a treasurer for the ordinary purposes of said board, such officer is not the legal recipient of the fund raised by the levy under Section 7639 G. C., and since Section 2689 G. C., requires payment of such a fund by the county treasurer to the treasurer or proper officer of the taxing district it follows that there is no authority in the auditor to directly contract with a depository for the deposit of said fund. The conclusion reached obviously answers your fifth question in the negative.

Answer to your sixth question is thought to be in the affirmative, since the power delegated to the library trustees under section 7637 G. C., to own and control property in its own name, carries with it the implied power to do those things necessary for the proper use and preservation of such property, and it is presumed in many instances the employment of persons in capacities other than librarians and assistants, would be a necessary exercise of this implied power. It would follow then that your sixth question should be answered in the affirmative.

It is believed question seven may be briefly answered in the affirmative since no reasons are stated tending to show any incompatibility between the two offices, and no reason can be seen from your general statement why the duties of a librarian may not be joined with those of a treasurer, should the library trustees see fit to combine such offices.

Similar reasoning concludes an affirmative answer to your eighth question.

Relative to your ninth question it has been previously indicated that while the board of library trustees may select a treasurer for certain lawful purposes, this officer in the capacity of treasurer is not the treasurer of the school district. The clerk of the board of education, however, is the treasurer, and proper officer of the taxing district, and apparently is the lawful authority to receive from the county treasurer the library fund raised by the levy made under 7639 G. C,, from which it follows that the Clerk of the Board of Education is the treasurer of the library fund for the purpose at least of depositing the same as required by law with the public depository, and after this act has been consummated the depository in a sense becomes the custodian or treasurer of the library fund, paying the same out upon proper order from the library trustees.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3793.

INHERITANCE TAX LAW—JOINT ACCOUNT CREATED IN 1902 IN NEW YORK WITH CERTAIN TRUST COMPANY IN CERTAIN SECURITIES INCLUDING STOCKS OF OHIO CORPORATIONS FOR C. A. S. AND E. B. S. AND SURVIVOR OF THEM AS JOINT TENANTS—C. A. S. DIED IN 1921—TAXATION.

C. A. S. and E. B. S. both of New York, created in 1902 *a joint account with a certain trust company in that state in certain securities, including stocks of Ohio corporations for "C. A. S. and E. B. S. and the survivor of them as joint tenants." C. A. S. died in* 1921.

HELD, assuming that the property was in reality the joint property of C. A. S. and E. B. S., a taxable succession in E. B. S. to the extent of half the value of

the Ohio securities included in said account occurred at the death of C. A. S. by virtue of paragraph 5 of section 5332 of the General Code.

COLUMBUS, OHIO, December 14, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Enclosed herewith please find your file papers in the matter of the Estate of Charles A. Spofford.

The Commission has requested the opinion of this department on the question raised by these papers, which may be stated as follows:

> At the time of the death of the decedent a certain trust company held as custodian certain securities, some of which were those of corporations organized under the laws of Ohio, for the account of C. A. S. and E. B. S. and the survivor of them as joint tenants. The account was established several years prior to the passage of the present inheritance tax law of Ohio. C. A. S. died testate on the 5th day of March, 1921. Does any tax liability arise by virtue of the death of C. A. S. with respect to any enlargement of the right, title and interest of E. B. S. in and to the securities in this joint account accruing at the death of C. A. S.?

Consistently with previous opinions of this department, certain assumption must be made in order to open the way to a consideration of the most serious law question which might be presented by these facts.

The attached will of C. A. S. contains a residuary clause under which would pass all property in this account if as a matter of fact the actual ownership of the property therein was vested in the decedent at the time of his death; while on the other hand, if the property in the joint account was actually fully vested in E. B. S. at the time of the death of C. A. S. then obviously, there was nothing upon which the inheritance tax statute could operate. It is the holding of the New York courts that the form of a joint account of this nature affords presumptive evidence of actual ownership.

> Matter of Maguire, 99 Misc., 466;
> Matter of Buchanan, 171 N. Y. Supp., 708.

The assumption that has been made therefore is that the property in the joint account was really owned jointly by C. A. S. and E. B. S. As intimated in other opinions, such a result is not possible in Ohio where joint tenancy is not recognized by the law. The arrangement would witness a title analogous to an estate in common with the remainder to the survivor. Such an estate would have fully vested prior to the enactment of the inheritance tax law of 1919 but no question as to the application of that law thereto need be considered.

In New York, however, joint estates in intangible property of this kind are apparently recognized.

> Matter of Dalsimer, 153 N. Y. Supp., 58;
> Matter of Dana, 149 N. Y. Supp., 417.

See also New York cases hereinafter cited.

