

and clear of the dower right and interest of said Cora A. Cuppett in and to said property. By the provisions of said deed, however, this property is conveyed to the State of Ohio "subject however to the rights of Edward Cunningham, his heirs and assigns, to the oil, gas and minerals, and the right to exploit, mine and remove the same, and also to the right Taylor and Miller have to take timber therefrom under their contract of December 10, 1928, which expires two years from that date."

Subject to the exceptions above noted, the title of said John S. Cuppett to the above described property, and his deed conveying the same to the State of Ohio, are hereby approved.

How far the reservation in favor of Edward Cunningham with respect to oil, gas and other minerals in these lands will affect the use that your department intends to make of said lands is a matter for the determination of your department and of the board of control. In this connection it may be observed that it is altogether probable that the board of control, in releasing the money necessary to pay the purchase price of this property, did so under the assumption that the state was to get a fee simple title to the property, free and clear of all encumbrances and reservations of any kind. The same observation may perhaps be made with respect to the contract held by Taylor and Miller for the removal of timber from said lands.

Upon examination of the encumbrance estimate No. 139, I find that the same has been properly executed and approved and that there is a sufficient balance in the appropriation account to pay the purchase price of this property, which is the sum of \$1,350.00. It is likewise noted that the purchase of this property was approved by the board of control under date of June 9, 1930.

I am herewith returning to you said abstract of title, warranty deed, encumbrance estimate No. 139, controlling board certificate and other files relating to the purchase of his property.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

2474.

INHERITANCE TAX—METHODS OF DETERMINING RATE—PREVALENT ASSUMPTION IN LINE OF SUCCESSION.

*SYLLABUS:*

*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 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.*

COLUMBUS, OHIO, October 22, 1930.

HON. MICHAEL B. UNDERWOOD, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

"Recently Frank L. Damon, of Kenton, died, leaving a widow and adopted daughter.

Mary W. Damon, widow, received \$17,172.92 less \$5,000.00 exemption leaving \$12,172.92 for inheritance tax, which was \$121.73; Helen Caroline Damon, adopted daughter, received \$23,073.97 less \$3,500.00 exemption leaving \$19,573.97 for inheritance tax, which was \$195.74. As far as these two items are concerned, there is no dispute.

To Warren D. Oakes, a nephew, \$1,092.81 less \$500.00 exemption leaving \$592.81 for inheritance tax, which was \$29.64; also Charles Stanley Oakes, a grand nephew, was left \$1,092.81 and no exemption, leaving \$1,092.81 for inheritance tax, which was \$76.50; also Mary Goode, a niece, was left \$1,092.81 less \$500.00 exemption leaving \$592.81 for inheritance tax, which was \$29.64.

The last three items of \$29.64, \$76.50 and \$29.64 are in dispute.

Warren D. Oakes, a nephew, and Charles Stanley Oakes, a grand nephew, and Mary Goode, the niece, are to receive their bequests providing the adopted daughter, Helen C. Damon dies without children. In the event that she marries and has children, according to the terms of the will she is to inherit what they are to receive. These several amounts are to be held in trust.

Is it proper to charge the total amount of \$453.25, which includes the tax on these last three items against the estate before distribution, or how should it be charged?

This matter is not in litigation, it is simply a question of paying the inheritance tax on these different bequests."

From a consideration of the provisions of the last will and testament of Frank L. Damon, mentioned in your communication, it appears that the successions of Warren D. Oakes, William H. Oakes and Mary Goode, nephews and nieces of the testator are contingent upon the death of Helen Caroline Damon without leaving child or children, surviving her, or if she die, leaving child or children that all of such children die before any of them attains the age of twenty-five years. These provisions of the will suggest the application of the provisions of Section 5343, General Code.

Touching this point, the Supreme Court of this State, in its opinion in the case Section 5343 does relate to estates or interests in which there is no present fixed right, of *Wonderly vs. Tax Commission*, 112 O. S., 233, 246, said: "We are of opinion that but in which such may be created by the happening of a future uncertain contingency or condition." Said Section 5343, General Code, provides 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 pro-

visions of this chapter, without interest; and the executor or trustee shall immediately upon the happening of such contingencies or conditions apply to the probate court of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested parties, for an order modifying the temporary order of said probate court so as to provide for a final assessment and determination of the taxes in accordance with such ultimate succession. Such refunder shall be made in the manner provided by Section 5339 of the General Code."

The facts here presented likewise suggest a consideration of the question as to whether the provisions of Section 5336, General Code, apply exempting said successions from an assessment of inheritance taxes until the named beneficiaries shall come into actual possession or enjoyment of such successions. As to this, it is to be observed that although the successions to the nephews and the niece of the testator above named, are dependent upon the happening of a contingency or future event, and such successions were not, therefore, vested at the death of the decedent, yet it does not appear that by reason of this character of such successions the actual market value of such successions cannot be ascertained at the time of the death of the testator. It must be held, therefore, that the provisions of Section 5336, General Code, do not apply, to the question here presented. *Tax Commission vs. Oswald, Executrix*, 109 O. S. 36; *Wonderly vs. Tax Commission*, supra.

It does not appear from your communication whether the inheritance taxes assessed against the successions of the nephews and niece of the testator above named were so assessed by temporary order, subject to refunders in the manner provided by Section 5343, General Code, or otherwise. It is apparent from the provisions of this section of the General Code, that the assessments of inheritance taxes on said successions should have been made by temporary order, subject to refunders and not by permanent order. See *Tax Commission of Ohio vs. Trust & Savings Bank*, 24 O. A., 331.

In this connection, it is further suggested that the order imposing the inheritance taxes on the successions of the two nephews and the niece of the testator should recite that said taxes are imposed under the provisions of Section 5343, General Code, at the highest possible rate on the assumption that Helen Caroline Damon will die without leaving 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. Obviously, these recitals should go into the order for the benefit of the persons who may hereafter seek a refunder of said taxes in the event that said nephews and niece do not come into possession of their contingent interests under this last will and testament.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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2475.

APPROVAL, BONDS OF PARMA VILLAGE SCHOOL DISTRICT, CUYA-HOGA COUNTY, OHIO—\$37,000.00.

COLUMBUS, OHIO, October 22, 1930.

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