After this apportionment has been made the township is at liberty to proceed in accordance with sections 3298-1 et seq. for the improvement of its half of the road; for there is nothing in said series of sections to indicate that the township must improve the road to any given width. On the other hand, the municipal corporation may proceed in accordance with sections 3812 et seq. as to the half of the road within its limits. The proceedings of the township and the village will be carried on as entirely independent proceedings. Of course, when the time approaches for doing the work, there can be an understanding between the township and village authorities that the two contracts will be let at the same time, although there will have to be separate advertisements for each contract. Likewise, the assessment proceedings by the township and those by the municipality, and the bond issues by the township and municipality will be entirely separate and distinct affairs.

It cannot be urged, as against the plan outlined, that the municipality has no right to improve a township road. The fact remains that one-half of the highway is a street or public place within the confines of the village, and therefore subject to improvement by the village, even in the absence of such a statute as section 7177 G. C. See sections 3629, 3714 and 3812 G. C.; Steubenville vs. King, 23 O. S. 610; and see especially Scully vs. Cincinnati, 1 C. S. C. R. 183, 13 Ohio Dec. Reprint, 489; and Glashein vs. Cheviot, 5 O. L. R. 599, 53 W. L. B. 307.

Returning to the practical features of the situation, it should perhaps be noted that bonds issued by the township to provide funds for improving its half of the highway, will as to the "township's share" be in anticipation of the collection of taxes levied on all the taxable property of the township, including that within the village; whereas, bonds of the village for the village's share of the cost of improving that half of the highway within the village will be paid out of taxation of property within the village alone. Notwithstanding this circumstance, however, an undue burden on the village may be avoided because of the wide discretion vested in both municipal and township authorities in the matter of proportion of cost that may be assessed against benefited lands and the area that may be assessed.

Perhaps other plans of improvement of the road in question are available; but after careful thought as to the practical side of the matter, no reason is perceived why the simple method outlined above is objectionable from any standpoint.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1577.

INHERITANCE TAX LAW—HOW INTERESTS ARISING UNDER A CERTAIN WILL ARE TAXED.

Method of inheritance taxation of interests arising under a certain will described.

COLUMBUS, OHIO, September 20, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your letter of recent date requesting the opinion of this department upon the following question:

> "F in his will provides as follows:
>
> 'I give, bequeath and devise all of my property to my beloved wife, M, and her heirs forever, in trust, however, for the following purposes * *
>
> 'Out of the income of my said estate my said trustees shall pay out to herself and to my beloved children, such sums of money as may be needed

for their support, education and comfort. Said trust shall continue for a period of ten years after my eldest child becomes of age, at which time, my said trustee shall divide my property in the same proportion to my said wife and my children that each would have received had I died intestate, and that part which falls to my wife to be to her the same as if I had died intestate; and that part or portion of my estate which falls to each of my children shall be to them for and during the period of their natural lives respectively, and at the death of each of them, said property to vest absolutely and in fee simple to the heirs of each of my children respectively.'

Assuming that there are two children and that at the death of the testator a period of seven years had elapsed after the eldest child became of age, how should inheritance tax be assessed:

1. Against the widow.
2. Against the estate taken by each child.
3. Against the remainder which is to vest in fee simple in the heirs of each of these two children?"

The primary question to be considered under the will quoted is that of the intention of the testator in creating the trust which is to continue for a period of ten years after his eldest child becomes of age. If the purpose of the testator was that the trust estate should accumulate during this period pending its final division in the manner pointed out by the later clause of the will, but subject to the invasion of the income for the support, etc. of the widow and children, then one answer might be suggested. If, however, the intention of the testator was that the trust estate should be merely kept intact for the designated period, but that the beneficial interest in the income during that period should reside in the widow and children subject to the discretion of the widow as head of the family, then another and different question is presented. For in the one case, on principles discussed in a recent opinion to the commission respecting discretionary power to invade the principal in favor of a life tenant, it would have to be held that during the estate for years no taxable beneficial interest in the income vested in the widow and the children. The result of such a holding would raise an interesting question. But if on the contrary the intention of the testator was to give the income of the estate during the period named in the will for the support of the family, then, if it is possible to do so, the interest of each successor in such income should be ascertained.

