the emergency appropriation heretofore made for the purpose set forth in said contract, sufficient to cover the amount payable thereunder, and being satisfied that said contract and bond are according to law, I am this day certifying my approval thereon.

I have this day filed said contract and bond, and all other papers submitted to me in this regard, with the auditor of state.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1542.

INHERITANCE TAX LAW—WHERE TESTATOR DEVISED HIS PROPERTY TO WIDOW FOR LIFE WITH POWER TO INVADE PRINCIPAL AND CONSUME SUCH PART THEREOF AS SHE DESIRES, DIRECTING THAT UNCONSUMED BALANCE REMAINING AT HER DEATH PASS TO HIS CHILDREN IN EQUAL SHARES—HOW TAX DETERMINED.

A testator devised his property to his widow for life with power to invade the principal and consume such part thereof as she desires, directing that the unconsumed balance remaining at her death should pass to his children in equal shares;

HELD:

1. *The interest of the widow is an estate for life with discretionary power to dispose of the principal for her own use.*

2. *The children take vested remainders after the life estate, subject to be divested by the exercise of the power.*

3. *The immediate taxation of such estates at the highest possible rate requires the power to invade the principal to be ignored, the widow's interest to be taxed as an ordinary life estate, and the interests of the children to be taxed as ordinary vested remainders.*

4. *Upon ultimate adjustment, in the event of the invasion of the principal, the children will be entitled to proportionate refunders.*

5. *Query as to whether or not each invasion of the principal by the widow during her life tenancy could be made the predicate of the assessment of an inheritance tax in respect of the interest thus appropriated by her.*

COLUMBUS, OHIO, September 1, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested the opinion of this department upon the following question:

> "A decedent devised his property to his widow for life with power to invade the principal and consumes such part thereof as she desires. He then directs that the unconsumed balance remaining at the death of the widow shall pass to his children in equal shares. How do you advise that inheritance tax be assessed in such a case? Shall it be assessed as though the fee

passed to the widow subject to a readjustment at her death, or shall she be taxed on a life estate merely and the children taxed on the remainder?"

An approach to the answer to this question is afforded by the general statement that, save in certain particulars not necessary to be noticed in this connection, the inheritance tax law of this state does not deal with or affect the nature of the estates themselves which are made subject to the tax. That is to say, while in a few instances certain transfers of property which are not in their essential nature "inheritances" are to be considered as "successions" for the purpose of the inheritance tax law (see paragraphs 3 to 7, inclusive, section 5332 G. C. and section 5332-1 G. C.); yet in general the nature and quality of the succession is determined by the common or statutory law of the state with respect to successions generally, such as the statute of wills and the statute of descent and distribution, and not by the inheritance tax law itself. The inheritance tax law—putting it in still another way—imposes a tax on the estates which are created by the operation of the other laws referred to.

Thus, it may happen that a result which has been arrived at in another state having an inheritance tax law similar to that of Ohio would not be possible in Ohio because of differences between the Ohio law of estates and that of other states having similar inheritance tax laws.

It is obvious therefore that two inquiries are always involved in a question like that which you submit:

First: What is the nature of the estate created by the will or the intestacy? and

Second: How does the inheritance tax law apply to the estate so created?

The first of these questions as it emerges from the facts stated by you is as to the nature of the interest of a person who is given by will a life estate with power to invade the principal. If such power is unlimited and to be exercised at the discretion of the donee, it is obvious that the interest of the donee in the property to which the estate relates is nearly as valuable as a fee simple, though perhaps not quite so valuable. Yet technically, according to the Ohio decisions, it is not a fee simple but is aptly described as a life estate coupled with power.

In *Johnson* vs. *Johnson*, 51 O. S., 446, the testator devised and bequeathed his residuary estate to his wife without words of limitation but "with full power to bargain, sell, convey, exchange or dispose of the same as she may think proper" and coupled the gift with the following gift over:

"but if at the time of her decease any of my said property shall remain unconsumed, my will is that the same be equally divided between my brothers and sisters and their children, * * *."

The court held, in the language of the syllabus, that:

"Under this will the widow took only a life estate in the property, * * * with power to bargain, sell, convey, exchange or dispose of the same as she might think proper for consumption in her life support, and that what remained at the time of her death, unconsumed in supporting her, belongs to the remaindermen designated in the will."

