1121.

COLLATERAL INHERITANCE TAX—WHERE TESTATOR DIED PRIOR TO JUNE 5,1919, AND LEFT ENTIRE ESTATE IN TRUST DURING LIFETIME OF HIS WIDOW DIRECTING IT SHOULD BE DISTRIBUTED AT HER DEATH AMONG HIS THEN LIVING RELATIVES OF CERTAIN CLASS AND IN DEFAULT OF ANY SUCH RELATIVES THEN IN ACCORDANCE WITH LAWS OF DESCENT AND DISTRIBUTION—INHERITANCE TAX NOT APPLICABLE—WHEN SAME IS APPLICABLE.

Where a testator who died prior to June 5, 1919, left his entire estate in trust during the lifetime of his widow and directed that it should be distributed at her death among his then living relatives of a certain class, and in default of any such relatives then in accordance with the laws of descent and distribution:

HELD:

That the fact that the interests after the life estate are contingent in respects of the persons ultimately to take does not make the act of June 5, 1919, applicable thereto, and no tax is assessable under that act on account of such contingent successions.

The act applicable is the collateral inheritance tax law in force prior to June 5, 1919, under which the tax can not be assessed until the death of the widow, when it is to be valued as of the date of the death of the testator.

A contingent interest created by the will of a testator dying prior to June 5, 1919, the contingencies with respect to which are such as that the ultimate taker and the amount or value of the entire estate subject to such contingencies are both uncertain, is, in the event of the happening of such contingencies after June 5, 1919, taxable under the act of that date.

COLUMBUS, OHIO, April 1, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of your letter of recent date, which is quoted somewhat fully as follows:

> "In your opinion No. 493 addressed to the commission and dated July 18, 1919, you say:
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> 'Final opinion on the question as to the effect of the act upon contingent remainders and executory devises of real estate arising under wills of decedents dying prior to June 5, 1919, and not vesting until after that date, is reserved for further consideration.'
>
> A similar reservation also was made as to
>
> 'Such gifts over upon contingencies as may not have vested under any possible theory of the law at the death of the testator, and may have vested after June 5, 1919.'
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> A case has now arisen of a decedent who died in December, 1918, leaving his entire estate in trust during the lifetime of his widow, who is to receive a net income therefrom. The third item of his will reads as follows:
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> 'Item Third: At the death of my wife it is my will, and I hereby direct my said trustee to make distribution of all of my estate so held by it in trust, and to fully execute its trust in the following manner, to-wit:
>
> I hereby direct my said trustee to distribute to my then living nephew or nephews, the son or sons of my brother or sister or both as the case may be, one-half of all my personal property including stocks and other interests, share and share alike, and to my then living niece or nieces,

daughter or daughters of my brother or sister or both as the case may be, the remaining one-half of all my personal property including stocks, share and share alike, and to make deeds conveying to said living nephew or nephews jointly, an undivided one-half of all of my real estate of which my said trustee shall then be seized in trust, and to make deeds conveying to said living niece or nieces jointly, the remaining undivided one-half of all of my real estate of which my said trustee shall then be seized in trust. In the event that at the time of final distribution at my wife's death, there should be no living nephew, then the whole estate shall be distributed and deeded to my then living niece or nieces, or if at that time there be then no living niece then my whole estate shall be distributed and deeded to my then living nephew or nephews, and if at that time there shall be neither nephews nor nieces surviving my wife, then my estate shall be distributed and deeds be made to such heirs and distributees as would take my estate in that case under the laws of descent and distribution of the state of Ohio.'

The commission desires your advice as to whether or not the remainders created by the item quoted are subject to inheritance tax under the act of June 5, 1919. As the widow is still living, can settlement be made for the tax on such remainders at the present, or must it be postponed until her death? If made, then, is the tax to be computed on the value of the estate as of the date of death of the testator, or as of the date of final distribution?"

The first and most important question which you submit involves a construction both of the will and of the act of June 5, 1919. It appears that the interests created by item third are clearly contingent with respect to the identity of the takers. The contingency could only be greater by introducing some element of doubt as to the amount to be distributed in gross, for the amount to be distributed to each is contingent upon the number of survivors on the determination of the life estate. The contingency would not be enough to prevent the immediate taxation of the interests at the highest possible rate, because there is certainty that there will be remainders to be taxed. See *Matter of Zborowski,* 213 N. Y. 109, construing sections similar to section 5343 of the General Code as amended.

