"The county surveyor shall report to the county commissioners on or before the first day of April in each year the condition of the county roads, bridges and culverts in the county, and estimate the probable amount of funds required to maintain and repair the county roads, bridges and culverts, or to construct any new county roads, bridges or culverts required within the county."

Section 6956-1 in its form as amended 108 O. L. part I, page 503, reads as follows:

"After the annual estimate for the county has been filed with the county commissioners by the county surveyor, and the county commissioners have made such changes and modifications in said estimate as they deem proper, they shall then make their levy for the purposes set forth in said estimate, upon all the taxable property of the county not exceeding in the aggregate, two mills upon each dollar of the taxable property of said county. Such levy shall be in addition to all other levies authorized by law for said purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. The provisions of this section shall not, however, prevent the commissioners from using any surplus in the general funds of the county for the purposes set forth in said estimate."

Clearly, these two statutes are to be read together, with the result that the county commissioners may include in the levy authorized by section 6956-1 an item for the construction of new bridges.

Your second question as to whether the city of Toledo may demand a portion of the county bridge funds has, in effect, been passed upon in a previous opinion of this department (No. 900) dated December 24, 1919, and directed to the Bureau of Inspection and Supervision of Public Offices, copy of which is enclosed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1395.

INHERITANCE TAX LAW—WHERE T DIED TESTATE ON MAY 1, 1920 AND A FEW DAYS BEFORE HIS DEATH IN CONTEMPLATION OF THAT EVENT CONVEYED TO A, A TRACT OF REAL ESTATE WORTH $20,000, THERE BEING AS CONSIDERATION FOR SUCH CONVEYANCE SERVICES RENDERED BY A WHICH SERVICES WERE FAIRLY WORTH $1,000—ALSO ANOTHER CASE IN WHICH INADEQUACY OF CONSIDERATION DETERMINED FOR PURPOSE OF INHERITANCE TAX.

T died testate on the first day of May, 1920. A few days before his death and in contemplation of that event he conveyed to A a tract of real estate worth $20,000, there being as consideration for such conveyance services rendered by A which services were fairly worth $1.000.

The second item of the will of the decedent reads as follows:

"In consideration of service rendered to me by B, I hereby give, devise and bequeath to him my home farm (describing it)."

Such home farm at the date of death of T was well worth $15,000 *and the services rendered by B, which consisted of board, washing, nursing, care and attention during the past ten years, were well worth the sum of* $5,000.

Held: Assuming the inadequacy of the consideration in both cases and the fact of contemplation of death in the first case (concerning which no conclusions of law are expressed in the opinion), both the conveyance and the devise constitute taxable successions under the inheritance tax law of 1919, *and the amount of the consideration is in neither instance a technical charge on the estate granted or devised for inheritance tax purposes.*

COLUMBUS, OHIO, July 2, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of recent date you request the opinion of this department, as follows:

> "T. died testate on the first day of May, 1920.
>
> A few days before his death and in contemplation of that event he conveyed to A. a tract of real estate worth $20,000.00, there being as consideration for such conveyance services rendered by A., which services were fairly worth $1,000.00.
>
> The second item of the will of the decedent reads as follows:
>
> 'In consideration of services rendered to me by B., I hereby give, devise and bequeath to him my home farm (describing it).'
>
> Such home farm at the date of death of T. was well worth $15,000.00 and the services rendered by B., which consisted of board, washing, nursing, care and attention during the past ten years, were well worth the sum of $5,000 00.
>
> Will you be good enough to advise the commission as to what extent the property conveyed to A. and the real estate devised to B. are subject to inheritance tax, A. and B. being adult children of the testator? "

Had these questions arisen under the old collateral inheritance tax law they would have been completely covered by opinions of former Attorneys-General. Thus, in the Annual Report of the Attorney-General for the year 1914, Volume II, p. 1342, appears an opinion of the Hon. Timothy S. Hogan, in which it is held under the law referred to that

> "The fact that a devise is founded upon a valuable consideration is immaterial as affecting the question of the exemption of the same from the inheritance tax."
>
> (Head-note.)

