that property may be owned by a township does not exempt it from assessment.

In the case which you have stated, it is not believed that technical questions as to title are the controlling consideration. The fact remains that the trustees of Jackson township are exercising control over the property in question under color of title at least. Evidently, the village of Frazeysburg is not claiming title, because it has recognized the title in the township by levying an assessment against the property as township property. It further appears that the township is actually making use of the property and deriving income therefrom, in that they are leasing a building thereon to lodges and using it themselves as a township hall. Assuredly, on the plainest of principles of equity as well as upon the ground of estoppel, the trustees cannot have the benefit of the exercise of ownership for one purpose and deny ownership for another purpose.

For the reasons thus briefly stated, the conclusion of this department is that the township trustees are liable for the assessment in question.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2203.

INHERITANCE TAX LAW—WHERE TESTATOR DIRECTS HIS EXECUTOR SHALL PAY ALL TAXES ASSESSED AGAINST SUCCESSIONS OF HIS ESTATE OUT OF RESIDUARY ASSETS AS GENERAL DEBT OR CLAIM, NO DEDUCTION SHOULD BE MADE IN APPRAISING RESIDUARY ESTATE FOR AMOUNT OF TAXES ON SPECIFIC LEGACIES SO DIRECTED TO BE PAID—NO ADDITION SHOULD BE MADE TO VALUE OF SPECIFIC LEGACIES ON ACCOUNT OF PROVISION THAT TAX SHALL BE SO PAID.

Where a testator directs that his executor shall pay all inheritance taxes assessed against the successions of his estate out of the residuary assets as a general debt or claim, no deduction should be made in appraising the residuary estate for the amount of taxes on specific devises and legacies so directed to be paid; and no addition should be made to the value of the specific devises and legacies on account of the provision that the tax shall be so paid.

COLUMBUS, OHIO, June 29, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission has requested the opinion of this department upon the following question:

> "Richard Roe in his will directs that his executor shall pay all inheritance taxes assessed against the successions of his estate out of the residuary assets as a general debt or claim. The will further contains a bequest to X, who is not related to the testator, of a quantity of jewelry having a value of $5,000.00. The tax on this is $350.00. By the direction in the will X gets the benefit not only of the bequest of the jewelry but also of the further payment of the amount stated. On the determination of tax, should the court make the assessment on the value of the jewelry alone, or should he also include the sum of $350.00 as a succession of which X gets the benefit?"

In order to state the problems involved in the commission's question fully, let it be assumed that the residuary estate amounts in value to $10,000.00, without any deduction for any taxes. A full statement of the question then is as to to whether $350.00 should be deducted from the value of the succession of the residuary legatee, making that value $9,650.00, and added to the value of the specific legacy of jewelry, making its value $5,350.00; or should the specific legacy be valued at $5,000.000 and the residuary legacy at $10,000.00?

These seem to be the legal possibilities. Manifestly, the sum of $350.00 should not be deducted both from the residuary legacy and the specific legacy; no one would so claim. Nor is it proper to deduct the $350.00 from the residuary legacy without adding it to the value of the specific legacy, for this would result in imposing a tax on the basis of a value less than that which actually passed by the will. Nor should the sum be added to the value of the specific bequest without being deducted from the value of the residuary bequest, for this would result in a tax on aggregate values in excess of the actual value of the assets of the estate as a whole. It is believed, therefore, that, as intimated, the choice lies between the two positions first above outlined.

The decisions of New York raise doubt as to the question which the commission submits.

In *Matter of Gihon,* 169 N. Y. 443, Cullen, J., speaking of the effect of such a testamentary provision, uttered the following dictum:

> "In reality, the tax is still paid out of the legacy, the effect of the direction of the testator being merely to increase the legacy by the amount of the tax."

and cited *Matter of Swift,* 137 N. Y. 77. That this was dictum, however, sufficiently appears from the statement that the learned judge was at the time discussing the question of the deduction of the amount of the federal inheritance tax imposed under the war revenue act of June 13, 1898, and was therefore merely arguing to a conclusion respecting an entirely separate and distinct question.

In *Matter of Swift,* referred to by Judge Cullen, the appraiser had deducted the amount of tax to be assessed on specific legacies from the value of the residuary estate, when the will directed that the payment of the tax upon the legacies be an expense of administration. The court, per Judge Gray, sustained the lower court in overuling the appraiser, and held "that there should be no deduction from the value of the residuary estate of the amount of the tax to be assessed * * * upon prior legacies * * *." Moreover, Judge Gray employed the following language:

> "The legacies taxable should be reported, irrespective of the provision of the will, and * * * a mode of payment of the succession tax prescribed by will is something with which the statute is not concerned. * * * That which is to be reported * * * for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose, or under any testamentary direction."

As a mere matter of authority it will be at once seen that in so far as the two cases which have been discussed are inconsistent, the earlier one (Matter of Swift) is, after all, controlling, as it was a square decision upon the point, whereas the other was a mere dictum and was itself based upon what seems to have been a misconception of the holding in the earlier case.

Manifestly, for reasons already stated, a decision that the amount of the

tax which is made a charge upon the residuary estate is not to be deducted from the value of that estate is equivalent to a holding that such amount is not to be added to the value of the specific legacy on account of which the tax is assessed.

Turning to the other side of the argument, it does seem reasonable to regard the payment of the tax out of the testator's estate as a direct benefit to the specific legatee and, therefore, as in the nature of a succession to him. See Gleason & Otis on Inheritance Taxation, p. 87, where this view seems to be favored, though the learned authors are unable to point to any case where it has been actually carried out with logical accuracy in practice. However, there are certain mathematical difficulties connected with the application of any such theory. If we are to take $5,000.00 as the basis of the computation of the tax to be paid out of the residuary estate, as the commission does in its letter, and if we thereby determine the tax to be in the first instance $350.00 on the $5,000.00 succession in the seven per cent class; and if we then proceed to add the $350.00 to the $5,000.00, we have $5,350.00 as the taxable value of the specific legacy. But if that is to be taken as the basis, then we must also assess a seven per cent tax on the $350.00 or, rather, recalculate the tax on a legacy worth $5,350.00; we now have $374.50 as the tax due on the enhanced specific legacy. But this tax also must be paid under the terms of the will from the residuary estate. This process would have to be repeated an infinite number of times, although the amount of the additional tax on each process would tend to approach zero. In view of this difficulty, it is the opinion of this department that the rule in *Matter of Swift* should be followed and that the $350.00 should not be added to the value of the specific legacy nor deducted from the value of the residuary bequest; rather, it should be treated as a condition imposed upon the residuary legatee in the nature of a personal obligation, such as might have been imposed by a contract *inter vivos*.

It is the opinion of this department, therefore, that the specific legacy should be assessed on the value of the jewelry alone.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2204.

INHERITANCE TAX LAW—WHEN PROCEEDS OF INSURANCE POLICY OF DECEDENT ARE NOT SUBJECT TO SAID TAX.

Where a decedent takes out an insurance policy payable to a trustee, with written instructions to pay any inheritance taxes that may be assessed against her estate so as to leave the several successions undiminished for her beneficiaries, and to pay any balance to the beneficiaries themselves, no taxable succession under the inheritance tax law arises in respect to the proceeds of such policy.

COLUMBUS, OHIO, June 29, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of the commission's letter of recent date submitting for the opinion of this department the following question: