3236.

APPROVAL, CONTRACT OF STATE OF OHIO WITH E. ELFORD, COLUMBUS, OHIO, FOR GENERAL CONTRACT WORK, DORMITORY FOR COLORED GIRLS, OHIO STATE REFORMATORY FOR WOMEN, MARYSVILLE, AT A COST OF $59,600—SURETY BOND, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

COLUMBUS, OHIO, June 19, 1922.

HON. LEON C. HERRICK, Director, Department of Highways and Public Works, *Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval a contract (five copies) between The State of Ohio, acting by The Department of Highways and Public Works, and E. Elford, of Columbus, Ohio. This contract is for all work embraced under the general contract for a dormitory for colored girls, at the Ohio State Reformatory for Women, at Marysville, Ohio, and calls for an expenditure of fifty-nine thousand six hundred dollars ($59,600.00).

Accompanying said contract is a bond to insure faithful performance, executed by The Fidelity and Casualty Company of New York.

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return same to you herewith, together with all other data submitted to me in this connection.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3237.

INHERITANCE TAX LAW—WHERE TESTATOR BY WILL CREATED POWER OF APPOINTMENT WITH RESPECT TO OHIO PROPERTY, PROVIDING THAT IF POWER NOT EXERCISED BY DONEE PROPERTY SHALL PASS TO NON-EXEMPT CORPORATION—HOW TAXED.

Opinion No. 497 for the year 1919 (Opinions, Attorney-General, 1919, Vol. I, page 836) adhered to and supplemented.

Where a testator by his will created a power of appointment with respect to Ohio property, providing that if the power is not exercised by the donee the property shall pass to a non-exempt corporation, it is improper to impose immediate taxation at the highest possible rate on the interest subject to the power, or to enter an order of postponement of the assessment of the contingent succession in the estate of such testator; the proper disposition of the case is a determination that the property covered by the power of appointment is not taxable in the estate of the testator-donor, as paragraph 4 of section 5332 of the General Code makes the succession arising by virtue either of the exercise or of the non-exercise of the power, one arising in the estate of the donee of the power.

COLUMBUS, OHIO, June 20, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Some time ago the Commission requested this department to reconsider Opinion No. 497 for the year 1919, and particularly the following statement in that opinion which dealt with paragraph 4 of section 5332 of the General Code:

> "This is only half, however, of the intent embodied in the paragraph; for the paragraph aims to clear up what would otherwise be a doubtful question as to the application of the tax to an estate passing under a power of the kind described or because of failure to exercise it. You will observe that it is not the will of the testator (or grantor—for such powers can be created by deed as well as by will) that has the effect of ultimately vesting the estate in the appointee or appointees, but it is the concurring will of the testator or grantor, as the donor of the power, and the donee of the power that brings about this result. This question becomes particularly difficult of solution when (as is very frequently the case) appointment is made by the will of the donee of the power, as in the second case above supposed. There the property passes from the original donor to the ultimate successor as the cumulative result of two wills—one that of the donor, and the other that of the donee of the power. One possible result of such a situation in the absence of a specific statute governing the case might be the double taxation of the succession—once as a contingent remainder arising under the first will, and again as a fee arising under the second will. To avoid this the paragraph provides that such a transaction shall be deemed a succession taking place at the time of the exercise of the power of appointment. Similarly, as to failure to exercise the power of appointment. The law provides that the resultant devolution of estates shall be regarded as taking place as the result of the conduct—that is to say the will or intent—of the donee of the power rather than as the result of the act of the original donor. Exhaustive notes illustrating the holdings of the courts on such questions, both under statutes of this kind and under the common law, as affecting inheritance taxes are found in 33 L. R. A. (N. S.) 236; and L. R. A. 1918-D, 339."

The statutory provision requiring interpretation may be quoted, as follows:

> "4. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property heretofore or hereafter made, such appointment when made shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by said donee by will; and whenever any such person or corporation possessing such power of appointment shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a succession taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as if the persons, institutions or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise the same, taking effect at the time of such omission or failure."

It will be observed that this section, though it does require the taxation of the succession occurring by and through the exercise or failure to exercise of a power of appointment, does not specifically provide against the taxation of the interest covered by the power of appointment under section 5343 of the General Code as a contingent estate arising under the will of the donor of the power if the power was created by will. To that extent the language above quoted from the former opinion rests upon inference rather than the express language of this particular paragraph.