While the question is not free from doubt and should be decided, of course, by the court upon the interpretation of the whole will, it seems most likely that the second of the two possible constructions would be that favored by the court. It seems to be the intention of the testator that the income of the estate shall be used for the support of his family during the period of years named by him. Such slight evidences as appear on the face of the portion of the will quoted in the commission's letter may be referred to. In the first place, the testator does not merely authorize the widow to use the income for the purpose designated; he commands her to do so as his trustee. In other words, it is the intention of the testator that the income shall be used for this purpose; and to the extent that it is not so used it will at the end of the period so operate as to enhance the interest which will fall into the life estates and remainders limited on the estate for years. The trust is a trust for family support, yet the trustee is not to provide this support but to pay out to the children such sums of money as may be needed for their support, education and comfort. On the whole, though some waiving of technicalities is necessary to reach the result, it is believed that a fair appraisement of the equitable estates for years, sufficiently accurate under all the circumstances, is to regard the interest of each beneficiary in the income during the remaining three years as equal

to that of each of the other beneficiaries therein during said period. In other words, the value of an estate for three years in the whole should be ascertained and then divided into as many shares as there are beneficiaries, including both children and widow.

The testators' will is such as that the estates directly limited upon the estate for years are life estates. By the direction

> "that part which falls to my wife to be to her the same as if I had died intestate"

the testator evinces an intention that the widow shall have at the expiration of the three year period a life estate in one-third of his real property and the absolute possession and enjoyment of one-half of the first four hundred dollars in value and one-third of the remainder of his personal property. (Section 8592 G. C.)

These provisions, if the widow elects to take under the will, vest in her interests which may be described as follows: One as an estate for the widow's life limited upon an estate for years to last three years; the other as a vested interest in the designated proportion of the personal property postponed for a period of three years.

It is now to be noted that a contingency affects the wife's interest in the real estate. She may not actually live out the three year period, in which event her life estate in one-third of the real estate will never arise. This contingency, in the opinion of this department, does not affect her interest in the personal property which is vested, and as to the real estate it is believed that the principle discussed in opinion No. 1323, addressed to the commission under date of June 8, 1920, would not prevent the immediate taxation of the life estate as a vested estate, unless section 5343 of the General Code, which requires the immediate taxation of estates dependent upon contingencies or conditions to be made at the highest possible rate, has some effect upon the question.

It will not be necessary to quote section 5343, which has been commented upon in several recent opinions of this department to the commission. It is obvious that if the widow should die during the three year period the interests of the children would be increased. The highest possible rate of taxation would therefore be produced by ignoring the widow's provision in lieu of dower in so far as the real estate is concerned, and limiting the remainders for life to the children immediately upon the estate for years, without any deduction for the widow's life estate in one-third thereof.

It is believed, however, that this procedure is not proper. Section 5343 of the General Code was intended to provide for the immediate taxation of contingent or conditional successions which would otherwise not be immediately taxable at all. The widow's life estate here is not contingent or conditional in any exact sense, but, for reasons pointed out in the opinion referred to, her life interest, limited upon the estate for years, is vested at the death of the testator. That being the case, section 5343 should not be applied at this point. But if the widow's expectancy of life at the death of the testator is more than three years, her life estate should be immediately valued and taxed as a vested interest, without any future readjustment.

As a result of all the foregoing the widow's interest, should she take under the will, will be represented by the value of an aliquot part of the income of the estate for a three year period, determined by the number of beneficiaries, (three, including herself), plus the value of a life estate in one-third of the real estate to begin at the expiration of three years, plus the value of one-half the first four hundred dollars in value of the personal property and one-third of the remainder of such personal property, the possession and enjoyment of which is to be postponed for three years.

But if the widow elects to take under the law, then, for reasons pointed out in a recent opinion to the commission, an entirely different result would follow, both as to her interest and as to the interests of the other beneficiaries. In that event, the value of her dower interest in the real property is to be immediately deducted from the whole estate and not taxed at all; the value of her distributive share in the personality is to be taxed as such; the sum of all the interests thus taken by her under the law is to be deducted from the corpus of the estate and the number of beneficiaries of the gift of the income for years is to be reduced by one; but the life estates of the children will in that event be unaffected in value, as they will still be limited upon the widow's life estate in one-third of the real estate, and diminished as to the personality by her distributive share thereof.

The foregoing comments cover the taxation of the widow's succession and foreshadow that of the successions of the children in the event that the widow elects to take under the law.

