause, and in dismissing the said writ, instead of setting aside the said assessment of taxes for the reasons filed in the Supreme Court.

Max P. Arlt,
Attorney of Prosecutor.
Addison P. Rosenkrans,
Of Counsel with Prosecutor.

Service of a copy of the within Notice is admitted this 6th day of March, 1931.

William A. Stevens,
Attorney for Respondent.

55 OCT.T.1931

New Jersey Court of Errors and Appeals

William Zipper, Executor of the Last Will and Testament of Marie Kircheis, Deceased, Prosecutor-Appellant, vs. John McCutcheon, Comptroller of the Treasury of the State of New Jersey, Respondent-Appellee.	On Certiorari. On Appeal from Supreme Court.

Brief for Prosecutor-Appellant

STATEMENT OF CASE

On February 4, 1931, an order was entered in the Supreme Court affirming the assessment of transfer inheritance taxes by the Comptroller of the Treasury in the matter of the Estate of Marie Kircheis, deceased, as removed by a Writ of Certiorari, and dismissing that Writ (Case, pages 56-57). An appeal from that order was taken to this Court (Case, page 58).

The Writ of Certiorari (Case, page 1) was allowed for the purpose of reviewing two items of inheritance tax levied by the Comptroller of the Treasury against the estate of Marie Kircheis. These items [part of a total tax of $2,377.56 (Case, pages 10-12]) are for the respective sums of $640 and $680. The item of $640 was assessed by reason of the erection of a mausoleum by the executor in obedience to the directions of his decedent's Will. The item of $680 was levied upon a supposed interest in certain real property

640
680
1320

which the executor claims to have been, in fact, wholly his own.

The decedent died on September 27, 1927, testate, and a resident of the County of Passaic (Case, page 35) leaving an estate of the value, as determined by the Comptroller, of $37,870.07 (Case, page 10). In her Will she made several specific bequests totalling $13,500.00 (Case, pages 40-44, Items "Fourth", "Fifth", "Sixth" and "Seventh") and gave her residuary estate to her "foster son", William Zipper (Item "Eighth"), whom she appoints her executor (Item "Tenth").

Item "Second" of her Will runs as follows:

> "I hereby order and direct my executor hereinafter named to purchase and acquire a suitable plot, at a cost of approximately One Thousand ($1,000.00) Dollars, in Mount Hebron Cemetery, at Upper Montclair, New Jersey, and to erect or cause to be erected on said plot, a suitable mausoleum for a final resting place for the remains of my beloved late husband and myself and at a cost of approximately Ten Thousand ($10,000.00) Dollars, unless such a plot has been purchased and a mausoleum erected thereon by me before my demise."

"Such a plot" was not purchased and no mausoleum erected by decedent in her lifetime. Her executor bought a plot in Mount Hebron Cemetery for $1440.00, adding $240.00 to that price for perpetual care, and paid $9000.00 for a mausoleum (Case, pages 13 and 26). These expenditures amounting to $10,680.00, were less than the

total ($11,000.00) authorized by Item "Second" of the Will (Case, pages 26 and 40).

GROUNDS OF APPEAL

These are found in the Notice of Appeal (Case, page 58), and in their formal statement are, of course, nothing more than that the Supreme Court erred in confirming the assessment of transfer inheritance taxes by the Comptroller of the Treasury, as removed by the Writ of Certiorari, and in dismissing the said Writ instead of setting aside the said assessment for the reasons filed in the Supreme Court.

ARGUMENT

1.

THE ITEM OF $640 LEVIED BY REASON OF THE ERECTION OF THE MAUSOLEUM IS INSUPPORTABLE IN LAW BECAUSE THE BUILDING OF THE MAUSOLEUM WAS EXPRESSLY DIRECTED BY DECEDENT'S WILL AND THE COST OF IT WAS NOT GREATER THAN THAT AUTHORIZED BY THAT INSTRUMENT, AND THE SUM SO EXPENDED DID NOT PASS TO ANYONE EITHER UNDER THE WILL OR BY THE INTESTATE LAW.

The statute in effect at the time of the death of the decedent, and which controlled the assessment of taxes in respect to her estate, is found in Chapter 228 of the Laws of 1927. The pertinent provisions of the act are as follows:

1. A tax shall be and is hereby imposed upon the **transfer** of any property, real or personal, of the value of $500 or over, or of any interest therein or income therefrom, in trust or otherwise, **to persons or corporations,** except as hereinafter provided, in the following cases:

First. When the **transfer** is by Will or by intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.****

Fifth. ****In determining the clear market value of **such** property, the following deductions and no other shall be allowed: Debts of the decedent owing at the date of death;****a reasonable sum for funeral expenses and last illness, such proportions of the State, county and municipal taxes for the current fiscal year upon the property as the elapsed portion of the said year bears to a full calendar year, the ordinary expenses of administration, including the ordinary fees allowed executors and administrators****.

Under the terms of this act, the sum expended by the executor in the erection of a mausoleum in obedience to the directions of the decedent's Will, and at a cost not greater than that authorized therein, is not a part of decedent's taxable estate. This view accords with the very nature of the tax, as defined by the courts of this State.

In Archibald vs. Maurath, 92 N. J. Eq., 357, at page 36, Vice Chancellor Backes in dealing with the collateral inheritance tax act of 1894 said:

> The phraseology of section 1, that "all property which shall pass by will or by the intestate laws of this state****shall be subject to a tax," does not import an impost upon the property, for our courts have construed the act as not a tax on property, but an exaction from persons taking, for the privilege of taking by testament or statute, and as such sustained the constitutionality of the tax. Neilson v. Russell, 76 N. J. Law 27; Eastwood v. Russell, 81 N. J. Law 672; Carr v. Edwards, 84 N. J. Law 667.
>
> Chapter 228, Laws of 1927, does not differ materially, insofar as this point is concerned, with the act of 1894, for the language of Chapter 228, Laws of 1927, is:
>
> 1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of Five Hundred Dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided, in the following cases, &c.
>
> Vice-Ordinary Buchanan, in **Re Huggins, 96, N. J. Eq., 273,** at page 281, in speaking of P. L. 1909, Chapter 228, said:
>
> It is clear, I think from the history and purpose of the legislation on the subject, that by this taxing statute the legislature

intended to tax only transfers of a donative nature, and, so far as I know or can recollect, there has never been any attempt made in this state to levy a tax on any contrary theory.

The same Vice Ordinary, in dealing with the Transfer Inheritance Tax Act of P. L. 1922, page 293, in the case entitled "In re Gilchrist's Estate" 128 Atl. Rep. 876, observed:

The design is to impose a transfer tax which shall be measured by such amount of decedent's assets as ultimately passes to the beneficial enjoyment of the beneficiaries. To that end, it is provided that there shall be deducted from the assets, in the computation of the tax, the debts owing by decedent, the funeral expenses, the elapsed portion of State, County and Municipal taxes upon the property, administration expenses, including executors' or administrators' commissions and counsel fees—all items which are required to be paid out of the estate in the administration itself, in reduction of the amount which would otherwise pass to the beneficiaries.