The rights of survivorship incident thereto and the accretion resulting therefrom were not taxable under the New York law prior to 1915. At that time how-

ever, New York adopted an amendment substantially identical with paragraph 5 of section 5332 of the General code. It is not necessary to quote the two sections for an examination of both of them will establish their substantial verbal identity. Under this New York law the question at once raised was as to whether a tax could be imposed in case the joint ownership had been created prior to the adoption of the amendment. The answer in the New York courts was in the affirmative. The following is quoted from Matter of McKelway, 221 N. Y. 15:

> "But joint ownership in personal property may be severed by the act of one in disposing of his interest. If the interest of one joint owner passes to a third party he and the other joint tenant become tenants in common. The doctrine of the survivorship applies only if the jointure is not severed. (Williams on Personal Property, pp. 302-306). The undivided half of this joint property which Mr. McKelway might have effectually disposed of at any time during his life never passed into the absolute ownership of his wife until her husband's death. A transfer tax thereon does not diminish the value of a vested estate and is free from the objections to a tax on vested remainders and reversions as set forth in matter of Pell, 171 N. Y. 48; 63 N. E. 789, or to a tax on contingent remainders as set forth in Matter of Lansing, supra.
>
> As to the one-half which Mrs. McKelway herself owned and had the right to dispose of, the rule of the Pell case must govern. She gained nothing in regard thereto by the death of her husband except as the *jus accrescendi* eliminated his interest. The right of the survivor of two joint tenants of personal property to the exclusive ownership thereof may be deemed a taxable transfer of one-half of the joint property but not to the whole. It is taxable only to the extent of the beneficial interest arising by survivorship, which is, as we have seen, the accruer by survivorship of the whole instead of the half. To this extent it was a property right fully acquired only on survivorship, analogous to an interest created by a power of appointment under a will executed prior to the enactment of the law taxing transfers, and, therefore, one that could be cutdown by the imposition of an excise tax after the joint ownership began. (Matter of Vanderbilt, 50 App. Div. 246; 63 Supp. 1079; 163 N. Y. 597.) The imposition of such a tax violates no contract for neither joint tenant agrees not to terminate the joint tenancy. Mrs. McKelway had no contract with her husband as to the joint property which was not as ambulatory as the will to the last moment of Mr. McKelway's life and, for the purposes of taxation, she is deemed to have acquired his interest in the joint property by his death."

In other words, the court held that because of the existence of the right of severance of the jointure as an incident to a joint tenancy the interest of the survivor in half the property could not be regarded as vested in the constitutional sense until the death of the other joint tenant without having severed the jointure.

The court thus held that the New York statute applied in cases where the joint tenancy had been created prior to the enactment thereof, and that so construed it was constitutional. See also Matter of Dolbeer, 226 N. Y. (Memorandum opinion.) In this case it was held that under the terms of the New York statute the accrual of the right of survivorship to the joint account created subsequent to the passage of the statute was taxable on the basis of the *value of the whole*. The following is quoted from that decision:

"In Matter of McKelway, 221 N. Y. 15, it was held that even when the joint account was created prior to the adoption of the statute, the transfer by survivorship was taxable to the extent of one-half the joint property. When the joint account is created *subsequent* to the adoption of the statute, the privilege of acquiring the entire property by the right of succession may be subjected to the tax on the method of acquisition. (Matter of Vanderbilt, 172 N. Y. 69, 73; Matter of Keeney, 194 N. Y. 281; 222 U. S. 525.) The right to take property by survivorship is the creation of law upon which the State may impose conditions (Matter of Dows, 167 N. Y. 227; Matter of White, 208 N. Y. 64, 67), if no vested or contract rights are thereby violated."

It does not appear that any of the property in question here was placed into the joint account after June 5, 1919. Therefore the principles of the McKelway case apply if the Ohio statute is to receive the same interpretation as the New York statute. It is believed that such interpretation must be given to the Ohio statute.

As stated in the opinions referred to, this part of the Ohio statute could have been passed for no other purpose than to cover interests or estates existing under the laws of other states, for Ohio does not recognize any joint tenancy. The case is therefore distinguishable from the one considered in Opinions of the Attorney General for the year 1920, Vol. 1, page 473, which concerned Ohio property. The New York decisions are therefore controlling. The Ohio statute expressly provides that the accrual of the right by the death of the one joint tenant is to be deemed a taxable succession in the conventional sense, the saving clause of the act being section 4 thereof, providing that the act itself shall not affect successions taking place prior to its accrual, but that all successions occurring subsequent thereto shall be affected by and taxable under it, except in certain cases which do not apply here. Inasmuch as it is the death of the joint tenant and not the creation of the joint estate in contemplation of death that is made a taxable succession, it is clear that the case is within the express terms of the statute.

For the foregoing reasons, it is the opinion of this department that to the extent of half the value only of the property held in the joint account and upon the assumptions of fact above made, the interest of E. B. S. therein arising at the death of C. A. S. is taxable in Ohio so far as stocks in Ohio corporations are concerned.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3794.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENT, I. C. H. NO. 23, LICKING-KNOX COUNTY.

COLUMBUS, OHIO, December 14, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.