Indeed, the court went further and held that the widow was a quasi trustee for the remaindermen, so that she could not invade the principal by disposing of any part

of it as a gift to a third party "or otherwise than for her support or the benefit of the estate." The court followed *Baxter* vs. *Bowyer,* 19 O. S., 490.

This holding was distinguished in *Widow's Home* vs. *Lippardt,* 70 O. S. 261, wherein it was held that a conveyance of a fee simple title by the first devisee under a somewhat similar will was good as against the remaindermen. Some of the expressions in the opinion of Summers, J., which is quite exhaustive, might be taken as indicating the view that in that case, where there was no limitation on the nature of the estate taken by the first tenant save that arising from implication, a fee was created. However, the conclusion is based upon language appearing at pages 291 et seq., from which quotation will be made as follows:

> "But it is unnecessary to determine the estate taken by Maria Zeltner in the view taken of the power given her by the will. A life estate in real property with a power to convey in fee is not an estate in fee simple but it is more than an estate for life; the estate, it is true, is not greater, but there is an estate and a power. This power may be given with an estate expressly limited for life, but an unlimited power cannot be given with an estate limited for life by implication, the reason being that if the power is unlimited there can be no life estate, the presence of the power prevents the implication of a life estate. But why, looking to substance and not to form, should not the power exist with an implied life estate? * * *
>
> There seems to be some misapprehension of Johnson vs. Johnson, * * * . That case does not decide, * * * that a devise over of what, or if anything remains, of itself limits an absolute or unqualified power of sale, but in the opinion it is said: 'The plain intention of the testator * * * is, that the property is given to the widow to be by her used and consumed, and that while so using and consuming the same she is empowered to bargain, sell, convey, exchange, or dispose of the same as she may think proper, limited, however, in the exercise of such power, to the purpose for which the property is given to her, that is for her consumption.' * * * Under the power so limited she could not dispose of the fee of the property by gift during her life, nor by will at her death. * * *
>
> In the present case, by the express terms of the will, Mrs. Zeltner took an estate in fee (this was the case); and the subsequent limitation by like terms, applies only to what may remain of the estate after her power with respect to it has been exercised."

In other words, a result somewhat different from that arrived at in the Johnson case was reached in the Lippardt case because of the differences between the language of the two wills.

In the case submitted by the commission the facts are unlike those in either of the two cases; the estate is expressly limited for life instead of being, as in the Lippardt case, an express fee; and instead of being, as in the Johnson case, a life estate arising by implication. The power given in the case submitted by the commission is to consume, and from a power of such nature there would arise the implication suggested in the Johnson case, which would, for example, prevent a life tenant from giving away any of the estate.

Other cases might be cited, but those previously discussed will suffice as authority for the conclusion that a gift for life with power to invade the principal and consume the same, subject to the discretion of the life tenant, is no more than a life estate coupled with a power to be exercised for the benefit of the life tenant.

From this it follows quite naturally that the gift over of what may remain unconsumed amounts to a vested remainder in the whole of the property, subject to be divested in part from time to time by the exercise of the power.

With these conclusions the discussion of the nature of the estates created by the will may be dropped for the time being, and we may now turn to the inheritance tax law for the purpose of determining how that law applies to the situation thus far developed.

Consideration of the following sections of the inheritance tax statute is involved in this question:

"Sec. 5336: Taxes levied under this subdivision of this chapter shall be due and payable at the time of the succession, except as herein otherwise provided, but in no case prior to the death of the decedent. Taxes upon the succession to any estate or property, or interest therein limited, dependent or determinable upon the happening of any contingency or future event, and not vested at the death of the decedent, by reason of which the actual market value thereof cannot be ascertained at the time of such death, as provided in this subdivision of this chapter, shall accrue and become due and payable when the persons or corporations then beneficially entitled thereto shall come into actual possession or enjoyment thereof. * * *"

"Sec. 5342. * * * In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled, no allowance shall be made on account of any contingent encumbrance thereon, nor on account of any contingency upon the happening of which the estate, or some part thereof, or interest therein, may be abridged, defeated or diminished; but in the event of such encumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgement, defeat, or diminution of such estate, or interest therein, as aforesaid, a refunder shall be made in the manner provided by section 5339 of the General Code, to the person properly entitled thereto of a proportionate amount of such tax on account of the encumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate enjoyed."