If, as we suppose will be conceded, the transfer inheritance tax act of 1927—like most such statutes enacted in this country—**imposes a tax only** upon the right to receive and not upon the right to transmit, the sum expended by this executor, **in obedience to the express direction of his decedent's will,** for a mausoleum for her body and that

of her deceased husband, is not a part of her taxable estate. It is not a legacy, distributive share or donation; no beneficiary takes it, or is intended to take it, or shares in it or is intended to share in it; it is a thing which lies altogether outside the statute.

The sum which the decedent directed to be so expended may be small or great,—reasonably proportioned or extravagantly disproportioned to the volume of her estate; but whether it be the one thing or the other, the statute, taxing only "transfers of a **donative** nature", does not operate upon it.

It is precisely for this reason that the **debts** of a decedent must be deducted from the total value of his estate, **whether the statute directly authorizes such deduction or not.** Neilson vs. Russell, 76 N. J. L., 655.

This view of the inheritance tax act of 1927 is entirely harmonious with section 5 thereof, which provides that "in determining the clear market value of such property, the following deductions and no others shall be allowed: Debts of the decedent****, a reasonable sum for funeral expenses and last illness****". For the phrase "such **property**" embraces only **donated** parts of an estate. The statutory exception from tax of "a reasonable sum for funeral expenses and last illness" is quite as unnecessary and superfluous as the express exemption of monies required to pay "debts of the decedent". It can only become applicable

where there is no testamentary direction in respect to the amount to be expended for "funeral expenses", and **in such case is only expressive of the pre-existing law.** For where there is no will or, if a will, no specific directions therein touching the sum to be expended for burial, the executor or administrator may lawfully expend only a reasonable sum for the burial of his decedent. As between the beneficiaries under a will or the distributees (if there be no will) on the one hand and the executor or administrator on the other, the executor or administrator may lawfully expend only a reasonable sum for the funeral of his decedent. Any sum expended by him beyond a reasonable sum belongs to the beneficiaries or distributees, as the case may be; and on exceptions to an accounting will be charged against the accountant.

We find no case in this jurisdiction expressly dealing with an assessment by the comptroller of a tax upon a mausoleum built pursuant to testamentary directions at a cost authorized thereby, and but one such case in any jurisdiction.

In Morrow, Treasurer of the State vs. Durant, Executrix, 140 Iowa, 437, it was held that a sum reserved by the terms of a will for the burial expense of a testator does not pass to any collateral heir and therefore is not taxable under the inheritance tax law. This case is directly in point. In the sixth paragraph of his will, the testator directed his executrix to "build for me in the cemetery at Algona, Iowa, a tomb which will not exceed the cost of $2,000 and pay for the same out of my es-

tate when same is completed, that my remains be placed therein to remain." The statute of Iowa provided that "all property within the jurisdiction of this state and any interest therein which shall pass by law to any person (other than a father, mother, etc.) shall be subject to a tax of 5% of its value above the sum of $1,000 after the payment of all debts". The statute elsewhere said that the term debt shall include, in addition to debts owing by the decedent at the time of his death a reasonable sum for funeral expenses, court costs, etc. The court held that the funds set aside by the testator for his tomb was not a debt within the meaning of the statute, and was not limited to a reasonable sum on that account, and that the "State Treasurer can collect the tax only upon the property which passes by succession to some of the persons included within the collateral class."

If it is true that the cost of the mausoleum in question is exempt from taxation by the comptroller because authorized by the will, it is unnecessary to consider whether it falls within the scope of the words "funeral expenses". That it does so fall is clear from the cases cited in the "Report of Examiner" of the Inheritance Tax Bureau (Case, page 14), and the contrary is not maintained by the Comptroller, who adopted the report.

In re Saunders, 137 N. Y. Sup., 438, the testator directed, not the purchase of a cemetery plot for his own burial or the re-interment of deceased relatives, but the **improvement** of a family vault, a one third interest in which was owned by the test-

ator and two thirds by his two living brothers. In these circumstances the Surrogate allowed an exemption from tax of one third only of the whole cost. The provision in the Will for the improvement depended on the concurrence of the testator's brothers therein and on their selection of a granite block for the center of the plot. The result reached by the Surrogate is supportable upon the ground that two thirds of the expenditures was beneficially taken by the testator's brothers.

"In re Saunders" is not at all a parallel case.

In the present case the Comptroller felt constrained to consider the **reasonableness** of the price expended for it (See "Report of Examiner", Case pages 13-21). The actual burial expenses of $951.00 and the cost of the cemetery plot of $1680.00 were approved or passed by him (Case, page 13), but he concluded that, although "it is highly improbable that a satisfactory" mausoleum "could be obtained for any less than the sum of $9,000.00" (Case, page 19), yet the cost to be allowed under the transfer inheritance tax act should not be "in excess of $1,000.00". From the actual cost of $9,000.00, he deducted $1,000.00, and imposed a tax at the rate of eight per cent upon $8,000.00, and so arrived at the figure of $640.00 (Case, page 18 and page 11 also).

Upon what ground under our statute can the Comptroller claim a right to determine the reasonableness of the cost of a mausoleum which the executor has erected in compliance with the terms of his decedent's Will, at an expenditure less than

that authorized thereby, where the purpose of the mausoleum as expressed and limited by the Will, is for the burial of decedent's body and that of her deceased husband?

Where the decedent dies intestate, or, if testate, without testamentary direction touching funeral expenses, the Comptroller, under the plain terms of the statute, may assess such sum spent by an executor or administrator for burial charges as in the just and reasoned judgment of the Comptroller shall be deemed unreasonable. As is observed in the Opinion of the Supreme Court in this case (Case, pages 53-55). "In such a case the interested parties may challenge the expenditure and the executor may be surcharged with it and be obliged to pay. The fact that the testator prescribed an extravagant amount would seem not to call for any difference in the application of the rule."

We respectfully urge that the contrary is true. The reason why a legatee or distributee whose interests are affected by the extravagance of an executor or administrator may protest is that such executor or administrator has acted **contrary to the presumed intention of the decedent,** and has thereby wrongfully deprived them of a portion of his bounty. But where the testator himself has prescribed an extravagant expenditure for his funeral expenses, and his executor has expended for those purposes the sum so prescribed, no such presumption is violated, and the legatee or distributee has no right to complain; the estate which the testator has disposed of is his own, and with his own he may do as he wills.

THE ASSESSMENT UPON THE MAUSOLEUM IS ALSO INDEFENSIBLE BECAUSE THE SUM AUTHORIZED BY THE WILL OF THE DECEDENT TO BE EXPENDED FOR THAT PURPOSE, AND THE SLIGHTLY LESS SUM ACTUALLY EXPENDED THEREFOR, IS A REASONABLE SUM, ALL THE CIRCUMSTANCES CONSIDERED.