If there were no statute like paragraph 4 of section 5332, the result of a transaction of the kind to which it refers would undoubtedly be that the succession arising by virtue of the exercise or non-exercise of the power would be considered to have taken place in the estate of the donor of the power.

Emmons vs. Shaw, 171 Mass. 410;
Walker vs. Treasurer, 221 Mass. 600;
Hill vs. Treasurer (Mass.) 118 N. E. 891;
Commonwealth vs. Williams, 13 Pa. 29.

So that unless paragraph 4 of section 5332 be looked upon as a substitute for this rule instead of as cumulative of it, double taxation will result.

Though it has been hereinbefore said that paragraph 4 says nothing definite on the subject in hand, yet it does provide that the succession arising in case of the exercise of, and in case of the failure to exercise the power, shall be deemed successions taxable "in the same manner as if the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by said donee by will." This means, if it means anything, that for inheritance tax purposes the succession shall be deemed to have taken place in the estate of the donee, even though the power is not exercised by will, and it seems reasonable and just to assume that the legislature meant—as it seems to have come very near saying—that, conversely, these events should not constitute successions in the estate of the donor.

But this is the very construction that has been given to similar statutes where the question has been raised. See

In re Walroth, 72 N. Y. Supp. 984;
In re Tucker, 59 N. Y. Supp. 699;
In re Hull, 97 N. Y. Supp. 701;
In re Howe, 83 N. Y. Supp. 825; 136 N. Y. 570;
(Discussing the application of the highest possible rate section.)
In re Dimock, 168 N. Y. Supp 584;
Attorney-General vs. Thorpe (Mass.) 119 N. E. 171.

Accordingly, the former opinion is adhered to.

The Commission's recent letter also states a specific case as follows:

"Our attention has now been called to a will by which a power of appointment is vested in a son of the testator which will also contains a provision to the effect that if such son shall not exercise the power so vested in him the property shall pass to an institution of the sort included in paragraph 3 of section 5335.

The question now arises as to the duty of the court under section 5343.

Under the will containing such a provision over as is outlined above, should tax be determined in the proceeding in the estate of the testator and

at the same time other inheritance taxes are being adjudicated thereon? Or, should the entry in the original estate find that as to the succession covered by the power of appointment, no adjudication could then be made and let the tax be determined in a proceeding to be hereafter instituted on the estate of the son?"

Consistently with the above general statements, it is the opinion of this department that no temporary tax under section 5343 should be imposed on the succession. The proper form of entry is simply to state that no taxable succession takes place with respect to such remainder rather than to postpone the taxation of the successions in the estate.

These conclusions require some elaboration. For if a similar question had arisen in New York the assessment would probably be postponed or made according to the highest possible rate instead of the succession being held free from tax in the estate of the donor. Though the Ohio statute is in almost every other respect substantially similar to that of New York, this is one of the instances in which it differs materially from the New York statute. The discussion of the difference in language between the two and the practical difference in the respective results to be reached under them can perhaps be best developed by a short historical statement.

In 1897 New York amended its transfer tax by inserting in section 220 of chapter 284, which was chapter 908 of the laws of 1896, certain paragraphs, one of which was almost *verbatim* the same as paragraph 4 of section 5332 of the present Ohio law above quoted. Like the Ohio statute, it taxed as a succession from the donee of the power, the creation of interests arising under all of the following alternative conditions:

(1) Where the power was created before the amendment went into effect.

(2) Where the power was created after the amendment went into effect.

(3) Where the power was exercised.

(4) Where the power was not exercised.

The validity of this section was attacked as retroactive in so far as it applied to cases falling at the same time within the first and fourth classes; that is, there the power was conferred by an instrument antedating in legal effect the passage of the amendment and the power was not exercised by the donee. This contention was upheld in Matter of Lansing, 182 N. Y. 238, relying upon Matter of Pell, 171 N. Y. 48. This case was followed in several later decisions unreported by the Court of Appeals, and in some later reported cases.

Matter of Spencer, 190 N. Y. 517;
Matter of Lewis, 94 N. Y. 550.

But in all these decisions where the question was raised, it was held, while that statute was in force, that where the power was exercised, though created prior to the passage of the act, its exercise was taxable under the amendment. Following these decisions New York amended her statute so as to be consistent with the cases. As now in force, it provides as follows:

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or

after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

In short, this statute merely declared the result of the decisions of the New York courts under the earlier statute.

