4218.

INHERITANCE TAX—INSURANCE POLICIES TO EXTENT OF $40,000 EXEMPT—"LOWEST POSSIBLE RATE" CONSTRUED.

SYLLABUS:

In computing the gross estate for the purpose of the estate tax provided for by section 5335-1, *General Code, there should be included as a part of such gross estate not only the proceeds of insurance policies payable to the estate of the decedent, but likewise the proceeds of insurance policies on the life of the decedent which are payable to or for the use of designated beneficiaries to the extent that the proceeds of such policies are in excess of the sum of* $40,000.

Where inheritance taxes on successions of an estate have been determined at the lowest possible rate in the manner provided for by section 5343-2, *General Code, and such inheritance taxes have been paid as thus determined, only the amount of taxes so paid at such lowest possible rates are to be credited against the estate tax provided for by section* 5335-1, *General Code.*

COLUMBUS, OHIO, April 1, 1932.

HON. DON ISHAM, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication from you which reads as follows:

"In re: Estate of William H. Gintling, Deceased.

The net estate of the above named decedent which is taxable under Section 5332 of the General Code of Ohio amounts to $39,917.82. The tax on this amount, computed at the lowest rate, namely, the life estate of the widow and remainder to four children, amounts to $253.96. The deceased, however, carried considerable insurance, payable partly to designated individuals and partly carried in trust for the use of certain individuals. As result of this insurance the gross estate for Federal tax purposes is $224,943.83. This amount is subject to a deduction of $174,518.33, so that the net estate on which a Federal estate tax must be paid is $50,425.50. The amount of tax due on this sum is $508.51, and this amount is subject to a credit for the amount paid to the State of Ohio, to-wit, $253.96, so that the amount due on the Federal estate tax is $254.55. The question arises what if any tax is due under General Code Sec. 5335-1.

Section 5332-4 specifically exempts insurance proceeds from taxation under Section 5332, and it is not clear whether the additional tax provided for by Sec. 5335-1 must be computed on the basis of a gross estate amounting to $224,943.83, which includes all of the life insurance carried by the deceased; or whether the tax under that section is computed upon the same gross estate as is taxable under Section 5332, which, in this case, would be $71,436.15.

If a gross estate of $71,436.15 is used as a basis for the tax under Section 5335-1, there is of course no tax due. If, however, the gross estate of $224,943.83, is the proper basis for computation of this tax, then the tax under Section 5335-1 will be 80% of the Federal estate tax ($508.51) or $406.80, subject, however, to the credits provided in Section

5335-3. Section 5335-3 provides that the gross amount of 80% 'shall be credited with the amount of tax levied on successions from such estate under the provisions of Section 5332 at the rates provided in Section 5335.'

In the Gintling case it will be possible to tax the estate at the highest rate and also at the lowest rate. The tax at the highest rate would be $1007.29, and if that amount were taken as a credit then there would be no tax due under Sec. 5335-1. The tax at the lowest rate would be $253.96, and if that amount were taken as a credit then there would be a tax due under Section 5335-1 in the amount of $148.84. Even though the executor elects to pay the tax at the lowest rate, bonds will be deposited with the county treasurer to secure payment of the tax at the highest rate, and it would seem that the estate would be entitled to the full credit of $1007.29 and would not be required to pay any tax under Section 5335-1.

Your opinion, therefore, is respectfully requested on the following two questions:

(1) In computing the tax under Section 5335-1, should the statute be construed to require that insurance not payable to the estate but payable to an individual beneficiary or trustee be included in computing the gross estate?

(2) Where an estate may be taxed at both the highest and the lowest rate, which rate shall be allowed as a credit against the tax provided in Sec. 5335-1, pursuant to the provisions of Section 5335-3?"

The questions presented in your communication call for the consideration of sections 5335-1, et seq., General Code, enacted by the 87th General Assembly, May 18, 1927, and of certain sections of the inheritance tax law to which said sections are supplementary.

