for and on behalf of the State of Indiana. This would, therefore, constitute a State function.

7. In answer to your seventh question I wish to advise that it would not be necessary to have a formal contract between the employer and the Indiana Boys' School, although such a contract might be advisable as hereinafter stated.

8. If the boys damaged any property of the employer, the Indiana Boys' School would not be responsible therefor as the State cannot be liable or sued for a tort unless it has given its permission to be sued therefor. This permission has not been given. However, it might be well, to save any controversy, that the employer be required to sign an agreement relieving said Indiana Boys' School from any liability of whatever nature, by reason of its permitting said children to so engage in such activity, and waiving any damages such employer might sustain by reason of any activity of such children while so engaged in said employment.

---

**STATE BOARD OF TAX COMMISSIONERS: Inheritance tax, meaning of "in contemplation of death." Meaning of "intended to take effect in possession or enjoyment at or after death."**

June 24, 1943.

Hon. Isaac Kane Parks,
Inheritance Tax Administrator,
State Board of Tax Commissioners,
Indianapolis, Indiana.

Dear Mr. Parks:

I have your letter of May 13, 1943, in regard to the estate of Minnie Guffin. Your inquiry concerns the application to a transfer by deed of Section 1 of the Inheritance Tax Act (Sec. 6-2401, Burns' 1933), which reads in part as follows:

> "All transfers enumerated in this section shall be taxable, * * * if made in contemplation of death of the transferor, and any transfer of property made by a person within two (2) years prior to death, shall, unless shown to the contrary, be deemed to have been

made in contemplation of death; or if made by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor; * * *."

The deed is as follows:

"WARRANTY DEED.

"THIS INDENTURE WITNESSETH, That Minnie Guffin, a widow of Rush County, Indiana, in consideration of love and affection, does convey and warrant, to Fred E. Guffin, her son, of Rush County, Indiana, to have and to hold, subject to my life estate therein, for and during his natural life only, together with the added privileges during said grantees life time only, of cutting, using or selling any timber growing thereon, and of taking, using, or selling natural gas, oil, gravel or other mineral found under the surface thereof, the following described real estate situated in Rush County, Indiana, to wit:"

(Description of real estate)

"And provided further that grantor reserves to herself an estate in said land, for and during grantor's natural life.

"And said grantor does hereby convey and warrant, subject to her own life estate reserved therein, as aforesaid and subject to said life estate and privileges granted above, to said son Fred, and subject, expressly, to the reservations, provisions, conditions and limitations hereinafter set forth, all grantor's remaining title and interest in the foregoing described real estate, to her four children to wit: Nellie G. Guffin, Chase L. Guffin, Florence Guffin Bitner, and Mary Guffin Perry in equal shares: Provided that if at the death of my said son Fred, he leave surviving him, a child or children, or a child or children of a child of said Fred that died before his death, then in such event, the title conveyed to my said four children shall, at said Fred's death determine and immediately vest in fee simple in said child, children, grandchild or grandchildren of said Fred as follows: if said Fred at his death, leave

surviving him a child or children, but no child of a formerly deceased child of said Fred, then said title shall vest absolutely in the child or children of said Fred: if at his death said Fred leave surviving him a child or children, and also a grandchild or grandchildren that may be the child or children of a predeceased child of said Fred, then said title shall vest in said child or children and said grandchild or grandchildren so that such grandchild or grandchildren shall take such share only as the deceased parent thereof would have taken had he or she not have died before the death of said Fred: provided further that if said Fred, at his death leave surviving him no child but leave surviving him a child or children of a deceased child, said title shall at Fred's death vest in such grandchild or grandchildren of said Fred so that the child or children of any deceased child of said Fred will take such title as would have vested in the deceased parent, if living at Fred's death: and provided that no adopted child of said Fred and no adopted child of any deceased child of said Fred shall acquire any interest in said realty by virtue of this deed.

