Sec. 1182-3. "* * * All bonds hereinbefore provided for shall be conditioned upon the faithful discharge of the duties of their respective positions, and such bonds * * * shall be approved as to the sufficiency of the sureties by the director, and as to legality and form by the attorney general, and be deposited with the secretary of state * * *."

Finding said bond to be properly executed according to the above noted statutory provisions, I hereby approve same and am returning it to you herewith.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5308.

INHERITANCE TAX—BASIS OF TAXING LIFE ESTATE AND REMAINDER—SPECIFIC CASE.

SYLLABUS:

The codicil with the last will and testament of a decedent, reads as follows:

Item IV—I direct the executors and trustees named in my said last will and testament—to see that A during her lifetime is always cared for and provided with every comfort but under such guards and restrictions that she cannot waste any of the payments that may be made to her by any injudicious commitments on her part or any commitments that do not meet with the full approval of (the executors) or their successors.

Held: 1. The above item creates a life estate in "A" with a vested remainder over.

2. If the rate on the succession of the remainder is less than the rate of the succession of "A", the entire amount left by the testator for the use and consumption of "A" during her lifetime should be taxed at the statutory rate applicable to the succession of "A". If, however, the rate on the succession of the remainder is higher than the other, the life estate of "A" should be computed on the entire amount left for "As" use and consumption, and the same taxed at the statutory rate applicable to the succession of "A" and the remainder taxed at the statutory rate applicable to the succession of the remaindermen.

(Opinion dated July 21, 1922, reported in the Opinions of the Attorney General for 1922, page 676, distinguished.)

COLUMBUS, OHIO, March 31, 1936.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your recent communication, which reads as follows:

> "The codicil with the last will and testament of a decedent whose estate is now assessable for inheritance tax provides:
>
> 'Item IV—I direct the Executors and trustees named in my said last will and testament—to see that A during her lifetime is always cared for and provided with every comfort but under such guards and restrictions that she cannot waste any of the payments that may be made to her by any injudicious commitments on her part or any commitments that do not meet with the full approval of (the executors) or their successors.'
>
> Will you advise the commission as to the following points:
>
> 1. Is it your opinion that said interest of A can be valued for taxation now under section 5343 of the General Code or is the same interest an annuity of uncertain amount and to be taxed and valued in the future as provided by section 5336 of the General Code?
>
> 2. Do you affirm the opinion of July 21, 1922 reported A. G. O. 1922, page 676, or has the same been subsequently amended by your later opinion or by the findings of the Supreme Court of Ohio relative to sections 5343 and 5336 of the General Code in the cases of Tax Commission v. Oswald, 109 O. S., 52; Wonderly v. Tax Commission, 112 O. S. 2337?"

So much of section 5336, General Code, as is pertinent to your inquiry, reads as follows:

> "Taxes levied under this subdivision of this chapter shall be due and payable at the time of the succession, except as herein otherwise provided, but in no case prior to the death of the decedent. Taxes upon the succession to any estate or property, or interest therein limited, dependent or determinable upon the happening of any contingency or future event, 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, as provided in this subdivision of this chapter, shall accrue and be-

come due and payable when the persons or corporations then beneficially entitled thereto shall come into actual possession or enjoyment thereof."

In considering the application of the provisions of the above section, to a succession, the Supreme Court in the case of Tax Commission vs. Oswald, 109 O. S. 36, stated at page 53:

> "Clearly the provisions of Section 5336, General Code, do not apply, for that section relates to estates (1) *'limited, dependent or determinable upon the happening of any contingency or future event,'* (2) *'not vested at the death of the decedent,'* and (3) *'by reason of which the actual market value thereof cannot be ascertained at the time of such death.'* In the case at bar two elements of Section 5336, to-wit, the second and third, as above noted, are wanting, hence the section cannot apply."

Likewise, in the case of Wonderly vs. The Tax Commission, 112 O. S. 233, it was declared at page 239:

> "It is to be noted that in order to apply Section 5336, General Code, three elements must be taken into consideration: (1) The succession must be dependent or determinable upon the happening of a contingency or future event; (2) it must not be vested at the death of the decedent; and (3) by reason of the two foregoing elements such condition must exist that 'the actual market value cannot be ascertained at the time of such death.' This construction of section 5336 was adopted by the court in *Tax Commission* v. *Oswald, Exrx.*, 109 Ohio St., 36, 53, 141 N. E. 678."

