ation are not valid and binding obligations of Williams county, and advise the industrial commission not to purchase the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1323.

INHERITANCE TAX LAW—SUCCESSIONS TO GRANDCHILDREN BORN PRIOR TO DEATH OF TESTATOR TAKE PLACE IMMEDIATELY ON SUCH DEATH AND AMOUNT TO VESTED REMAINDERS SO THAT TAX IS IMMEDIATELY DUE AND PAYABLE—GRANDCHILD ENTITLED TO EXEMPTION—REMAINDER IN LAND DEVISED TO TWO CHILDLESS SONS VESTED IMMEDIATELY AT DEATH OF TESTATOR IN HIS RESIDUARY DEVISES—LIFE ESTATES GIVEN RESPECTIVELY TO CONSORTS OF CHILDREN OF DECEDENT ARE WHOLLY CONTINGENT—WHEN AND HOW TAX DETERMINED FOR ABOVE CASES.

V. died testate since June 5, 1919, having bequeathed to each of eight living children certain tracts of real estate using identical language in connection with each devise, which language in the case of his daughters is as follows:

> *"I give and devise to my daughter, C, for and during her natural life, and her heirs, meaning children, in fee simple the following described real estate, etc.*
>
> *If J, her husband, shall survive her, in that event I give to her surviving husband for and during his natural life, one equal third part in value of said real estate."*

All of the children of the testator are married, two sons are childless, one has one child, and one three and one seven.

1. *The successions to the grandchildren born prior to the death of the testator take place immediately on such death and amount to vested remainders, so that the inheritance tax is immediately due and payable; they are nevertheless subject to be divested in part by the birth of brothers or sisters, and in the event of such birth the successors to such immediately taxable successions will be entitled to revisions of the tax and refunders of the excess amount paid by virtue of sections 5343 and 5342 G. C., and the then vesting remainders of such subsequently born brothers and sisters must be appraised and taxed when they come into the beneficial enjoyment of such estates, viz., at the termination of the intermediate life estates, without diminution for the value of such life estates.*

2. *Each grandchild living at the death of the testator is entitled to an exemption of* $3,500 *from the value of his share of the whole estate.*

3. *The remainder (or reversion) in the land devised to the two childless sons vested immediately at the death of the testator in his residuary devisees or heirs at law These heirs at law being persons who take under the will, their shares therein should be added to the shares which they take under the will for inheritance tax purposes, subject to later revision in accordance with the principles above set forth, in the event of the birth of a child to either or both of such sons.*

4. *The life estates given respectively to the consorts of the children of decedent are wholly contingent, and no account of them whatsoever should be taken in the initial assess-*

ment of the tax. In the event of their vesting in possession or enjoyment, the adjustment should be made in the manner above outlined.

COLUMBUS, OHIO, June 8, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Careful consideration has been given to the commission's recent request for opinion, which is as follows:

"V. died testate since June 5, 1919, having bequeathed to each of eight living children certain tracts of real estate, using identical language in connection with each devise, which language in the case of his daughters is as follows:

'I give and devise to my daughter, C., for and during her natural life, and her heirs, meaning children, in fee simple the following described real estate, etc.

'If J., her husband, shall survive her, in that event I give to her surviving husband for and during his natural life, one equal third part in value of said real estate.'

All of the children of the testator are married, two are childless, one has one child, and one three and one seven.

In determining the values of the several successions for inheritance tax purposes we would like to have you advise us:

1. Do the successions to the grandchildren (being the children of each respective child of the testator and who have a remainder interest in the lands) take place immediately on the death of the testator, so that inheritance tax is now due and payable? If so, in the event of the birth of another child to a son or daughter who now has children, what adjustment can be made as to inheritance tax in connection with the remainder interest in the land covered by a devise to such son or daughter?

2. Is each grandchild living at the death of the testator entitled to an exemption of $3.500.00 to be deducted from the value of his share of the remainder in which he is entitled to a part?