In this condition of the case law and statutory law in New York, it was held that where the donee of the power so exercised it as to vest the interests subject thereto in the same persons and in the same manner as in whom and in which they would have vested if the power had not been exercised, the ultimate takers could elect to take under the instrument creating the power—i. e., directly from the donor—instead of under the exercise of the power. Matter of Spencer, supra; Matter of Lewis, supra; though if the persons were the same but the devolution among them is not precisely the same as it would have been had the power not been exercised, this rule did not apply. Matter of Cooksey, 182 N. Y. 92.

As a result of these decisions, then, the practical effect was, and under the present New York statute still is, apparently, that it cannot be told at the time of the creation of the power by will whether successions in the estate of the testator-donor will take place or not; and even after the exercise of the power by the donee this question remains undecided until the ultimate successors have elected, in case the exercise of the power produces a result identical with that which would have been produced by its non-exercise. But if the exercise of the power produces a different result, then there is no tax in the estate of the donor if the power was testamentary and one is to be determined as in the estate of the donee.

From all the foregoing it is apparent that we must determine whether we are to apply to the Ohio statute, which is identical with the New York statute held unconstitutional by the New York courts, the decision made and principles laid down by those courts. In order to answer this question we must trace the history of this New York statutory language outside of that state, for the statute was widely copied before the New York courts had held it unconstitutional; and after the New York decisions the courts of other states were confronted with the same question which had been decided in New York. Thus, in Minot vs. Stevens, 207 Mass. 588, extensively annotated in 33 L. R. A. (N. S.) 236, the Supreme Judicial Court of Massachusetts was asked on the authority of Matter of Lansing, supra, to strike down as unconstitutional the relevant part of the Massachusetts statute of 1909 providing as follows:

"Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September 1, 1907, such appointment, when made, shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter 563, of the acts of the year 1907, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will. And whenever any person possessing such a power of appointment, so derived, shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter 563 of the acts of the year 1907, and all acts in amendment thereof and in in addition thereto, shall be deemed to take place to the extent of such omis-

sion or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

It will be observed that this statute is wholly retrospective if any part of it is retrospective; that is to say, it applies only to powers arising prior to the taking effect of the law.

In an opinion which commends itself for its careful reasoning, and which relies so far as any federal question is concerned upon Chandler vs. Kelsey, 205 U. S. 466, and Moffit vs. Kelly, 218 U. S. 400, the court refused to follow In re Lansing and sustained the constitutionality of the statute above quoted. This decision is followed in Burnham vs. Treasurer, 212 Mass 165 and Montague vs. State, 163 Wis. 58. Messrs. Gleason and Otis in their work on Inheritance Taxes, page 176, state that the original New York statute is in force in Colorado, Connecticut, Idaho, Massachusetts, Minnesota, Rhode Island, South Dakota and Wisconsin, to which we may add Ohio; and save in New York, it does not seem to have been successfully questioned.

It will thus be seen that the Ohio legislature in 1919 having these conflicting decisions before it, evidently cast its lot with the Massachusetts and Wisconsin courts; and for administrative purposes there is of course nothing for the Commission or this department to do excepting to assume that the Ohio statute is wholly constitutional, and applicable strictly in accordance with its terms.

However, another point remains to be considered. This state has a specific constitutional inhibition against the enactment of retroactive laws, and in so far as any question might be involved with respect to the application of the statute to the exercise of powers created by instruments taking effect prior to June 5, 1919 (which does not appear in the Commission's letter), the application of this constitutional provision might have to be considered. In the absence of any specific question opinion will of course have to be reserved. It may be said, however, that the uniform construction of the Ohio constitutional provision referred to has been that it protects vested rights only; Article II, section 28 of the Constitution of Ohio; Rairdon vs. Holden, 15 O. S. 207; whereas the leading Massachusetts case above referred to is expressly predicated upon the following reasoning:

"The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. * * * His relation to it is very much like that of an owner. * * * Those who would take in default of an appointment have only an interest which is contingent upon the conduct of the donee of the power, who can make it vest in them absolutely in possession, or can defeat it altogether. * * * After a will or deed containing such a power has taken effect, and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later? * * * The cases above cited, * * * show that the succession is not so vested in those who will take if the power is not exercised, that it may not go to the appointee through the exercise of the power of appointment.

until the time comes for the final determination, it is not established as belonging to anyone. * * *

We think it is in the power of the legislature to say, in reference to succession in possession after the death of the persons whose decease is awaited, that property so held is not vested in anybody, and that when it vests in possession through a proper disposition of it, which is dependent upon the will and conduct of the donee, a succession tax shall be imposed."