"Provided also, that if my said son Fred shall die without leaving any child or grandchild surviving him, and if at the time of said Fred's death any one of my said children, Mary, Florence, Nellie or Chase shall have died, leaving no child nor grandchild surviving, then the title herein conveyed to such of my said four children, so dying, shall determine, and revert to grantor, if living, and, if not living, shall revert to the heirs of Minnie Guffin, grantor herein.

"IN WITNESS WHEREOF the said Minnie Guffin, grantor, a widow, has hereunto set her hand and seal on this 10th day of September, 1938.

Minnie Guffin (SEAL)

"STATE OF INDIANA }
} SS:
COUNTY OF RUSH }

"Before me, the undersigned, a Notary Public within and for the county and state aforesaid, on this 10th day of September, 1938, personally appeared Minnie Guffin, widow, grantor aforesaid, who acknowledged the execution of the foregoing instrument.

"Witness my hand and official seal.

Hannah S. Morris,
Notary Public.

(NOTARY SEAL)
"My commission expires:
January 25, 1941.

"DULY ENTERED FOR TAXATION January 2, 1942
Hubert R. Alexander, Auditor, Per Agnes Wilk, Deputy. Fee, $.30.
"RECEIVED FOR RECORD, The 2nd day of Jan. A. D. 1942, at 1:15 o'clock P. M.
Fee $2.70
#4
Anna F. Downey,
Recorder, Rush County, Indiana."

In the statutory order of liability for tax, the first consideration is whether this transfer was in contemplation of death. The transfer, of course, would take effect upon delivery of the deed, and if that delivery came within two years of the date of death (December 24, 1941), it is by statute deemed to be in contemplation of death.

Upon the factual question of delivery we are aided by a substantial number of Indiana cases which hold, as stated in Wainwright Trust Co., Admr. v. Stern, 72 Ind. App. 116 (1920) at page 117:

> "The fact that the deed had been duly recorded in the recorder's office after it had been signed and acknowledged by the grantors named therein constituted a *prima facie* delivery and acceptance by the grantees."

For a recent discussion of the inference of delivery arising from recording, see Bellin v. Bloom, 217 Ind. 656 (1940).

That there was a *prima facie* delivery of the deed in question does not, however, settle the time of delivery. The well-settled rule is that if the deed is found in the hands of the grantee, it is presumed to have been delivered upon the day it bears date. In Scobey v. Walker, 114 Ind. 254 (1888), the Court said at page 257:

> "The rule is well established, that where a document, purporting to be a duly acknowledged deed, with regular evidence of its execution upon its face, is found in the hands of the grantee, or if such a deed is found upon the proper records, a presumption arises that it was delivered at the time it bears date, or at some time prior to the date of its recording."

To the same effect, see Koons v. Burkhart, 68 Ind. App. 30 (1918).

In the instant case, it does not affirmatively appear that the deed was in the hands of the grantee as it did in Scobey v. Walker, yet the recording after the death of the grantor must have been at the instance of one of the grantees, and it is, therefore, my opinion that the same presumption should apply —i. e. that in the absence of "proof to the contrary, it will be presumed that the deed was delivered at its date."

> 12 L. R. A. 176, citing Purdy v. Coar, 109 N. Y. 448;
> Ward v. Dougherty, 75 Cal. 240;
> United States v. LeBaron, 60 U. S. 73, and other cases.

In reliance upon that presumption, the delivery in this case was upon September 10, 1938, more than two years prior to the death of the decedent and would not by statute be deemed to have been in contemplation of death.

In the absence of the two-year provision in the statute, is there any presumption arising from the fact that the transfer was not, so far as the present facts appear, based upon a valuable consideration?

And it may be said, in passing, that it is always possible under Indiana law to show by extrinsic evidence the actual consideration for a deed of transfer although that showing

may vary the recitation in the deed. Provided, of course, the consideration is not stated contractually in the deed. In Hays v. Peck, 107 Ind. 389 (1886), the Court said at page 390:

> "It is an elementary doctrine that the consideration of a deed may be shown by parol, and it is impossible to give effect to this doctrine without permitting the parties to prove what agreement as to the consideration preceded the execution of the deed."