"Sec. 5343. When, upon any succession, the rights, interests, or estates of the successors are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon such successions at the highest rate which, on the happening of any such contingencies or conditions, would be possible under the provisions of this subdivision of this chapter, and such taxes shall be due and payable forthwith out of the property passing, and the probate court shall enter a temporary order determining the amount of such taxes in accordance with this section; but on the happening of any contingency whereby the said property, or any part thereof, passes so that such ultimate succession would be exempt from taxation under the provisions of this subdivision of this chapter, or taxable at a rate less than that so imposed and paid, the successor shall be entitled to a refunder of the difference between the amount so paid and the amount payable on the ultimate succession under the provisions of this chapter, without interest; * * * *."

"Sec. 5344. Estates in expectancy which are contingent or defeasible, and in which proceedings for the determination of the taxes have not been taken, or have been held in abeyance, shall be appraised at their full undiminished value, when the persons entitled thereto shall come into the

beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for the purpose of this subdivision of this chapter, upon which such estates in expectancy may have been limited. * * *"

For convenience let us take first the remainders of the children. These, as already stated, are vested, subject to be divested. Being vested, they must be presently taxed. But what shall that tax be—i. e., how shall these remainders be valued for taxation? Section 5343, above quoted, provides that whenever the interests of the successors are dependent upon contingencies whereby they may be wholly or in part defeated, the tax shall be imposed upon the successions at the highest rate which would be possible under the provisions of the chapter upon the happening of any such contingency; and, as previously advised, the New York courts have held the statutes of that state, from which this provision is taken, to apply not only in the selection of the highest rate, literally speaking, but also to require the court to search for the combination of circumstances which will produce the greatest amount of tax.

Matter of Zborowski, 213 N. Y. 109.

One contingency which is possible in this case is that the life tenant—the widow—without violating any of the expressed or implied limitations upon her power to invade the principal, may actually invade and consume the entire principal during her life tenancy. In that event nothing will go to the remaindermen, the children. But this contingency is one that might conceivably decrease the taxable interests of the children by the application of section 5343 without, however, increasing the taxable interest of the widow, unless the power to consume the principal and the contingency that the facts may be such as that she is justified in consuming it entirely will add to the value of her interest for the purposes of inheritance taxation. That is to say, if the result of assuming this contingency for the purpose of getting the highest possible rate is that the widow's interest will be valued substantially as a fee, then, presumably, such a contingency would produce the highest possible rate; because there would be two exemptions if the remainders enter into the calculation, whereas there would be but one exemption to be taken out of the estate if the widow's interest were regarded as a fee for the purpose of applying section 5343 of the General Code. So that we can not determine what contingency will produce the highest possible rate, without determining whether or not the widow's power to invade the principal can be considered in determining the value of her estate presently to be taxed. One curious result of so doing would be that if the life tenant should not consume the entire principal section 5343 would require that a refunder be made of a proportionate part of the tax paid by her or paid by the executor and charged to her interest. This privilege or right would be of little use to the life tenant, however, as she would be dead before it could be exercised or asserted. Nevertheless, if this be the correct interpretation of the section the peculiarity of the result in this case does not militate against its correctness. However, it is believed that section 5343 does not have reference to contingencies or conditions of this kind. Indeed, there are no contingencies or conditions in the will affecting the estate or interest taken *by the life tenant* at all. As already stated, the thing now under consideration is to be defined as a power. This power does not depend upon any contingency whatever. It may be conditioned, as already suggested, by the life tenant's actual need for support or by her actual desire to consume the proceeds, so that she would be unable to give away the corpus of the estate; but the future necessities of the widow or her desires and whims can not be drawn into the calculation under section 5343. The power given to the widow, valuable though

it is, is not presently taxable, nor can it be used to enhance the value of the widow's life estate on the theory that its exercise is a contingency which may create a fee in her under section 5343 for reasons just stated.

Accordingly, it is the opinion of this department that section 5343 of the General Code is not to be applied in the way just discussed to the taxation of the estates arising under the will inquired about.