In Gleason & Otis on Inheritance Tax, 4th Edition, at page 617, under the heading "Funeral and Burial Expenses", the authors say:

> As to what may be regarded as reasonable in such case there is very little authority. Probably the station in life rule as to necessaries is applicable. When the expenditure is provided for in the will, the rule seems to be that the testator is the best judge of what he can afford to spend on himself when he dies. Out of an estate of $6,000.00, testator devised $2,000.00 for a tomb stone and burial expenses, held at the fact that the testator designated that amount is a presumption of its reasonableness, and that, as the same does not pass to any collateral heirs, it was not taxable.

In the instant case, the direction that $10,000 should be spent for a mausoleum is in the same proportion or less.

It does not appear that the decedent left any relatives closer in blood than those named in her will. These were either collateral relatives or relations by marriage only. She provided for the expenditure of one-third or less of her fortune for an enduring resting place for the remains of her deceased husband and her own body; and in the absence of any evidence in the record to the contrary, the presumption is that the sum chosen by the decedent for the purpose is not unreasonable. Gleason & Otis, 4th Edition, page 617. Morrow vs. Durant, Supra.

This is especially so, it would appear, in view of the finding of the examiner that a satisfactory mausoleum could not have been obtained "for any less than the sum of $9,000", which was the sum actually expended for the purpose.

For both these reasons, we think that the Supreme Court should have set aside the item of $640 levied by the Comptroller by reason of the erection of the mausoleum.

2.

THE ITEM OF $680.00 LEVIED UPON A SUPPOSED INTEREST OF THE DECEDENT IN CERTAIN REAL ESTATE, SHOULD BE SET ASIDE BECAUSE THE COMPTROLLER SHOULD HAVE DETERMINED THAT THE EXECUTOR INDIVIDUALLY OWNED THE WHOLE; OR IT SHOULD BE REDUCED, BECAUSE OVER-VALUED.

The appellant urges two points: first, that no tax at all should have been levied on the alleged transfer of this real estate, or, in the alternative, if the court should rule the alleged transfer subject to taxation, the valuation placed on the property for the purpose of taxation is contrary to the evidence and excessive.

The testatrix in her will says (Case, page 40):

> "Third: I give, devise and bequeath to my beloved foster-son William Zipper of the City of Clifton, Passaic County, New Jersey, and his heirs forever, my undivided half interest in our homestead known as 28 Washington Avenue, in the City of Clifton, which property is at the present time in our joint names."

The Comptroller, in imposing a tax, relies on the provision of the statute concerning conveyances known as Section 16, Compiled Statutes, 1538, (Case, page 24).

> "No estate shall be considered and adjudged to be an estate in joint tenancy except it be expressly set forth in the grant or devise creating such estate, that it was or is the intention of the parties to create an estate in joint tenancy or not an estate of tenancy in common, usage or decision heretofore made to the contrary notwithstanding."

It is obvious that the legislature intended to void the application of this very provision of the statute to the imposition of inheritance tax, when in 1922 it passed the amendment to the Transfer Inheritance Tax Act, Section 1, Subdivision Fifth (Chapter 175, Pamphlet Laws of 1922), which reads as follows:

> "Fifth. Whenever property, real or personal, is held in the joint names of two or more persons, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the surviving joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this act in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or joint depositor and had been devised or be-

> queathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will; excepting therefrom such part thereof as may be proved to the satisfaction of the Comptroller of the Treasury by the surviving joint tenant or joint tenants, person or persons, to have originally belonged to him or them and never to have belonged to the decedent."

The court's specific attention is directed to the words "****excepting therefrom such part thereof as may be proven to the satisfaction of the Comptroller of the Treasury by the surviving**** PERSON OR PERSONS to have originally belonged to him or them and never to have belonged to the decedent." The insertion of the words "person or persons" clearly indicates the legislative intent that the test of joint tenancy or tenancy in common was done away with and that the determining factor is "to have originally belonged to the decedent." This construction was placed upon this statute in the Matter of Huggins Estate, 125 Atl. 27, decided by Vice-Chancellor Buchanan, May 7, 1924, where the court uses the following language:

> "As a matter of fact the 'succession' of the surviving joint tenant, I take it, is not a transfer by, or a succession from the deceased joint tenant at all, any more than the succession of a remainder man is a transfer by or succession from the prior

life tenant. The change of interest which takes place on the death is in no wise the act of decedent, nor a succession by operation of law, but is the action of the original creator of the estate. The additional interest which the survivor gains on the death of his co-tenant comes to him not from the co-tenant, but from the original grantor."

"Let us now turn to the question of consideration. It is clear, I think, from the history and purpose of the legislation on the subject that by this taxing statute, the legislature intended to tax only transfers of a donative nature, and so far as I know or can recollect, there has never been any attempt made in this State to levy a tax on any contrary theory."

"Likewise, if a decedent gave property by will to a man from whom he had in his lifetime received property of equal value, in consideration of his premises, to make the testamentary gift in question, the testamentary 'gift' would probably not be deemed taxable."

The case at bar comes properly within this doctrine. (Case, page 28.) The deed dated April 12, 1920, from Draper, et al to William Zipper and Marie Kircheis, has revenue stamp attached, $9.50, and is subject to a mortgage of $4,500.00, making a total purchase price of approximately $13,500.00 to $14,000.00 Two checks were produced payable to Syruc Draper and Bertha M. Draper, one for $6,000.00 and one for $3,000.00,

both signed by William Zipper. (Case, page 29.) The mortgage for $4,500.00 was cancelled off record September 15, 1920, and check is produced dated September 13, 1920, for $4,635.00, signed by William Zipper, payable to the mortgagee. Mrs. Kircheis kept her funds in the bank in her own name. (Case, page 33) I find that she maintained a check account with the Northern Trust Co. of Philadelphia, for a good many years, and which account she closed this year, (1927).

The wording of the statute (Chapter 174, Pamphlet Laws of 1922, Section 1, Subdivision Fifth) "proof to the satisfaction of the Comptroller of the Treasury should not be interpreted as giving the Comptroller of the Treasury arbitrary power," but "proof sufficient to satisfy any reasonable mind" should be all that is necessary. The proof is conclusive and not questioned by the Comptroller of the Treasury that the purchase money for the property was paid by William Zipper (Case, pages 28 and 29), and any interest which the "person or persons" (William Zipper) gained by the death of the decedent, originally belonged to him. The "devise," if it may be termed such, was not donative and therefore not taxable.

For these reasons we believe this item of tax should be set aside. If we are found to be wrong, we think the item should be reduced at least.

The department assesses a market value of $17,000.00 on the real estate. (Case, page 36.)

The entire purchase price was $13,500.00 (Case, page 28), and special investigator William Seddon (Case, page 29), says "the residence has a value of $15,000.00, or $16,000.00 possible, as full market value was paid at the time and valuations have not advanced." It is a matter of common knowledge that in the year 1920, real estate values were at their peak and values had not advanced by 1927. If anything, they had declined. We find nothing in the record which justifies the valuation of $17,000.00

Respectfully submitted,

MAX P. ARLT,
Attorney for Prosecutor-Appellant.

ADDISON P. ROSENKRANS,
Of Counsel.

Harrison Press, Inc., Printers, 113 S. Stockton St., Trenton, N. J.