Sections 5335-1, et seq., General Code, were enacted for the purpose of taking advantage of the credit allowed to the states by section 301(b) of Title III of the Revenue Act, enacted by Congress and approved February 26, 1926. Section 301(a) of this act provided for the imposition of a federal estate tax and the rates thereof. Paragraph (b) of this section provides as follows:

> "The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304."

Section 5335-1, General Code, enacted by the 87th General Assembly, as above noted, provides that "In addition to the tax levied under section 5332 of the General Code of Ohio, there is hereby levied an additional tax upon the transfer at death of the estates of resident decedents of an amount equal to eighty per centum of the tax imposed by title III of the act of congress approved February 26, 1926, known as the 'Revenue Act of 1926'," at rates therein designated contained in said act of congress. In the consideration of an act of the General Assembly of the state of Pennsylvania similar to section 5335-1, General Code, the Supreme Court of Pennsylvania in the case of *In re Knowles,* 295 Pa. 571, speaking of the provisions of section 301(b) of the Revenue Act of 1926, above quoted, said:

"By this statute, the Federal government has declared it to be the national policy that the net value of all estates, in excess of $100,000, that amount being exempt (§ 303(a) (4), 44 Stat. at L. 72 chap. 27, U. S. C. title 26, § 1095(a) (4)), shall, before distribution to the persons entitled thereto, be reduced by certain percentages, progressively levied as succession taxes, but it is willing that the several states shall indirectly profit by this system; to that end, the Federal statute in effect provides that, in all instances where a state imposes inheritance taxes, the Federal government will allow, to those paying such local inheritance taxes, the amount thereof, up to a sum equal to 80 per cent of its own inheritance taxes, retaining the right to collect only so much of the Federal tax as may exceed the sum thus relinquished. This is a method of distributing to the several states moneys collectable by the national government from their taxables, and the provision in question is not intended to either burden or benefit the taxpayer. Whenever a state does not see fit to take advantage of the situation thus created, the national government will collect the entire 100 per cent of its assessed Federal inheritance taxes."

With respect to your first question as to whether the proceeds of insurance policies not payable to the estate of the decedent, but payable to or for the use of individual beneficiaries are to be included in computing the gross estate for the purpose of the tax provided for by section 5335-1, General Code, it will be observed that this section provides for an estate tax which is an aliquot part of the federal estate tax provided for by section 301(a) of the Revenue Act of 1926, above referred to. In this situation, I am inclined to the view that every item of property of whatsoever kind entering into the computation in determining the gross estate of a decedent for the purpose of the federal estate tax is to be included as a part of the gross estate of such decedent for the purpose of the tax provided for by section 5335-1, General Code. In this connection, it is noted that although under the provisions of section 5332-4, General Code, as enacted by the 89th General Assembly, 114 O. L. 94, proceeds of life insurance payable on the death of the insured otherwise than to the estate of the insured are not included in the estate of the decedent for the purpose of the inheritance tax provided for by section 5332, General Code, there should be included in the estate of the decedent for the purpose of the additional tax provided for by section 5335-1, General Code, the proceeds of all insurance policies on the life of the decedent in the manner and to the extent provided by section 302 of the Revenue Act of 1926 which provides that the value of the gross estate of the decedent shall be determined by including "the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under polices taken out by the decedent upon his own life."

By way of specific answer to your first question, therefore, I am of the opinion that in computing the gross estate of the decedent for the purpose of the additional tax provided for by section 5335-1, General Code, there should be included as a part of such gross estate not only the proceeds of insurance policies payable to the estate of the decedent but likewise the proceeds of insurance policies on the life of the decedent which are payable to or for the use of designated beneficiaries to the extent that the proceeds of such policies are in excess of the sum of $40,000.

In the consideration of the second question presented in your communication

in its application to the Gintling case, I note your statement that it will be possible in this case to tax the estate at the highest rate and also at the lowest rate. I assume from this statement that the successions in the Gintling case are subject to contingencies which make applicable section 5343, General Code, which provides that 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, the inheritance tax provided for by section 5332, General Code, 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 inheritance tax law.