Coming now to the estates of the children as they would be in the event that the widow elects to take under the will: It is to be observed that in the first place each child has the same interest in the income during the three years as has been described with respect to the widow's interest therein. The life estates arising in the children are immediately vested and should be valued as follows:

Each child is entitled to a life estate in a ratable share of two-thirds of the real estate and what remains of the personal property after deducting the widow's distributive share thereof, plus a ratable share of a life estate in one-third of the real estate after the death of the widow; in other words, approximately two-thirds of the personal property is to be divided into as many shares as there are children and the value of a life interest of each child in his share limited upon an estate for three years in the whole is to be ascertained; then to this is to be added the value of a life estate in a share of two-thirds of the real estate, to arise after the expiration of three years; and finally, the remaining one-third in value of the real estate, the life estate in which is given to the widow, is to be divided into shares and (for the estates over are vested, as already pointed out) the value of an estate for life in each child, limited upon an estate for life in the widow, is to be ascertained and added to the share of that child.

The sum of the interests thus respectively valued for each child is to constitute the taxable succession of the child, subject, of course, to exemptions, and subject also to qualification hereinafter to be made.

There remains the ultimate remainder in fee simple. This, according to the will, is given "to the heirs of each of my children respectively," but, as pointed out in another opinion which has reached the commission or will soon reach it, the use of the word "heirs" necessarily implies a contingency or condition, to-wit, that each child shall leave heirs. Section 5343 now comes into play and requires immediate taxation at the highest possible rate. Moreover, as pointed out in opinion No. 1323 and in the other opinion last referred to, the testator has not fully provided for the devolution of these ultimate remainders, in that he has not (it will be assumed) stipulated what shall become of them in the event that the last child to die leaves no heirs. However, it must be remembered that each remainder, so far as the will is concerned, is a separate estate. You infer that there are two children. If one of them should die without leaving wife or children, the operation of the will is such as that the other would succeed to the remainder as "heir" of the deceased child. This would leave the survivor invested with a life estate in an undivided half of the property (or in specific property, if the estate is to be divided that way), and with the fee in the other half of the property, divided or undivided. At that point the will would have spent its force as to the second half, but would still be operative as to the first half, so that when after the death of the survivor of the two children the fee of the entire property becomes vested in the heirs of such

surviving child (assuming no alienation of his estate in fee in the meanwhile), such heirs would not receive the fee in the second half under the will of the present testator.

In other words, in the usual course of nature the two children will not die at the same time, and it is possible that one may be the heir of the other. On the other hand, it is more remotely possible that they will both die at the same time, leaving a single person remotely related to the testator as their common heir. Even in that event resort to presumptions might establish the legal conclusion that the possible single ultimate remainder-man would receive part of his estate under the testator's will and part from the presumed survivor by virtue of the statutes of descent and distribution operating upon the estate of that survivor.

Bearing in mind that section 5343 of the General Code is to be applied by imagining a *possible* contingency, it is believed that the highest possible rate would be obtained by assuming the death of the first child without heirs other than the other child, which, as to the remainder after the life estate of the first child, would add the value of that remainder to the taxable interest of the second child; then let it be assumed that the surviving child dies leaving a single heir remotely related to the testator; this assumption will place the remainder after the life estate of the second child in the seven per cent class.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1578.

ROADS AND HIGHWAYS—AUTOMOBILE REGISTRATION LAW—WHEN FUNDS MENTIONED IN SECTION 6309-2 G. C. (108 O. L. 1083) MAY BE USED IN IMPROVEMENT OF CURBS AND GUTTERS.

The funds mentioned in section 6309-2 G. C. (108 O. L. Part II, p. 1083) may be used in the improvement of curbs and gutters, provided that their existing foundation is used in whole or in substantial part as the sub-surface of the improvement.

COLUMBUS, OHIO, September 20, 1920.

HON. CHARLES M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your letter of recent date is received, reading:

> "Please refer to section 6309-2, as amended in House Bill No. 573.
>
> Subdivision 2 provides that fees collected on account of automobile registration shall constitute a fund to be used for the maintenance and repair of public roads and streets. 'Maintenance and Repair' as defined by this section, 'includes all work done upon any public road or highway, or upon any street, in which the existing foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.'
>
> Can these funds be used by village for the purpose of repairing and relaying the gutter and constructing the curb at the outer edge of sidewalks?
>
> It has been the custom of the village to construct the curb and gutter, the property owner constructing the sidewalk. In other words, the village takes care of the street from curb to curb, including the curb, leaving the sidewalk to the property owner."