See also,

> Pierse v. Bronnenburg, 40 Ind. App. 662 (1907);
> Foster v. Pruett, 105 Ind. App. 367 (1938).

Generally, if a transfer is based upon a valuable consideration comparable in value to the property transferred, the transfer is not taxable. In Re Kraft, 143 Atl. (N. J.) 764 (1928) the Court, after setting out the two-year provision of the New Jersey inheritance tax statute, said,

> "The language of that sentence is broad enough to include transfers made in exchange for a consideration of equal value received by the transferors. From the history and purpose of the legislation, however, it is obvious that it was not intended to tax transfers of that kind, even though they were made in contemplation of death or intended to take effect at death."

See also the annotation in 99 A. L. R. at page 951. (In Indiana such transfers based upon full or partial consideration are taxable only pro tanto—see post.)

But the converse of that proposition is not true: a lack of consideration so far as the deciding cases show, apparently raises no presumption that the transfer was in contemplation of death but is only evidentiary. Hence, a categorical statement that such a transfer was or was not in contemplation of death cannot be made. That decision depends upon what the evidence shows was the manifest purpose in making the transfer.

The definition of "in contemplation of death", which is most frequently quoted is that of Justice Hughes in U. S. v. Wells, 283 U. S. 102 (1931) in which it is said, at page 117:

> "As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. * * * The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, * * *."

The second question presented is whether this transfer is one intended to take effect at or after the death of the decedent.

The construction of the deed undoubtedly grants to the son, Fred, a life estate subject to a reserved life estate in the grantor and vests a contingent remainder in fee in the four children, subject to defeasance. Although the life estate in the son, Fred, and also the remainder in fee appear to be vested, nevertheless by the great weight of state authority a reservation of a life estate postpones the possession and enjoyment of the estate until the death of the grantor and is subject to tax as a "gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor." There are no adjudicated Indiana cases in point, but as stated in an annotation in 100 A. L. R. at page 1257:

> "Although the Federal courts have continued to hold that the reservation of a life estate or income by the transferrer of property does not make the transfer one intended to take effect in possession or enjoyment at or after death under the Federal estate tax statute, the recent decisions of the state courts have consistently held that such a reservation makes the transfer one intended to take effect in possession or enjoyment at or after death under their respective inheritance tax statutes. * * *"

In Prange's Will, 231 N. W. (Wis.) 271, (1930), noted in 100 A. L. R. 1245, the Court said:

> "The test to be applied, in order to determine whether or not a transfer was intended to take effect

> in possession or enjoyment at or after such death, is whether the donor reserved to himself any beneficial or economic interest, or any right thereafter to otherwise dispose of any such interest in the corpus of the trust, for the benefit of himself or otherwise."

And in 61 C. J., 1660, it is said:

> "Within the terms of a statute taxing transfers intended to take effect in possession or enjoyment after death of the transferor are transfers wherein the grantor reserves a life estate to himself, or the right to use, profits, or income from the property, or a portion thereof for life; * * *."

See also Guaranty Trust Co. v. Blodgett, 287 U. S. 509 (1932); 121 A. L. R. 359.

These cases show a consistent interpretation of state statutes as above set forth.

However, in this situation too, attention must be directed to the question of consideration. A further provision of Section 6-2401, Burns' 1933 Statutes, is:

> "* * * and if any transfer falling under the foregoing provisions is made for valuable consideration, excepting love and affection, so much thereof as is the equivalent in money value of consideration received by the transferor shall not be taxed but the remaining portion shall be."

Although the deed in question was apparently a gift, extrinsic evidence may show that in fact some consideration was given, and to the extent that consideration was given under Indiana law the transfer would not be taxable.

Hence, the answer to the second question also depends upon an evidentiary showing of the consideration for the deed. The most that can be said is, if the deed was entirely a gift, as it appears to be, the transfer is entirely taxable.