New Jersey
Court of Errors and Appeals

WILLIAM ZIPPER, Executor of the Last Will and Testament of MARIE KIRCHEIS, Deceased, *Prosecutor-Appellant,* *v.* JOHN MCCUTCHEON, Comptroller of the Treasury of the State of New Jersey, *Defendant-Respondent.*	On Certiorari. — On Appeal.

BRIEF OF DEFENDANT-RESPONDENT, COMPTROLLER OF THE TREASURY

This is an appeal from a judgment of the Supreme Court (R. pp. 56, 57) affirming, *On Certiorari,* a certain transfer inheritance tax assessment made by the Comptroller of the Treasury in the matter of the estate of Marie Kircheis, deceased, late of Passaic County, New Jersey. Appellant contends that the Comptroller erred in refusing to allow the executor's claim for funeral expenses in its entirety and in including in the taxable estate of said decedent her one-half interest in certain real property, and that the judgment of the Supreme Court affirming the action of the Comptroller is likewise erroneous.

STATEMENT OF FACTS

Marie Kircheis died, testate, September 27, 1927, a resident of Clifton, Passaic County, New

Jersey. (R. 35) Her last will and testament, bearing date of June 11, 1927, was duly probated in the Orphans' Court of Passaic County and letters testamentary thereon issued to William Zipper. (R. 40, 44.)

William Zipper, as executor of the estate, on or about October 10, 1927, filed the usual transfer inheritance tax return with the Comptroller of the Treasury wherein he declared that the only real property owned by the decedent at the time of her death was a burial plot in the Mount Hebron Cemetery of an estimated market value of $250. (R. 36.) The department upon investigation ascertained the fact, however, that Marie Kircheis at the time of her death was a tenant in common with William Zipper of real property described as 28 Washington Avenue, Clifton, Passaic County, New Jersey. (R. 24, 25, 28.) This property in its entirety was valued by the Comptroller's appraiser at $17,000 and the decedent's one-half interest therein at $8,500. (R. 25.) This asset was, of course, added to the schedule of real property of the estate. (R. 36.)

The personal property was reported at a total value of $28,861.21 made up of the following items (R. 36):

Money in hands of William Zipper,	$27,413.21
Household furniture and personal effects	1,448.00
Total	$28,861.21

Upon investigation by the Comptroller the total of the personal property was increased to $29,-370.07 by the addition of an item of interest on funds in the hands of William Zipper amounting to $508.86. (R. 36.) After making the alterations as indicated above the total value of the decedent's estate, including real and personal property, was $37,870.07. (R. 49.)

The executor of the estate claimed deductions against the gross estate in the amount of $17,373. (R. 37, 38.) Included in the list of deductions was a claim for the erection of a mausoleum in the amount of $10,000. (R. 38.) The disallowance of a portion of this item as a deduction constitutes one of the objections to the assessment. In addition to the $10,000 item the schedule of deductions also included a claim for funeral expenses in the amount of $951, and a claim of $1,680. for the purchase of a burial plot for the deceased. (R. 37, 38.) These latter items, as well as $1,000 of the $10,000 claim, were considered by the Comptroller as a reasonable amount for funeral expenses and allowed as deductions in ascertaining the decedent's net taxable estate.

The second paragraph of the last will and testament of the decedent directed that the executor purchase at a cost of approximately $1,000 a suitable burial plot in the Mount Hebron Cemetery at Upper Montclair and that he erect thereon a suitable mausoleum for the interment of the decedent's body and the body of her husband at an approximate cost of $10,000, unless such plot had been purchased and the mausoleum erected before her death. (R. 40.) No such action had been taken by Marie Kircheis prior to her death. A special investigator of the Comptroller developed the fact that the amount to be expended for the erection of the mausoleum provided for under paragraph two of the will was $9,000, and not $10,000 as claimed in the original report. (R. 28.)

In levying the assessment the Comptroller of the Treasury, upon consideration of all of the facts in the case, including the provisions of the will, the gross value of the estate (real and personal), the decedent's station in life and the total amount claimed on account of funeral expenses, burial plot and mausoleum, concluded that the claim of $9,000 for the erection of a mausoleum for burial of the decedent was grossly disproportionate and

unreasonable and, therefore, allowed, of the $9,000 claim, only the sum of $1,000 in addition to the other funeral expenses and cost of burial plot, as representing a reasonable deduction for funeral expenses. The balance of the item of $9,000 was disallowed as a deduction and considered as a taxable transfer under paragraph two of the will and taxed at the rate of eight per cent, or $640.00. Appellant contends that the Comptroller should have allowed as a deduction the entire item of $9,000 expended for the erection of a mausoleum in addition to the other items of funeral expense enumerated above.

The transfer of the decedent's one-half interest in the real property, No. 28 Washington Avenue, Clifton, New Jersey, valued at $8,500, was taxed as a specific devise under paragraph three of the will to William Zipper, a nonrelative of the decedent, at the rate of eight per cent. The tax on this devise amounts to $680. Appellant claims that this real property was held by the decedent and William Zipper as joint tenants and not as tenants in common and that the transfer thereof to the survivor is not subject to the provisions of the Transfer Inheritance Tax Act by reason of the fact that, as alleged by appellant, all of the purchase price was contributed by William Zipper, the surviving joint tenant.

The Comptroller of the Treasury claims, in the first place, that the tenancy was, in fact, not a joint tenancy but a tenancy in common, and that the specific devise of the decedent's one-half interest therein under the third paragraph of the will is subject to tax; and, secondly, even though it might be conceded that there was a joint tenancy and that the survivor took by reason of such a tenancy, the transfer would still be taxable under Section 1, subsection 5 of the statute by reason of the fact that there is absolutely no proof in the record showing that the entire purchase price of this property was contributed by the surviving joint tenant and that

no portion thereof was contributed by the decedent.

POINTS AT ISSUE

Appellant attacks the assessment in two respects, viz.:

1. The Comptroller erred in refusing to allow the entire sum of $9,000, expended for the erection of a mausoleum, as a reasonable funeral expense of the decedent.

2. The Comptroller erred in levying a tax upon the transfer of the decedent's one-half interest in the real property under clause three of her will to appellant.

While the objections to the assessment, as set out in the Reasons for Reversal (R. 50, 51, 52) are numerous, they are all covered, in substance, by the two grounds stated above.

The objections will be considered in the above order.

ARGUMENT

POINT I

IN ASCERTAINING THE NET TAXABLE ESTATE OF A DECEDENT ONLY A "REASONABLE" AMOUNT IS DEDUCTIBLE AS A FUNERAL EXPENSE UNDER THE PROVISIONS OF THE TRANSFER INHERITANCE TAX ACT OF THIS STATE.

Chapter 228, Laws of 1909, being "An act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases," as amended by Chapter 228, Laws of 1927 (effective July 1, 1927), provides as follows (P. L. 1927, p. 428):

"1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided in the following cases:

First. When the transfer is by will or by intestate laws of this State from any person dying seized or possessed of the property while a resident of this State.