This conclusion is believed to be important in the consideration of the principal question, because if the case is one to which the section just cited would apply, if it could be made applicable at all; and if by reason of such fact the tax would normally under the new law accrue and be payable upon the death of the testator, we have an absurdity which is almost conclusive evidence that the new law was not intended to apply to such case. Consideration may be given in this connection to the following provisions of the statutes which are immediately involved:

"Section 5336. Taxes levied under this sub-division of this chapter shall be due and payable at the time of the succession, except as herein otherwise provided, * * *. Taxes upon the succession to any estate or property, * * * dependent or determinable upon the happening of any contingency * * *, 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 * * * shall accrue and become due and payable when the persons or corporations then beneficially entitled thereto shall come into actual possession or enjoyment thereof. * * *."

"Section 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 * * * and such taxes shall be due and payable forthwith out of the property passing, * * *; but on the happening of any contingency whereby the said property, or any part thereof, passes so that ultimate succession would be exempt * * * or taxable at a rate less than that so imposed and paid, the successor shall be entitled to a refunder * * *."

These two statutes must be construed together, as they are obviously not intended to be contradictory. The first of them is clearly intended to apply only when the second can not be applied. The second can not be applied when the value of the estates that would fall in upon the happening of any of the contingencies so as to produce taxation at the highest possible rate can not be immediately determined. In that event, the first of the two sections applies and justifies and commands the postponement of the accrual of the tax.

It has been previously stated that had the testator died subsequently to June 5, 1919, the contingent interests created by the item of his will quoted in your letter would have been presently taxable at the highest possible rate, there being no contingency which would affect the market value of the successions which could possibly occur. But he died some time prior to June 5, 1919, when amended section 5343 was not in effect, so that it appears rather clear that this particular will presents a case to which the new inheritance tax law can not have any application. This conclusion is not changed, in the opinion of this department, by consideration of the schedule of the new act, wherein it is provided, *inter alia,* that

> "all successions occurring subsequently to the approval of this act shall be affected by and taxable under it, whether the death of the decedent occurred prior to its approval or not, unless a tax has already accrued thereon under the provisions of the original sections hereby amended."

The reason for this conclusion lies in the fact that the word "successions" occurring in this part of the schedule must be taken in the sense established by the preceding provisions of the act in which it is found. Successions immediately taxable at the highest possible rate would therefore have to be held to have "occurred," not "subsequently to the approval of this act," but "prior to the approval of this act," where the testator died prior to the approval of the act. This is so even though it might be argued and demonstrated that in some senses at least the tax payable under the old collateral inheritance tax law had not perfectly "accrued" on June 5, 1919, because of the lack of machinery in that law for the immediate taxation at the highest possible rate of remainders contingent in respect of the person. So far as the old law is concerned, all taxes under it accrued in theory as of the death of the testator. So that the effect of this holding will not be to exempt the succession from taxation altogether but to subject the remainders to taxation under the old law when it shall be possible under that law to impose the tax.

In short, the case which the commission submits is not one of the kinds of cases which may raise ultimately the question reserved in the former opinion. These gifts over are not such as "may not have vested under any possible theory of the law at the death of the testator." Such a case will arise when the nature of the contingency is such as to make it impossible to apply section 5343 of the new law. Having given some consideration to this question, I take this occasion to answer it as an abstract question.

The only authority which is given in any of the books for holding that an inheritance tax law can never affect any succession occurring by reason of a death which has taken place prior to the time when the law goes into effect is the case of *Executors of Eury* vs. *The State,* 72 O. S., 448. The syllabus in that case does lay down the rule that the inheritance tax law of 1904 "applies only to such rights arising on a death occurring on or subsequently to that day." This syllabus, however correct it may be as a statement in the nature of an interpretation of the act of 1904, embodies a proposition broader than the necessities of the case required. The facts as given by the reporter were that the gift over, which did not take full effect until after the law went into effect, was made to living children and "to the issue of such * * * children as may then be dead as the parent would have if living in fee simple in equal rights."