It therefore becomes important to determine whether or not in the instant case the above three elements are present. That the first is lacking is evident for the reason that the interest passing to "A" is not limited, dependent or determinable upon the happening of any contingency or future event. Nor is the second present, inasmuch as the interest of "A" vested at the death of the decedent. From the language of Item 4 of the will, it is apparent that any or all of the estate is given to "A", to be used and consumed by her during her lifetime. It will be noted that she is to have as much as may be needed to supply her with every comfort and that the only limitation placed upon the amount which is to be used for that purpose is that no money shall be wasted by injudicious commitments. In other words, in addition to the income or interest, there is power to invade

the principal in whole or in part and consume the entire amount of the principal, if necessary.

Such being the facts, the actual market value of the succession passing to "A" could have been accurately ascertained at the time of the testator's death. The value thereof clearly would be the entire amount left by the testator for the purposes set out in Item 4 of his will. Therefore, the third element in section 5336, supra, is also wanting.

Therefore, inasmuch as the interest of "A" lacks all three of the elements contained in section 5336, supra, the provisions of said section can have no application.

It now becomes necessary to determine the exact nature of the interest which passed to "A". In regard thereto, it is to be noted that Item 4 of the will provides that "A", during her lifetime, should be cared for and provided with every comfort. From this language, it would appear that the entire amount charged with the support and maintenance of "A" is, if necessary, to be used for that purpose, and that the testator intended that "A" should use and consume said amount only during here lifetime, and that he did not intend to empower her to dispose of any of it by gift during her lifetime or by will at her death.

Facts analogous to those in the present instance appear in the case of Johnson, et al., v. Johnson, 51 O. S. 446, wherein it was held in the first branch of the syllabus:

> "1. A testator, after providing for the payment of his debts, used the following language in his will: 'Second—I give and devise unto my beloved wife, and her assigns, all of the remainder of my property, both real and personal, however the same may be known, or wheresoever the same may be situate, with full power to bargain, sell, convey, exchange or dispose of the same as she may think proper; but, if at the time of her decease, any of my said property shall remain unconsumed, my will is that the same be equally divided between my brothers and sisters, and their children, if deceased, the children to have the same amount the parent would be entitled to if living.' *Held:* That under this will the widow took only a life estate in the property, both real and personal, with power to bargain, sell, convey, exchange or dispose of the same as she might think proper for consumption in her life support, and that what remained at the time of her death, unconsumed in supporting her, belongs to the remaindermen designated in the will."

Of like holding is the case of the Tax Commission vs. Oswald, supra, the first branch of the syllabus of which reads as follows:

"1. The testator used the following language in his will:

'First. I will and bequeath to my wife, Jennie V. Oswald, whatever property I am possessed at my decease, both personal and real. She to have full power to sell, deed and transfer, any or all of it, as she may deem best to better her condition.

Second. After the death of my wife whatever property remains of my estate I will and bequeath as follows: One-half (½) to J. W. Oswald or his issue; one-half (½) to J. M. Oswald or his issue.

Third. At the time of this distribution, should either of my brothers above be deceased, without leaving issue—then such share shall go to the brother remaining or his issue.'

Held, that the wife, Jennie V. Oswald, took a life estate in the property, both personal and real, coupled with power to sell, deed and transfer any or all of it 'as she may deem best to better her condition,' and that the gift over of what may remain unconsumed amounts to a vested remainder in the whole of the property, subject to be divested in part from time to time, or in whole by the exercise of the power. (*Johnson* v. *Johnson,* 51 Ohio St., 446, 38 N. E., 61, approved and followed.)"

In light of the foregoing, it would therefore appear that it was the manifest intention of the testator to create a life estate in "A". This brings me then to the question of whether the remainder over is vested or contingent. In the Oswald case, supra, it was stated on page 52, that:

"A remainder is vested when there is a present fixed right to future enjoyment. A remainder is contingent which comes into enjoyment or possession on the happening of some uncertain event.

The further distinction is, however, to be borne in mind that it is not the uncertainty of enjoyment in future, but the uncertainty of the *right* to that enjoyment, which marks the distinction between a vested and contingent remainder."

In the present instance, the right to the estate in remainder was fixed and certain upon the death of the testator, but the enjoyment or possession of such remainder was postponed until after the death of "A". In other words, any amount which remained unconsumed by "A", amounts to a vested remainder in the whole of said property, subject to be divested in part, or possibly in whole, by the consumption thereof by "A".