* * *

Fifth. * * *

All taxes imposed by this act shall be at the respective rates herein specified upon the clear market value of such property to be paid to the Treasurer of the State of New Jersey, for the use of said State, * * *. In determining the clear market value of such property the following deductions *and no others* shall be allowed: Debts of the decedent owing at the date of death; * * * a *reasonable* sum for funeral expenses and last illness, * * * the *ordinary* expenses of administration, including the *ordinary* fees allowed executors, and administrators and the *ordinary* fees of their attorneys, * * *" (p. 430).

(Italics respondent's.)

The statute is very definite as to the deductions which shall be taken into account for the purpose of ascertaining the inheritance taxes chargeable. The act specifically states that only a "reasonable" sum for funeral expenses shall be allowed as a deduction in ascertaining the net estate for tax purposes. The statute has been so construed by our courts. The test in all cases, whether as applied to funeral expenses, executors' commissions, counsel fees, etc., is that they be "ordinary" and "reasonable" in amount.

In re Hack, 105 *N. J. Eq.* 334.

In re Gilchrist, 128 *Atl. Rep.* 876; 3 *N. J. Adv. Rep.* 905.

Vice-Ordinary Buchanan, *In re Gilchrist, supra,* speaking with reference to the requirements of the statute, says (p. 877):

> "* * * Of course, the total expenditure for the aggregate of all items of funeral expenses must be limited to a 'reasonable' amount so far as this tax statute is concerned."

Under these circumstances it is quite clear that the only inquiry with which we are presently concerned is whether the claim of $9,000 for the erection of a mausoleum for the burial of the deceased may be looked upon as a *reasonable* sum to be expended for funeral expenses. If it is not, then, of course, it must be scaled proportionately.

In re Gilchrist, supra.

And it might be well to observe at this point that the reasonableness of the amount is for the Comptroller to determine.

In re Hack, supra.
In re Gilchrist, supra.

The Prerogative Court, in *In re Hack, supra,* dealing with a claim for executor's commissions, says (p. 336):

> "* * * Undoubtedly the Comptroller could refuse to allow a deduction of more than a reasonable or 'ordinary' amount, if the agreement were for an excessive sum.
>
> * * * It is for the Comptroller to determine whether the $10,000 is a reasonable and ordinary sum. If so, he should allow it as a deduction. *If not, he should allow so much thereof as in his judgment is an ordinary and reasonable sum."*
>
> (Italics respondent's.)

It would seem that the Comptroller in determining what shall be considered a reasonable amount for funeral expenses should be guided by the rule applicable to intestate estates and testate estates

where the will contains no directions as to the amount to be expended for funeral expenses.

In re Gilchrist, supra.

Vice-Ordinary Buchanan, in the *Gilchrist* case, says (128 *Atl. Rep.* 876, at p. 877):

> "I take it, therefore, as a necessary consequence, that whatever expenditures in the way of funeral expenses are proper to be made by an executor of a will containing no directions as to funeral expenses, as against the interests of the residuary legatees, are to be deducted in the computation of this tax for such expenditures, obviously, would not be proper if they were not 'reasonable' in amount."

Of course, the test in such cases is the decedent's financial status and his station in life.

In re Gilchrist, supra.
Griggs v. *Veghte,* 47 *N. J. Eq.* 179.
In re Mansell, 41 *N. J. L. J.* 275.
11 *R. C. L.* 226.
24 *Corpus Juris,* 306.

The Vice-Ordinary in the *Gilchrist* case, referring to the amount to be allowed as a reasonable funeral expense, says that it

> "shall not exceed such sum as is reasonable under all the circumstances of decedent's station and position in life and the amount of estate left by him." (p. 877.)

In *Griggs* v. *Veghte, supra,* the Chancery Court says (pp. 188, 189):

> "If the estate is solvent there seems to be no doubt that a tombstone or monument, suitable to the station in life and circumstances of the deceased and reasonable with reference to the means of the estate, comes properly within the items of funeral expenses. * * *"

The rule that the decedent is the best judge of the reasonableness of the amount to be expended for his burial and that where he, by will, specifically directs the amount to be so expended, that the

same shall be presumed to be reasonable, can have no application in the determination of what is a reasonable amount to be allowed by the Comptroller under the Inheritance Tax Act for the purposes of determining the decedent's net taxable estate. (*In re Gilchrist, supra.*) The statute providing for a reasonable sum for funeral expenses certainly must be subject to the same interpretation whether the decedent dies testate or intestate, and an unreasonable amount in view of the size of the decedent's estate and station in life cannot be made reasonable simply because the testator may provide by will for the amount to be expended. For the purposes of the tax the Comptroller and not the testator is made the judge of the reasonableness of the amount claimed for funeral expenses. If the amount to be expended is unreasonable, considering decedent's station in life and the quantum of his estate, it is hard to see how the amount can be made reasonable simply because the testator fixes it by his will. Obviously, the statute was intended to reach just such cases.

There is no dispute between the parties as to the allowance of debts and funeral expenses as a deduction. Nor is there any doubt but that a reasonable sum for the erection of a monument (*Griggs* v. *Veghte, supra*) or the care of a plot (*In re Gilchrist, supra*) constitutes a part of the funeral expense. Even prior to the passage of Chapter 174 of the Laws of 1922, when the inheritance tax statutes failed to make any provision whatever for debts, it was held by our Courts that debts and reasonable sums for burial and administration expenses were proper deductions in ascertaining the net taxable estate.

Neilson v. *Russell,* 76 *N. J. L.* 655.
In re Dellinger, 94 *N. J. Eq.* 409, 416.
In re Roebling's Estate, 89 *N. J. Eq.* 163.
In re Christie's Estate, 87 *N. J. Eq.* 303.

And the same view has generally prevailed elsewhere.

In re Milward's Estate, 6 *Misc.* 425; 27 *N. Y. Supp.* 286.
In re Liss, 39 *Misc.* 123; 78 *N. Y. Supp.* 969.
In re Kent, 186 *N. Y. Supp.* 669.
In re Brooks, 119 *Misc.* 738; 197 *N. Y. Supp.* 637.
In re Fox's Estate, 159 *Mich.* 420; 124 *N. W.* 60.
Matter of Westurn, 152, *N. Y.* 93, 102.

Following the rule prevailing in this State, other jurisdictions have held that the cost of a monument must be considered a part of the funeral expense and is deductible in determining the tax chargeable; provided, of course, that the sum claimed be reasonable.

In re Kreeger, 277 *Pa.* 326; 121 *Atl.* 109.
Morrow v. *Durant,* 140 *Iowa* 437; 118 *N. W.* 781.
In re Saunders' Estate, 137 *N. Y. Supp.* 438.
Matter of Edgerton, 54 *N. Y. Supp.* 700; *aff'd,* 158 *N. Y.* 671.

And also, the cost of a cemetery plot has been treated as a part of the funeral expense.

Re Edgerton, supra.
Re Maverick, 135 *App. Div.* 44; 119 *N. Y. Supp.* 914; *aff'd,* 198 *N. Y.* 618.
Re Liss, 39 *Misc.* 123; 78 *N. Y. Supp.* 969.
Re Vinot, 7 *N. Y. Supp.* 517, 518.

As well as a sum set aside for the perpetual care thereof.