Technically, there might have been a failure of issue of the deceased children. The court, per Summers, J., seemed to think, however, that the estates over were vested, saying at p. 454:

> "We probably should conclude that they are vested though some of them were defeasible. For it is the rule no longer that where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, the vesting will be postponed until after that time has arrived, or that event has happened, but the test is the reason for the postponement, and if that was that the property had been given to another for life the bequest vested."

It seems clear, therefore, that the court was of the opinion that the devises or bequests over involved in the case before it had actually vested prior to the passage of the law of 1904.

But, waiving this ground of distinction, it further appears that the conclusion that the act could not apply to any interests ultimately arising under the will of a person dying prior to the passage of the act was predicated upon the language of the act itself. This appears from that part of the opinion of Summers, J., which is as follows:

> "Such clearly appears to have been the legislative intent, for not only is the act not expressly made retroactive but its words are all prospective. The right to inherit shall be taxed. The tax shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property, and if not paid within one year after the death of the decedent interest at six per cent is to be collected, and if paid prior to the expiration of one year a discount of one per cent per month shall be allowed, and all administrators, executors and trustees shall be liable for all such taxes. Other provisions that would be difficult of application if the act is retroactive are contained in it, so that it would be unreasonable to conclude that the legislature, in the absence of any suitable provisions for a retroactive operation of the act, intended it so to operate."

No machinery was afforded by the act of 1904 for the assessment of a tax at any other time than at the death of the testator. The tax was to accrue then, and interest and discount periods were computed from that date. This is the case under the new law with respect to contingent remainders taxable at the highest possible rate. It is not, however, the case with respect to remainders so absolutely contingent that they can not be taxed at the highest possible rate but are to be taxed when they come into possession and enjoyment, at which time the tax is to accrue and the interest and discount periods are to commence to run. There-

fore, the reasoning in *Executors of Eury* vs. *The State* does not apply, and inasmuch as the succession in the case now imagined would not take place until the happening of the contingency, it is believed that the schedule of the act of 1919, and particularly that part of it which has been quoted, sufficiently manifests an intent on the part of the legislature that such successions shall be taxable under the new law.

The answer above given to the principal question submitted by the commission makes necessary the following answers to the remaining two questions:

Settlement for the tax can not be made until the death of the widow, at which time it is to be worked out under the old collateral inheritance tax law.

When the tax is settled the valuation is to be made as of the death of the testator, as there is nothing in the old law like there is in the act of 1919 providing for a valuation as of the date when the estates come into possession and enjoyment under certain circumstances and for certain purposes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1122.

COLLATERAL INHERITANCE TAX—BEQUEST TO PUBLIC HOSPITAL NOT SUBJECT TO SAID TAX.

On facts stated in the opinion, a bequest to a public hospital is not subject to the collateral inheritance tax.

COLUMBUS, OHIO, April 1, 1920.

HON. CLAUDE J. MINOR, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I have your letter of recent date requesting the opinion of this department as to whether or not a certain bequest to the Good Samaritan Hospital, of Sandusky, Ohio, is subject to the collateral inheritance tax, the testatrix having died some time prior to the year 1919.

From your statement of facts it appears that the hospital has been in existence for some years, at all times as an organized institution and more recently under corporate forms; that it is organized not for profit, admits charity patients and draws no distinctions of creed, or otherwise; that it receives an annual subsidy from the city of Sandusky and derives income from patients who are able to pay the standard charges, but that its entire income is insufficient to provide for its operating expenses, revenue for which is obtained from charitable donations.

You refer to a previous opinion of this department, which seems to be wholly in point, and which holds that such an institution as this hospital appears to be is "an institution for purpose only of public charity" within the meaning of the collateral inheritance tax law, section 5332 G. C., now repealed. No reason is apparent for departing from this rule, it being entirely consistent with the decision in *Humphreys* vs. *State,* 70 O. S. 67, cited by you.

Accordingly, you are advised that under the facts as you state them the bequest is not taxable.

Respectfully,
JOHN G. PRICE,
Attorney-General.