3. How is the tax to be assessed on the remainder in the land devised to the two childless sons? Does such remainder pass immediately so that the same is taxed at once or is it contingent upon the birth of children to these sons so that the tax is postponed as to these remainders until the death of the original devisees?

4. If the remainders described in the third question are taxable now against whom are they taxed? If taxed as intestate property, is the value of the same to be divided among the children of the decedent and their heirs as other real estate as to which the decedent died intestate, and is the value of the same to be added for inheritance tax purposes to the value of such other intestate real estate? If so taxed, that is, as intestate property, in the event a child is born to one of the sons of the testator now childless which child becomes entitled to a remainder, when and how is the inheritance tax on such remainder, which will have been paid by the other heirs, refunded and how is tax assessed against such after born child?

5. Are the life estates given respectively to the consorts of the children of decedent, and which are contingent on the survival of such consorts after the death of their respective husbands and wives, such successions as are taxable immediately?"

Your first question is answered in part, it is believed, by the following cases:

Gilpin vs. Williams, 25 O. S., 283,
Linton vs. Laycock, 33 O. S., 128,
McArthur vs. Scott, 113 U. S., 340—a case arising in Ohio.

Numerous other decisions might be cited, but the principles involved in these three cases will it is believed, serve to establish the answer to the first half of your first question.

In the first of them it was held, in the language of the syllabus, that where

> "a testator devised certain lands to his daughter for life, with remainder after her death to her children, then unborn, forever, without otherwise disposing of the inheritance, * * * the reversion in fee descended to and vested in the heirs of the testator at his death, subject, however, to divest in the event that the devisee for life should die leaving children surviving her."

This case establishes the proposition that an undisposed of reversion vests in the heirs instead of remaining in abeyance, and that such vested interest is subject to be divested by the arising of later estates. The case is to be distinguished from the one under consideration here because the language of the will was such as to make it clear that the remainders were contingent upon the children surviving their mother. This came about by the use of the following language:

> "To my daughter, M. A., during her natural life, and to her children after her death forever."

The lower court had construed this, as the syllabus shows, in such way as to make the estates of the after born children contingent upon their surviving their mother. No such contingency appears to characterize the devise quoted in the letter of the commission.

The second of the above cited cases announces, in the third branch of the syllabus and the corresponding portion of the opinion, the adherence of the Supreme Court of this state to the principle "The law favors the vesting of estates." The origin of this doctrine is due to feudal conditions no longer existing, but it still constitutes a part of our law. The case also is of interest as establishing the conclusion that where a testator appears to have had no other motive in making his will than the creation of estates for years or for life, remainders will be deemed vested as soon as they are capable of vesting.

In the third case cited the testator devised certain real estate to his executors in trust, in part for his grandchildren. The estates thus provided for the grandchildren were therefore merely equitable, yet they were analogous to fee simple estates. The same condition existed as existed in *Gilpin vs. Williams*, so that it was held *inter alia* in the language of the head note that

> "all the grandchildren took equitable vested remainders, opening to let in those born after the testator's death, and subject to be divested" (under certain circumstances not material here).

Mr. Justice Gray rendered the opinion of the court, which is notable for the learning displayed. Among other parts of his opinion the following may be quoted:

> "For many reasons, not the least of which are that testators usually have in mind the actual enjoyment rather than the technical ownership of their

property, and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event. * * *"

Without multiplying authorities, we therefore believe that the first part of your first question is to be answered by the statement that the successions to the grandchildren living at the death of the testator take place immediately and amount to vested remainders in fee, subject to be divested in part by opening up and letting in like vested estates arising upon the subsequent birth of a brother or sister.

The case comes therefore as to such vested interests squarely within the provisions of section 5343 G. C. of the inheritance tax law of 1919, which provides in part as follows:

"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* * * * defeated or abridged, a tax shall be imposed upon such successions at the highest rate which, on the happening of any such contingences 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. * * *"

The words "highest possible rate" which are borrowed by the Ohio law from the law of New York refer not only to the main classifications of rates established by section 5335 G. C. of the inheritance tax law but also to the other subordinate classifications therein which are dependent upon the value of the property passing.