In re Maverick, 135 *App. Div.* 44; 119 *N. Y. Supp.* 914.
In re Vinot, 7 *N. Y. Supp.* 517, 518.

Attention is particularly called to the fact, however, that where the sum to be expended, either for the purchase of a monument or the care of a lot, is for the benefit of others the bequest is taxable

since such an expenditure cannot be considered as a part of the decedent's funeral expenses.

In re Gilchrist, supra.
Long's Estate, 22 *Pa. Sup. Ct.* 370.
Matter of Saunders Estate, 137 *N. Y. Supp.* 438.

In *In re Long's Estate, supra,* the provision was for the erection of monuments and the care of lots in which others than the decedent were interred, and in the *Matter of Saunders, supra,* the bequest was for the improvement and maintenance of a burial ground for the decedent's family. In the first of these cases the entire bequest was treated as taxable, while in the second case the bequest was prorated and the *pro rata* share for the benefit of others was held to be in the taxable class.

The Comptroller concluded, in levying the present assessment, that the claim of the executor in the amount of $10,000—subsequently reduced on investigation to $9,000—for the purchase of a mausoleum for the decedent should be scaled for two reasons:

(a) Because said amount was wholly unreasonable in the light of the decedent's station in life and the size of her estate at death.

(b) Because the mausoleum was to be used for the respose of the bodies of others.

Vice Ordinary Buchanan, in *In re Hack, supra,* says that

> "it is for the Comptroller to determine whether the $10,000 is a reasonable and ordinary sum."

and that,

> "undoubtedly the Comptroller could refuse to allow a deduction of more than a reasonable or 'ordinary' amount, if the agreement were for an excessive sum." (p. 336.)

Speaking more pointedly with respect to the statutory requirement that the sum to be allowed shall be reasonable, and, incidentally, citing an

illustration which is apropos of the instant case, the Vice Ordinary, in *In re Gilchrist,* says:

> "* * * Of course, the total expenditure for the aggregate of all items of funeral expenses must be limited to a 'reasonable' amount so far as this statute is concerned. If a decedent living in humble circumstances died leaving a $20,000 estate, and gave testamentary directions for funeral, monument and care of lot involving an expense of $10,000, such sum would, of course, be far in excess of a reasonable amount, and would not be deductible in its entirety in the computation of the tax."

It is interesting to note that the facts of the hypothetical case cited by the Vice Ordinary are not very much different from those of the present matter, and it will also be observed that he gives voice to respondent's claim, hereinabove, that a mere direction by testator as to the amount to be expended can have no effect on the question of *reasonableness* of the amount claimed in so far as determining the inheritance tax is concerned. The Vice Ordinary very clearly holds that even though the will may establish the amount to be expended still, for tax purposes and to meet the requirements of the statute, such amount must be scaled if it be unreasonable.

In the case *sub judice* the decedent left a total personal estate of only approximately $29,000, and including the real property, as to which there is some dissension as to ownership, the total estate of the deceased would amount to only approximately $38,000. In view of these facts, and the further fact that there was no proof submitted to show that decedent's station in life was any different than would ordinarily be the case of a person with an estate of the size left by her, the Comptroller concluded that the amount to be expended for the purchase of an elaborate mausoleum for the burial of the decedent was grossly disproportionate to her circumstances and station in life and,

therefore, had to be scaled for the purpose of meeting the requirements of the statute. It will be remembered that there were allowed as deductions in this proceeding; the sum of $951. for funeral expenses; cost of burial plot for the deceased, $1,680; and $1,000 for the erection of a monument or other suitable marker for the decedent's grave. The total of these items is $3,641. and represents a sum, at least in the Comptroller's estimation, which is a reasonable amount to be expended for the decedent's burial, considering the quantum of her estate and her social status. If we were to add to the above sum the further amount of $8,000 the total expenditure would reach $11,641 or approximately 40 per cent. of her entire personal estate.

As pointed out above, the claim of the executor in the amount of $9,000 for the purchase of the mausoleum would have to be scaled in any event under the rule laid down by the Prerogative Court in *In re Gilchrist, supra,* since it will be noted from an examination of the last will and testament of the decedent that the burial lot with the mausoleum erected thereon is specifically devised to William Zipper under the third clause of the will with the specific provision that he may be interred in the mausoleum if he so desires. In other words, the expenditure is not solely for the decedent. It is for the benefit of the decedent and others, and Vice Ordinary Buchanan, in the *Gilchrist case, supra,* says that

> "if the lot is so large as to exceed a reasonable lot for decedent's circumstances, if the gift for perpetual care of the lot is shown by the evidence to be, in effect, a gift, *partly for the benefit of others,* the allowance should be scaled proportionately."

This rule has also been applied by the Courts of New York and Pennsylvania in the following cases:

Matter of Saunders Estate, supra.
In re Long's Estate, supra.

There is no apparent reason why a bequest of an unreasonable amount for funeral expenses should be placed in a favored class. That is the result, of course, if cases such as the present one are permitted to escape the statute. Transfers by will and the intestate laws are by the act made taxable, and in ascertaining the tax in such cases the legislature was careful to provide that only "reasonable" sums for funeral expenses, counsel fees, executor's commissions, etc., should be allowed as deductions. Where the amount provided by the testator for said items is unreasonable, the transfer, insofar as it is unreasonable, should stand the same burden of tax as bequests to other beneficiaries.

Appellant has introduced no evidence or testimony whatever tending to establish the fact that the amounts to be expended for her burial are reasonable in view of her financial circumstances and station in life. No facts have been introduced to show that she was of such a social standing as to require any such elaborate provision for the interment of her body. In the absence of any proof to the contrary, it is respectfully submitted the record clearly establishes that the amounts claimed for funeral expenses in this case are grossly disproportionate and unreasonable and must be disallowed in the determination of the taxes chargeable.

Appellant seems to be of the opinion that the statute taxes transfers by will only when they are purely *donative* in nature. That this is an erroneous conclusion is evident from a reading of the statute and a review of the cases interpreting it. This claim has some merit insofar as transfers *inter vivos,* when made in contemplation of death or intended to take effect in possession or enjoyment at or after death, are concerned, but it has no application to the case of a transfer by will. (*State* v. *Mollier,* 96 *Kan.* 514.) It will be observed that the act (Chap. 228, Laws 1927, p. 428) provides that a tax is thereby imposed upon the

transfer of any property when such transfer is by "will or by intestate laws of this State * * *." This provision of the act, which is common to all inheritance tax statutes, has been construed in numerous cases to reach *all* transfers by will whether they be donative in nature or founded upon a consideration.

Matter of Gould, 156 *N. Y.* 423.
Clark v. *Treasurer & Rec. General,* 226 *Mass.* 301.
Hill v. *Treasurer & Rec. General,* 227 *Mass.* 331.
Carter v. *Craig,* 77 *N. H.* 200.
Richardson v. *Lane,* 126 *N. E.* 44; 234 *Mass.* 403.
State v. *Mollier,* 96 *Kan.* 514.
State v. *Gerhards,* 99 *Kan.* 462.
Re Grogan's Estate (*Cal.*), 219 *Pac.* 87.