Having concluded that the will in question creates a life estate with

a vested remainder and that the provisions of section 5336, supra do not apply, it remains then to determine how the interest of "A" shall be taxed. Section 5343 of the General Code, in so far as the same is pertinent, reads as follows:

> "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 under the provisions of this subdivision of this chapter, and such taxes shall be due and payable forthwith out of the property passing, and the probate court shall enter a temporary order determining the amount of such taxes in accordance with this section; but on the happening of any contingency whereby the said property, or any part thereof, passes so that such ultimate succession would be exempt from taxation under the provisions of this subdivision of this chapter, or taxable at a rate less than that so imposed and paid, the successor shall be entitled to a refunder of the difference between the amount so paid and the amount payable on the ultimate succession under the provisions of this chapter, without interest; * * *"

It is to be noted that the provisions of the above statute relate to succession of estates, the right of which is vested, but whose possession and enjoyment are created by the happening of a future contingency, and also to estates or interests now vested but whose possession and enjoyment may be defeated by a future contingency, and further requires that a tax be imposed upon such successions at the highest rate which, on the happening of such contingencies, would be possible. Since your letter does not disclose the terms of the will in respect to the succession of the remainder, if any, it is impossible to determine whether or not such succession would be taxable at a higher rate than the succession of the interest of "A". Therefore, if the rate on the succession of the remainder is less than the rate on the succession of "A", it is my opinion that the entire amount left by the testator for the use and consumption of "A" during her lifetime should be taxed at the statutory rate applicable to the succession of "A". If, however, the rate on the succession of the remainder is higher than the other, the life estate of "A" should be computed on the entire amount left for "A" 's use and consumption, and the same taxed at the statutory rate applicable to the succession of "A" and the remainder taxed at the statutory rate applicable to the succession of the remaindermen.

I come now to your question relative to an opinion reported in Opinions of the Attorney General for 1922, page 676. I assume that you refer to the third branch of the syllabus thereof which is in answer to the third and fourth questions asked therein.

It will be noted that the will under consideration in said opinion provided for payment to the beneficiaries named therein during their natural lives a sufficient amount of money as their necessities required, and that such payments were to be made from the income realized from the residue of the state. In said opinion it was pointed out that the persons named in said will took no direct life interest in the corpus of the state, which clearly distinguishes that case from the instant one.

In said opinion the question presented was whether or not the provisions of section 5342 of the General Code, would apply and whether or not the interest in question could be taxed as an annuity. In answer thereto, it was stated that inasmuch as there was no way of arriving at the then present value of the successions, the same could not be regarded as annuities. This is disclosed by the third branch of the syllabus, which reads as follows:

> "(3) The amount of right receivable by any of the beneficiary trust being uncertain and incalculable by any of the means required to be applied in determining the present value of annuities for sums certain, no inheritance tax on such residuary estate can at present be determined either as to the interests of the life beneficiaries or as to the contingent remainder under the highest possible rate."

A comparison of the facts in the Oswald and Wonderly cases with those set out in said opinion clearly reveals that there is no analogy between them. In both of these cases the question was whether or not the will created a fee simple subject to be divested, or whether or not a life estate subject to consumption by the life tenant was created.

While you ask in your communication if the above opinion has been amended by a later one rendered by this office, you fail to state to which opinion you refer. I assume, however, that reference is made to the opinion reported in Opinions of the Attorney General for 1930, page 1594, wherein it was held:

> "Where successions to nephews and a niece of a testator under his last will and testament are contingent upon the death of an adopted daughter of such testator without leaving a child or children surviving her, or if she die leaving child or children, that all of such children die before any of them attain the age of

twenty-five years, such successions to the nephews and niece of the testator are subject to inheritance taxes to be imposed in the manner provided by section 5343, unless it further appears that by reason of the contingent character of such successions the actual market value of the same cannot be ascertained at the time of the death of the testator."

The facts considered in said opinion were as follows:

Specific bequests to W, C and M, were contingent upon the death of H dying without leaving children surviving her or if H died leaving children, that all of such children die before any of them attain the age of twenty-five years. The question was whether or not the provisions of section 5343, supra, would apply to the succession of W, C and M.

Therefore, in specific answer to your second question, it is my opinion that the cases of the Tax Commission vs. Oswald, 109 O. S. 52, and Wonderly vs. Tax Commission, 112 O. S. 233, and opinion reported in Opinions of the Attorney General for 1930, page 1594, can be clearly distinguished from the opinion reported in Opinions of the Attorney General for 1922, page 676, and the latter is approved and affirmed.

Respectfully,

JOHN W. BRICKER,

Attorney General.

5309.

APPROVAL—BONDS OF VILLAGE OF NEWTON FALLS, TRUMBULL COUNTY, OHIO, $21,550.00.

COLUMBUS, OHIO, March 31, 1936.

State Employes Retirement Board, Columbus, Ohio.

5310.

APPROVAL—BONDS OF NEW PHILADELPHIA CITY SCHOOL DISTRICT, TUSCARAWAS COUNTY, OHIO, $4,500.00.

COLUMBUS, OHIO, March 31, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.