Matter of Zborowski, 213 N. Y., 109.

The second part of your first question requires further consideration of section 5343 and also of sections 5336 and 5342 G. C.

Said section 5343, after that part of it which has been quoted, goes on to provide as follows:

"but on the happening of any contingency whereby the said property, or any part thereof, passes so that such ultimate succession would be * * * 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, and the executor or trustee shall immediately upon the happening of such contingencies or conditions apply to the probate court * * * for an order modifying the temporary order of said probate court so as to provide for a final assessment and determination of the taxes in accordance with such ultimate succession. Such refunder shall be made in the manner provided by section 5339 of the General Code."

In section 5339 of the General Code referred to it is provided that the refunder shall be made by the county treasurer on the warrant of the county auditor 'out of the funds in his hands or custody to the credit of inheritance taxes. * * * without interest.

Section 5312 of the General Code provides in part as follows:

"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 * * * 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 * * * 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 * * * 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."

Section 5343 as above quoted and interpreted provides for the rate, and that part of section 5342 which has been quoted seems exactly to fit the case.

The provisions which have been quoted clearly authorizes the refunder to any grandchildren whose estates have been diminished or abridged by the process above described of the difference between the taxes they have paid and the taxes payable on ultimate succession. These provisions, however, do not completely cover the adjustment which must be made, because they fail to provide a method for assessing the tax with respect to the subsequently arising succession. This, it is believed, is provided for by section 5336 above referred to. The following quotation may be made from that section:

"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."

In connection with this section, section 5344 must be read. It provides that

"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, with out diminution for or on account of any valuation heretofore made of the particular estates for the purpose of this subdivision of this chapter, upon which such estates in expectancy may have been limited."

In this case the executory devise to the unborn child or children when it arises, as it will during the lifetime of the parents, will be a vested remainder after the life estate or estates of the parents. According to both the sections last above quoted it is not to be assessed for inheritance tax purposes until it comes into actual possession or enjoyment, at which time it will be valued as an estate in fee arising as of the death of the testator, without any subtraction from the value thereof of the intervening life estate or estates. The tax having been assessed in this manner, collection should then proceed in the ordinary way and the adjustment will be complete; for the grandchildren living at the death of the testator will have had their excess taxes refunded and the after-born child or children will have had his or their taxes assessed and paid.

Your second question is to be answered in the affirmative. You do not state the date at which the testator died. Section 5334 G. C. as last amended places grandchildren in the class entitled to an exemption of $3,500.00 each. Prior to that time the

section was not clear. The amendment was evidently made to clear up the meaning of the section and, in the opinion of this department, regardless of the date of the testator's death, the amended section, which must be presumed to be declaratory of the intention of the general assembly passing the act of June 5, 1919, in this particular, should be applied. The proper exemption to each grandchild being thus $3,500.00, it is clear on the principles above stated that such exemption should be deducted from the value of the vested estates which are to be presently appraised and taxed.

Your third question is also covered by principles developed in dealing with your first question, and particularly by the case of *Gilpin* vs. *Williams, supra*. From the form in which your questions are submitted it is supposed that there is no residuary devise, and that in the event of total failure of issue of the two childless sons there will be intestacy as to the remainders after the life estates. The doctrine of the case cited is that these reversions are vested, and the fact of intestacy so operates as to vest them in the heirs of the testator subject to be divested *pro tanto* by the subsequent birth of issue of either of the sons, or wholly by the subsequent birth of issue of both of them.

The remainders being thus vested, the assessment of the tax should not be postponed but should proceed in accordance with the principles above outlined.

Your fourth question presupposes the answer which has been given to your third question, and inquires against whom the vested remainders which have been found to exist should be taxed. It follows therefore that the value of the remainders over after the life estates of the two childless sons should be divided among the children of the decedent and their heirs as other real estate of which the decedent died intestate, and the share of each is to be added for inheritance tax purposes not only to the value of other intestate real estate, but also to the value of any other successions passing to the respective heirs as devisees or legatees. This follows from paragraph 1 of section 5331 of the General Code, which provides that

> "The words 'estate' and 'property' include everything * * * which passes to any one person, * * * from any one person, whether by a single succession or not."