Obviously the present transfer was by will. It is not understood that appellant denies the fact that he could not have made any such expenditure in the absence of the testamentary provision. In fact his brief candidly admits that the transfer is pursuant to the second paragraph of the will.

Appellant further argues that the statute does not specifically tax transfers by will for the erection of a monument or mausoleum and that the present case is, therefore, not within the act. The statute lays a tax "upon the transfer of any property, real or personal, of the value of five hundred dollars or over," when such transfer is "by will or by intestate laws of this State" and "all taxes imposed by this act shall be at the respective rates hereinafter specified." The act, after providing for deductions, exemption of transfers to the State and its political subdivisions; graduated rates in the case of brothers, sisters, father, mother, husband, wife, children, etc., then specifically directs that "property passing to every other *transferee,* distributee or beneficiary not hereinbefore classified shall be taxed at the rate of eight per cent. on

any amount up to nine hundred thousand dollars." The present transfer appears to be squarely within that section of the statute providing for an eight per centum tax in the case of "every other transferee." Since the statute specifically provides that a transfer, by will, of any property of the value of five hundred dollars or over shall be taxed, the appellant is obliged to show clearly that the statute, by subsequent provisions, grants him an exemption. Of course, the rule is well settled that exemptions from taxation are strictly construed against the claimant; in case of doubt the resolution being in favor of the rule which subjects all property to a just share of the public burdens.

In re Gopsill, 77 *N. J. Eq.* 215, 218.

The statute having provided for a tax on all transfers by will and specifically providing for the rate of tax in the case of *every other transferee* not thereinbefore classified, it is respectfully submitted that appellant's task of establishing his right to an exemption is a sizeable one.

The Comptroller of the Treasury is the proper officer to pass upon the reasonableness of the claim for funeral expenses and the burden of showing error upon his part, of course, rests heavily upon the appellant on this appeal.

In re Pierce's Estate, 89 *N. J. Eq.* 171, 172.
In re Bottomley, 92 *N. J. Eq.* 202, 204.

Of course, appellant must also establish that the judgment of the Supreme Court is erroneous since the burden on appeal is upon the appellant. In the absence of clear and convincing proofs that error has been committed the judgment affirming the assessment should be sustained.

POINT II

THE TRANSFER OF THE DECEDENT'S ONE-HALF INTEREST IN PROPERTY No. 28 WASHINGTON AVENUE, CLIFTON, NEW JERSEY, UNDER PARAGRAPH THREE OF HER LAST WILL AND TESTAMENT, IS TAXABLE.

Marie Kircheis, at the time of her death, was the owner as a *tenant in common* with William Zipper of property described as No. 28 Washington Avenue, Clifton, Passaic County, New Jersey. (R. 24, 25, 28.) Testatrix specifically devised her one-half interest in this property under paragraph three of her last will and testament to the said William Zipper. (R. 40.) Decedent's one-half interest was valued by the Comptroller's appraiser at $8,500 (R. 25) and the transfer thereof is made specically taxable under the statute. There appears to be no ground whatever upon which appellant may claim that the same is free from tax. Every claim urged by him appears to be clearly based on a misunderstanding of the actual circumstances of the case as established by the evidence before the Comptroller and the Supreme Court.

It would seem to be appellant's claim that this property was held by the decedent and himself as *joint tenants* and not as *tenants in common.* The report of the Special Investigator, to which the appellant took no exception before the Comptroller, specifically found that the title to this property was held by the decedent and the said William Zipper as *tenants in common* and not as *joint tenants.* The Special Investigator in his report (p. 24) says:

> " I have examined the deed which conveyed the property to Mrs. Kircheis and Mr. Zipper and find that there is no express language

therein stated that it was intended to create an estate in joint tenancy."

Further, in dealing with the inapplicability of the *Huggins Case* (125 *Atl.* 27) the Special Investigator reports (p. 25):

> "* * * This case is authority for joint tenancy when such facts arise as to create a joint tenancy with its survivorship, but I find that decedent and Mr .Zipper were *tenants in common* and *not joint tenants* and that Mr. Zipper acquired an undivided one-half interest in said premises under decedent's will which constituted a taxable transfer under our act."

His report (at p. 28) contains the further statement that

> "Deed for lot 28 Washington Avenue, dated April 12, 1920, between Cyrus A. Draper et al. to William Zipper and Marie Kircheis, recorded in Book I-28, page 48. * * * full covenant warranty deed, said party of the second part being the two persons above referred to and there is no recitation in the deed as to the respective interests of either party so under our statute covering jointly held property there would be an undivided one-half interest owned by each."

That the testatrix' belief ran in the same direction is best evidenced by the fact that she specifically devises her one-half interest in this property under clause three of her will to Mr. Zipper.

The Supreme Court had no doubt about the fact that we are here concerned with a tenancy in common and not a joint tenancy as is clearly evidenced by the following excerpt from that Court's opinion (R. 54, 55):

> "The other point presents no difficulty whatever. This is not a case of tenancy by the entirety, or a joint tenancy, or any case in which there is ownership of two parties and

one takes by right of survivorship. *The lands were conveyed to the testatrix and the executor as tenants in common.* * * *"

It is well settled in this State, by statute, that in the absence of a specific declaration in the deed of conveyance that the title shall be held in joint tenancy, a tenancy in common results. The act respecting conveyances (revision of 1898, 2 *C. S.*, p. 1538, par. 15) provides that:

> "No estate after the fourth day of February, 1812, shall be considered and adjudged to be an estate in joint tenancy except it be expressly set forth in the grant or devise creating such estate that it was or is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common, any law, usage, or decision heretofore made to the contrary notwithstanding."

Section 1, subsection 5, Chapter 228, Laws of 109, as amended by Chapter 228, Laws of 1927, providing for the taxation of all transfers of property (real and personal) when held in the joint names of two or more persons to the survivor, has no application whatsoever to the instant case since, as above pointed out, the record is clearly to the effect that the title to the real property in question was held in common and not jointly. The right of appellant to succeed to testatrix' one-half interest in said property was acquired not by survivorship, but as a specific devisee under paragraph three of her will. Transfers by will are, of course, within the statute.

Even if we were to assume for the purpose of argument that the decedent and William Zipper did hold title to this property as joint tenants and that he acquired the interest of Marie Kircheis upon her death as the survivor of such a tenancy, appellant's cause would still not be aided. As a matter of fact, a finding that this was a joint tenancy and not a tenancy in common would possibly result in the taxation of the full value of the property instead of only a one-half interest therein

since the record is totally lacking in any proof definitely establishing that the surviving joint tenant contributed all of the purchase price of said property and that no portion thereof ever belonged to the decedent.

Under the tax act it is specifically provided that the right of the surviving joint tenant to succeed to the entire joint property upon the death of the other joint tenant shall be taxed to the extent of the full value of the property, save in those cases where it can be proven to the satisfaction of the Comptroller of the Treasury that a portion or all of the purchase price thereof was contributed by and originally belonged to the survivor, and never belonged to the decedent. (Chap. 228, Laws of 1927, p. 429.)