Rather, the remainders of the children are to be taxed immediately just as if there were no possibility of their being divested, and when divested, in whole or in part, refunders are to be made to the children in the manner pointed out by sections 5342 and 5343. In short, the consumption of the principal by the widow is not to be regarded as a contingency giving rise to an estate in her for the purpose of section 5343, but only as a contingency or condition giving rise to a diminution, defeat or abridgement of the remainders of the children.

These considerations lead to the conclusion that the proper immediate taxation of the estates described in your letter is to value the life estate of the widow in the ordinary way, without any additions on account of her power to invade the principal, and to value the remainders of the children as if they were ordinary vested remainders, again ignoring the possibility of the consumption of the principal by the widow. This method of taxation will impose a full tax on all the estates.

When the time comes for final assessment and adjustment, and in the event of the consumption of any part of the principal by the widow, the children would be entitled, as previously stated, to a refunder. The question now arises as to whether the state is to lose the amount of this refunder, or whether there is a way of readjusting the tax against the widow or her estate after her death. The only way in which this could be done would be to regard the invasion of the principal of the estate by the widow as an appropriation by her of an estate so as to bring the case within section 5344, above quoted. Technically, of course, this would not occur. Suppose the property were land and the widow should exercise her power to invade the principal by conveying the fee simple title to the land and then consuming the proceeds. Though she has the power to convey the land, she never has the title thereto. She acquires an interest in the proceeds of the sale or disposition of the land, but not in the land itself. If the property consists of personal property, money or securities, however, she is empowered to convert it to her own use. Thereby she acquires the property in the thing itself and it would seem possible that each such conversion, both legal and equitable, might be made the predicate of subsequent assessments under sections 5336 and 5344 on the theory that the exercise of the power had given rise to an estate in possession and enjoyment in the widow under the will, which such estate had not been previously assessed under the act. This is a doubtful point, not now directly raised, and no final opinion is expressed thereon. See Gleason & Otis' Inheritance Taxation, p. 279, wherein it is said that:

> "Under this method" (referring to the New York practice prior to the application of the section providing for immediate taxation at the highest possible rate to cases of this kind; but the same result, after adjustment and refunder, follows when such application is made) "it is obvious that if a life tenant uses part or all of the principal, part of the estate will escape taxation, but * * * no remedy has as yet been discovered."

Whether the suggestion last made is a "remedy" or not is the question left open.

If it were possible to consider the widow's interest as a base or determinable fee, as is done in some states, the danger of ultimately losing some of the tax would,

of course, disappear. Such a view does not seem correct in Ohio, however, for the reasons stated.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1543.

INHERITANCE TAX LAW—FOREIGN EXECUTOR HAS RIGHT TO MARSHAL ASSETS OF ESTATE SO AS TO APPROPRIATE ASSETS IN OHIO TO PAYMENT OF GENERAL LEGACIES IN SUCH A WAY AS TO PRODUCE SMALLEST POSSIBLE TAX IN THIS STATE—MINORITY RULE ALSO DISCUSSED.

By the weight of authority, a foreign executor has the right so to marshal the assets of the estate as to appropriate assets in Ohio to the payment of general legacies in such a way as to produce the smallest possible tax in this state. The minority rule is supported by better reasoning, but the history of the Ohio statute is such as to suggest the likelihood of the application of the majority rule to that statute.

COLUMBUS, OHIO, September 1, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested the opinion of this department upon the following question:

> "T, a non-resident of Ohio, at the time of his death owned shares of stock in an Ohio corporation to the amount of $8,000.00. The total of his estate, including the Ohio property, is $90,000. There are no debts. By his will he bequeaths $10,000 to S., $20,000 to H. and his residuary estate to R. There is no specific devise of the Ohio property or of any of the assets.
>
> In the determination of Ohio inheritance tax, has the executor the right to designate the Ohio property as passing to S. or to H. or as being included in the residuary devise to R? Or should it be apportioned among all three in accordance with the value of the bequest to each?"

The Ohio inheritance tax law lacks specific provision for a case such as that found in subdivision 3 of section 220 of the inheritance tax law of New York, as follows:

> "Whenever the property of a * * * non-resident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in such decedent's will, including all transfers under a residuary clause of such will."

Such a provision as this would, of course, have answered the question put by the commission. In New York prior to the passage of this statute it was held that