The latter part of your fourth question presents the same problem as that involved in the second part of your first question, and is to be answered in the same way, namely:

In the event of the birth of a child to one of the sons of the testator now childless, the several heirs will be respectively entitled to a revision of the determination of the tax and to refunders accordingly; when the after-born child, or his heirs should he die before the termination of the life estate, come into actual possession and enjoyment of the remainder the inheritance tax thereon is to be assessed to him or them according to the full undiminished value of such interest as an estate in fee, without diminution for the value of the life estate.

In submitting your fifth question you seem to assume that the life estates over given to the consorts of the children of the decedent are contingent. This question is really not free from doubt, as there is some authority which would seem to justify the conclusion that these intermediate life estates are vested, inasmuch as they depend upon no contingency whatsoever save that of survival, and hence are in effect substantially, if not exactly, the same as if the phraseology had been

> "To A. for life, remainder to B. for life, remainder to C. in fee"

The point involved is one of considerable nicety, notwithstanding the seeming simplicity of the question, and there is also authority to the effect that where the gift is in form contingent it will be regarded as in law contingent. This theory accounts for the opposite result in the other type of case supposed by observing that notwithstanding that the actual enjoyment of such a supposititious intermediate estate would be

contingent in fact, it is not so in form so that the principle laid down in *Linton* vs. *Leycock, supra,* will make of it a technical vested remainder for life; but that this principle can not be so applied when the estate is contingent both in form and in fact.

See generally—Kales on Future Interests; 1 L. R. A., 434. Note.

Here the expression of contingency in the will itself is very strong, the words "if" and "in that event" both conditioning the gift. These are words of condition and not of time, and the better view would seem to be in accordance with the commission's assumption that this is indeed a contingent remainder.

It is now to be observed that the remainder is not only contingent in amount but also in person. In the first place, the value of the estate as a contingent remainder for life can not be ascertained until it vests. In the second place, it may never vest at all. The case is not one in which there is any certainty as to the ultimate vesting. Therefore, on principles which have been developed in a previous opinion to the commission, it would seem that the tax on these contingent remainders for life does not accrue immediately and should not now be assessed.

Greater difficulty is encountered in dealing with the effect of this situation upon the appraisement of the vested interests of the children. You do not ask this question, but it seems present on the facts and it will be considered before finally disposing of any part of your fifth question. On the one hand, section 5342 would seem to require the estates of the children, being now vested, to be immediately taxed as vested remainders after the life estates of their respective parents, who are children of the testator, without any allowance for the contingent life estate in one-third of the real estate which is given to their other respective parents. This also would seem to be taxation at the "highest possible rate" within the meaning of section 5343, for to ignore the intermediate life estates to the respective consorts of the children of the testator would eliminate one set of exemptions and thus enhance the value of the estates passing to the remaindermen. The only embarrassment arises from the fact that it might also be contended that the contingent remainders for life should also be taxed immediately at the highest possible rate. This requires an interpretation of section 5343, which it is believed is to be applied in the way already intimated, viz., by eliminating from consideration at the present time the contingent life estates, and taxing the remainders to the children as vested remainders in fee after the life estates of their other parents, subject to the process above outlined, in the event of the survival of the consorts who are entitled to the contingent life estates.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1324.

BOARD OF EDUCATION—WITHOUT AUTHORITY TO ACCEPT COMMERCIAL INSTRUMENTS KNOWN AS "TRADE ACCEPTANCES" IN PAYMENT FOR GOODS PURCHASED.

Boards of education are without authority to accept commercial instruments known as "trade acceptances" in payment for goods purchased, such action being contrary to the provisions of sections 5660 *and* 5661 *G. C. and beyond the powers of such officers.*

COLUMBUS, OHIO, June 9, 1920.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of a letter from your office,