There is evidence to the effect that the checks in payment of the purchase price of this property (R. 28, 29) and a check in satisfaction of a mortgage thereon (R. 29) were signed by appellant, but under all the circumstances of the case it is respectfully submitted that this evidence falls far short of proving that the funds used in the purchase of the property were those of the appellant and not of the testatrix. The record very clearly shows that the entire personal estate of Marie Kircheis, amounting to approximately $30,000 at the time of her death, was in the hands of William Zipper, the appellant, as agent or trustee for her. (R. 25, 27.) What proof is there that the payments represented by these checks were not made out of the property of Mrs. Kircheis in his hands? Having property of the decedent in his hands and having taken title in their two names the logical inference would seem to be that it was decedent's funds that were used in the purchase. In any event the proof submitted to the Comptroller was not sufficient to establish to his satisfaction that the funds used in the purchase were *originally* the property of the surviving joint tenant and *never belonged to the decedent.* That is the requirement of the statute and appellant has failed to fulfill it.

It will, of course, be understood that the discussion immediately preceding does not admit the existence of a joint tenancy. In fact it is respondent's claim that the tenancy was one in common as clearly established by all of the facts and therefore, any discussion with reference to the statute and decisions relating to the taxation of joint tenancies is not pertinent. There was clearly a tenancy in common existing between these parties under the deed by which they acquired title and the presumption, in the absence of a decree of a court of competent jurisdiction establishing an implied or resulting trust in favor of appellant, is that each owned a one-half interest, and the transfer of this interest under the provisions of paragraph three of the will of decedent is subject to the terms of the transfer inheritance tax act.

Appellant, as one of the reasons for setting aside the assessment, says that the provisions of the joint tenancy act (compiled Statutes of New Jersey, page 1538, par. 15) were not enacted for the purpose of imposing inheritance taxes. Just what is intended by this ground for reversal of the assessment is not clearly understood. There is no claim upon the part of the respondent that the joint tenancy act has any control whatever over the assessment of inheritance taxes, except, insofar as it may be used for the purpose of determining the nature of the tenancy under any specific deed of conveyance. The tax is not assessed under that statute and the same has no application to the present matter and respondent, therefore, fully agrees with appellant that said statute has no application here.

Appellant further claims that the real property was bought and paid for by him and that no part of the purchase price or upkeep was paid by the decedent. Just how this feature can in any way affect the validity of the assessment, once it is determined that the tenancy was, in fact, one in common and not one in joint tenancy, is not clear. As hereinbefore pointed out, the two grantees,

holding as tenants in common, are for all purposes presumed to be equal owners in the absence of a decree of a court of competent jurisdiction declaring an implied or resulting trust. Surely the Comptroller in an inheritance tax proceeding is not required, before he proceeds with an assessment, to inquire into the fact of ownership of funds used in the purchase of real estate, title to which is taken either in the individual name of the decedent, or in common with another or others. The statute contains such a provision in reference to property held in joint tenancy, but that section can have no application where the title is in the decedent in fee or in common with others. It is not within the power of the Comptroller to set aside a deed of conveyance or decree the interests of the parties therein. That is exclusively a function of the judicial and not the administrative branch of the government.

Appellant further urges that the Comptroller excessively valued the decedent's interest in the real property. It might be stated that there is no proof whatever in the record substantiating the claim that the valuation placed by the Comptroller's appraiser on the real property was in any way excessive, unjust, or contrary to the evidence before him. The appraiser valued this property at $17,000, and the decedent's one-half interest at $8,500 (R. 25) and appellant introduced no evidence whatsover to the effect that this value was in excess of the true market value of this property as of September 22, 1927, the date of death of the decedent. Of course, the judgment below affirming the assessment should be affirmed in the absence of proof showing wherein the Comptroller erred in valuing this property.

REPLY TO BRIEF OF APPELLANT.

Appellant claims that Chapter 294, Laws of 1926, controls the assessment of the tax in this case. It is presumed that this is a mere oversight, since it appears quite clear that Chapter 228 of the Laws

of 1927, amending Chapter 228, Laws of 1909, is the controlling statute. This amendment became effective July 1, 1927, and the decedent died September 27, 1927. It might be noted, in any event, the the provisions of the 1926 and 1927 amendments are identical insofar as the present inquiry is concerned.

Appellant says that the "reasonableness" of the deduction for funeral expenses can be questioned by the Comptroller only in the case of *intestacy* or *where the will fails to give any specific direction with respect to the amount to be expended.* In this, it is respectfully submitted, appellant is in error. The statute in no way limits the right of the Comptroller to determine the reasonableness of deducttions on account of funeral expenses and the logical interpretation of the statute would, therefore, seem to be that he has the power to exercise supervision in all cases involving the deduction of an unreasonable amount for such expenditures. This is the view taken of the statute by Vice Ordinary Buchanan in *In re Gilchrist, supra,* as is evidenced by the hypothetical case cited by him (see p. 877; 128 *Atl. Rep.*). It will be particularly noted that the case used by him as an illustration is that of a decedent leaving a will wherein specific provision is made for the expenditure of an amount for funeral expenses and which he says under circumstances there prevailing would be clearly unreasonable. There is no reason why the statute respecting the power of the Comptroller to determine the reasonableness of a deduction for funeral expenses should be limited to intestate estates and testate estates where the will makes no provision with regard thereto.

It is respectfully submitted that the rule of the Supreme Court of Iowa in the case of *Morrow* v. *Durant,* 130 *Iowa* 437, to the effect that the testator is the best judge of the reasonableness of the amount to be expended for funeral expenses, and that where the will specifically sets forth the amount to be used the deduction, for inheritance

tax purposes, must be in that amount, has been repudiated by the Prerogative Court of this State (*In re Gilchrist*). Vice Ordinary Buchanan specifically pointed out that the testator cannot make an unreasonable amount a reasonable one simply by providing therefor in his will.

Appellant, respecting the taxability of the transfer of the decedent's one-half interest in the real property under paragraph three of her will, claims that the provisions of the latest amendments to the inheritance tax act were intended to void the application of the provisions of the old conveyance act regarding the creation of joint tenancies. That this is not so seems so apparent as to hardly require much consideration of the claim. Section 1, subsection 5, of the statute, as appearing in every amendment to the act from 1922 down to the time of the death of the present decedent, provides a method for the taxation of transfers when effected by joint tenancy. This section, however, makes no attempt to in any way determine what shall constitute such a tenancy. Of course, the statutory rule respecting the creation of joint tenancies must prevail for the purpose of ascertaining whether or not in any given case there is or is not such a tenancy existing. Subsection 5 of the inheritance tax act merely prescribes the method for assessing the tax when it is once determined that the transfers are effected by joint tenancy and not by will or the intestate laws. The inheritance tax act, of course, makes no attempt to convert tenancies in common into joint tenancies, or *vice versa*. Whether there is a joint tenancy or tenancy in common is a question of fact to be determined from the circumstances of each particular case and the application of the rule of the conveyance act as above pointed out.

For the foregoing reasons, it is respectfully submitted that the judgment under review should be in all respects affirmed.

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