In the course of the opinion a distinction is drawn between the effect of consideration upon the taxability of a devise or bequest and that of a deed, grant or sale intended to take effect after the death of the testator. The language of the former Attorney-General on this point is as follows:

> "In a word, a very clear distinction is made by the authorities between the taxability of property passing by will, founded upon a consideration, and property passing by deed, grant or sale intended to take effect after the death of the testator, and founded upon a consideration. For a deed intended to take effect at the death of the testator or other similar instrument is only *conventionally* an inheritance, and the convention which the statute constructs will be limited to the purpose of the statute, which is to guard the evasion

of the tax by the expedient of making sales, grants or deeds intended to take effect at the death of the testator, so that where the sale, grant or deed is in reality founded upon a valuable consideration it is not permitted to stand upon a different foundation from any other similar transaction merely because it happens to be so made as not to take effect until after the death of the testator, and is, therefore, not to be regarded as within the purview of the statute. But the real subject of the tax is the privilege of inheriting property. This is regarded as in a sense something other than a natural right, whereas the right to dispose of property by grant, sale or deed is a natural right inherent in the very idea of property itself. Therefore, no reason exists in view of the authorities for making any such distinction as to taxation of inheritances created by will as is made with respect to conventional inheritance created by grant, sale or deed intended to take effect after the death of the testator."

The conclusions of Mr. Hogan were given the approval of his successor, the Hon. Edward C. Turner, in an opinion under date of February 14, 1916, (Opinions of Attorney-General for the year 1916, Volume I, p. 277).

For the reasons stated in the opinions referred to and upon the authorities therein given, which seem to be conclusive, the commission is advised that this department concurs in the result reached by the former Attorneys-General.

No distinction between the present inheritance tax law and the old inheritance tax law exists so far as a devise or legacy is concerned, so that the conclusions just approved fully answer the second question which you submit. The point is that a testamentary succession has taken place, that the devisee or legatee is not obliged to take under the will, and may renounce and claim his rights as a creditor of the estate, if he has any, by so doing he will escape inheritance taxation and at the same time he will lose the benefits of the will.

But the present inheritance tax law of this state differs from the collateral inheritance tax law in a respect material in the consideration of your first question.

Section 5332 of the General Code as amended provides that a tax is levied upon property passing under the following circumstances:

"3. When the succession is * * * by deed, grant, sale, assignment or gift, made *without a voluable consideration substantially equivalent in money or money's worth to the full value of such property.*

(a) In contemplation of the death of the grantor, vendor, assignor, or donor, or

(b) Intended to take effect in possession or enjoyment at or after such death."

The old law (section 5331 G. C.) employed the following language as descriptive of a class of successions similar to that mentioned and defined in the above quoted paragraph:

"by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor."

The respects in which the new law differs from the old appear to be as follows:

"(1) A transfer by deed, grant, sale, assignment or gift, is taxable though the possession and enjoyment thereof is not postponed until the date of death, if it is made in contemplation of death."

In the commission's letter it is stated as a fact that the conveyance of the testator to A. was made in contemplation of testator's death. The burden is, under the authorities, probably on the commission or its representative to establish this fact If there is no doubt about the fact, however, it will be assumed that it is as stated.

Under the old collateral inheritance tax law the contemplation of death was not enough to make the transfer taxable; under the new law it is, whether the enjoyment or possession of the estate is postponed or not.

(2) The former statute did not deal expressly with the subject of consideration, so that the former attorneys-general were able to reach the conclusion (believed to be correct, although there is some authority opposed to it) that a consideration was enough to defeat the tax in this class of cases.

The new statute, however, does deal with the effect of consideration, and by rather clear language states what that effect is by stipulating in substance that the deed, grant, sale, assignment or gift is taxable if made "without a valuable consideration substantially equivalent in money or money's worth to the full value of such property." In other words, the technicality of a consideration, whether "good" or "valuable," is no longer to operate as a final criterion to determine taxability or not. But the more substantial test of the donative aspect of the transfer is to be the determining one. The language of the section also makes it rather clear that where the transfer is made in contemplation of death and is donative in character, in the sense that such consideration as may exist is not the substantial equivalent in money or money's worth of the whole value of the property, the whole "succession" is taxable, without (technically) any allowance for the consideration Of course, some discretion is vested in the appraiser and the probate court, and it possibly would not be an undue exercise of such discretion to make some allowance for consideration in such cases. Technically, however, the amount of the consideration if liquidated is not a charge on the legacy or devise so as to diminish the quantum of the estate for inheritance tax purposes.

These conclusions are established under similar statutes by the following cases:

Matter of Orvis, 223 N. Y , 1;
Matter of Dana, 214 N. Y., 710; affirming 164 App. Div. 45;
Matter of Kidd, 178 N. Y. 274;
Estate of Reynolds, 169 Cal., 600.

Respectfully,
JOHN G. PRICE,
Attorney-General.