The contrary argument is, of course, that those who would take in the absence of the exercise of the power of appointment have interests which are vested subject to be divested by the exercise of the power of appointment; and a very plausible argument can be made to sustain this view, especially in the light of the Ohio decisions declaring that the policy of the law is to favor the vesting of estates, which policy is, of course, violated in a sense by a holding that remainders subject to a power of appointment are not vested anywhere until the power is exercised or not.

Whatever may be the result should any question arise as to the application of this section to the exercise of the power created by an instrument taking effect prior to June 5, 1919, it is the opinion of this department that the statute clearly qualifies the right to create powers by instruments taking effect after that date; so that in the case to which the Commission refers, there can be no doubt that the proper determination be made by the Probate Court which is called upon to determine the tax in the estate of the donor, is to the effect that the remainder subject to powers is no part of the estate of the donor for inheritance tax purposes.

The principles above developed also dispose of the question as to the application of section 5343 of the General Code. That section is copied from the New York law. It 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 provisions 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."

In New York, this section was construed as applicable only when the ultimate

taxation to which it looks forward, and in security for which the temporary tax is exacted, is to take place, or may take place, in the estate of the person successions from whom are being taxed.

Matter of Howe, 83 N. Y. Supp. 825; 176 N. Y. 570;
Matter of Burgess, 204 N. Y. 265;
Matter of Clarke, 78 N. Y. Supp. 869.

But because of the decisions commented upon in the earlier portion of this opinion, it came to be held that the *possibility* that the power might not be exercised, or that the effect of its exercise might be waived by beneficiaries entitled to the estate covered by it in the absence of its exercise, was a contingency the happening of which might give rise to successions in the estate of the donor; so that this possibility should be taxed immediately at the highest possible rate. Matter of Burgess, supra.

But in Ohio, the statute, assumed to be constitutional, makes the estate subject to a power always a succession in the estate of the donee and never a succession in that of the donor. That being the case, the authority of the earlier New York decisions is sufficient to support the conclusion that no tax under section 5343 is to be assessed. The section commences with a condition implicit in the words "When, upon any succession," and this condition is not satisfied because there is no "succession" in the estate under determination.

In a letter accompanying the formal request for opinion the Commission states that apprehension is felt in some quarters lest successions to which paragraph 4 of section 5332 is applicable may escape inheritance taxation, especially where the donor and the donee of the power are both non-residents. This apprehension may be well founded on practical grounds. Legally, however, there should be no fear, as the question is to be determined when it arises in the estate of the donee of the power; and if at that time the property is located in Ohio, it will be taxable. State vs. Probate Court, 124 Minn. 508; In re Warden, 157 N. Y. Supp. 1011; and Walter vs. Treasurer, 221 Mass. 600.

Of course, where the property consists of intangibles and the donor was a resident of Ohio who created the power by will and vested it in a donee who is a non-resident of Ohio, the result is that the succession does escape the Ohio inheritance tax; but conversely if the donor of the power with respect to similar property was a non-resident so that no Ohio taxation could be predicated upon any succession in his estate but the donee is a resident and exercises the power of appointment, especially by will, it will become a succession taxable in Ohio. Moreover, questions of this sort are most likely to be met with respect to real estate, as to which there is not so much danger of practical evasion or avoidance.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3238.

DELINQUENT REAL ESTATE—WHEN CERTIFIED TO AUDITOR OF STATE AS DELINQUENT—TAXES AND PENALTIES NOT PAID FOR FROM SUCCESSIVE YEARS—NON-PAYMENT OF ASSESSMENTS NOT SUFFICIENT—WHEN COUNTY TREASURER AUTHORIZED TO INCUR EXPENSES OF PREPARING ABSTRACT OF TITLE—WHEN TAXED AS COSTS—SEARCH TO DETERMINE PROPER PARTIES BY COUNTY TREASURER'S ASSISTANTS.