From the statement made in your communication above noted and particularly that part of it in which it is said it will be possible to tax the estate here in question at the lowest rate, I assume further that you have in mind the provisions of section 5343-2, General Code, which section was enacted May 2, 1927, as a section supplemental to section 5343, General Code. By this section, it is provided that in the case of a succession in any estate against which an inheritance tax is assessable and is being assessed under the provision of section 5343 of the General Code, above noted, the court, on motion of the executor or trustee, shall compute the tax at the lowest rate which upon the happening of any such contingencies or conditions would be possible under the inheritance tax law, and that such executor or trustee in lieu of the payment of such tax at the highest rate required under section 5343, General Code, may elect to pay the amount found by the court to be due at such lowest possible rate, and deposit with the treasurer of the county to whom such tax is payable cash or bonds of the estate for the purpose of securing the payment of the difference between the tax on such succession at the highest rate and the tax computed at the lowest rate.

In this situation, your question is whether the amount of inheritance taxes on a succession of this kind allowed by the provisions of section 5335-3, General Code, as a credit to the estate tax provided for by section 5335-1, General Code, is that arrived at by computing the inheritance tax at the highest possible rate, as provided for by section 5343, General Code, or at the lowest rate, as provided for by section 5343-2, General Code. Section 5335-3, General Code, provides that the tax imposed on any estate by section 5335-1, General Code, shall be credited with the amount of the tax levied on successions from such estate under the provisions of section 5332, General Code, at the rates provided in section 5335, General Code, and with the amount of any estate, inheritance, legacy or succession taxes actually paid to any state or territory of the United States or the District of Columbia in respect of any property included in the gross estate. In the consideration of this question, it is to be observed that the additional tax provided for by section 5335-1, General Code, is an estate tax partaking of the nature of the federal estate tax; and that inasmuch as the only credit with respect to state inheritance taxes that is allowed as a credit to the federal estate tax is such inheritance taxes as have been actually paid, the same rule applies in determining the inheritance tax credit to be allowed under the provisions of section 5335-3, General Code, to the estate tax provided for by section 5335-1, General Code.

I am of the opinion, therefore, by way of answer to the second question made in your communication, that where inheritance taxes on successions have been determined at the lowest possible rates in the manner provided for by section 5343-2, General Code, and such inheritance taxes have been paid as thus determined,

only the amount of taxes thus paid at such lowest possible rates are to be credited as against the estate tax provided for by section 5335-1, General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4219.

MUNICIPALITY—POWER TO LEASE REAL ESTATE NOT NEEDED FOR MUNICIPAL PURPOSES—MAY NOT MODIFY TERMS OF LEASE.

SYLLABUS:

Where a municipality has entered into a contract whereby it leased real estate owned by it and not needed for any municipal purpose, to the highest bidder after authorization and advertisement as required by section 3699, General Code, neither the council nor any other officer of such municipality has the power substantially to modify any of the terms of said lease, or to reduce the amount of the rent therein provided for.

COLUMBUS, OHIO, April 1, 1932.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your communication which reads as follows:

> "At the request of the City Solicitor of Steubenville, Ohio, we are submitting the following question for your opinion:
>
> May the council of a municipality reduce, modify or change a lease, or change the rate fixed by a lease for premises owned by a municipality, before the expiration of such lease, where the lease was executed to the highest bidder after due publication under section 3699 of the General Code?"

I am informed that the modification desired in this case is a temporary reduction of rent. I assume that the lease in question is in accordance with the proposal submitted by the highest bidder, and that it contains no provision for the reduction of rent during the term of said lease.

At common law a city has the same powers with reference to contracts as individuals, but where the statutes of a state provide the manner in which contracts shall be made and entered into by municipalities, they cannot be entered into otherwise than as provided by statute. *Wellston* vs. *Morgan,* 65 O. S. 219.

As stated in *Kerlin Bros. Co.* vs. *Toledo,* 20 C. C. 603:

> "Where the sale of property is to be made by a municipality, certain formalities required by statute must be strictly and carefully observed in order to insure the validity of the transaction."

Section 3698, General Code, reads as follows:

> "Municipal corporations shall have special power to sell or lease real estate or to sell personal property belonging to the corporation, when