

the estimate of balances and receipts from all sources for each fund and shall determine the total appropriations that may be made therefrom."

It is apparent from the foregoing, that the budget commission may be compelled to make changes in the original estimates made and contained in the budget submitted by the several school districts in the county and other taxing subdivisions within the county. In the event this becomes necessary, which is no doubt frequently the case, the duties of the county auditor, as a member of the county budget commission, would conflict with the duties of the members of a city board of education within the county, who oftentimes are required to appear before the budget commission to insist upon the proper share of revenues for their district.

For these reasons, if for no other, it seems clear that the duties of a county auditor and those of the members of a city board of education within the county are conflicting, and therefore the two positions are incompatible.

I am, therefore, of the opinion in specific answer to your question, that the same person may not at the same time lawfully hold the position of member of a board of education of a city school district and deputy auditor of the county in which the school district is located.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3507.

INHERITANCE TAX LAW—HOW REFUND MADE TO THE EXECUTOR OF AN ESTATE OF A PORTION OF TAX MONEYS FROM SAID ESTATE CREDITED TO THE SINKING AND GENERAL FUNDS OF A VILLAGE.

SYLLABUS:

Where, after inheritance taxes on successions to the estate of a deceased person have been determined by the probate court and paid into the county treasury and have been distributed in the manner provided by section 5348-11, General Code, as enacted by the act of May 8, 1919, 108 O. L., Part I, 575, a refunder order for a part of such inheritance taxes has been made by the probate court and approved by the Tax Commission of Ohio, the executor of the estate of such deceased person, who paid such inheritance taxes, is entitled to the payment of such refunder order, to the full amount thereof, out of the undivided inheritance tax funds of the county; and upon such payment, the county auditor of the county is required to reimburse the undivided inheritance tax fund of the county, to the extent of the amount of such refunder chargeable against a village in the county receiving its share of the inheritance taxes so paid in, by executing his warrant in this amount in favor of the county treasurer against the undivided tax moneys in the county treasury; which general tax moneys of the county are to be reimbursed at the time of the next semi-annual settlement by deducting from the amount of general tax moneys which will be due to such village the amount paid from the undivided tax moneys of the county for and on account of that part of said inheritance tax refunder chargeable to such village.

COLUMBUS, OHIO, August 14, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of a communication from you enclosing a letter directed to you by the Solicitor of the village of Hudson, Ohio, in which letter there are submitted a number of questions arising out of an order made by the Probate Court of Summit County directing a refunder of inheritance taxes theretofore determined and paid by the executor of the estate of one James W. Ellsworth, deceased, who at the time of his death was a resident of said village.

The communication received by you from the Solicitor of the village of Hudson reads as follows:

“Some six or seven years ago James W. Ellsworth died as a resident of the Village of Hudson, Summit County, Ohio. In the settling of his estate the inheritance tax was determined through the Probate Court of Summit County, Ohio and paid by the Executor of the Estate. Thereupon, one-half of said tax was distributed to the Village of Hudson, Ohio and one-half of said Village's share was put into the Village Sinking Fund, while the other half of said Village's share was put into the General Fund. The County Budget Commission insisted that this excess sum in the General Fund must be spent by the Village immediately and taxes reduced in said Village accordingly. This has been done and the money in the General Fund has been exhausted. The money in the Sinking Fund is still intact, for the most part.

Throughout these years, since the death of said James W. Ellsworth, deceased, the representatives of his estate have been litigating in the Federal Courts concerning the inheritance tax against said estate and have been finally compelled to pay the bulk of the tax claim by the Government, together with certain foreign and state taxes, which have diminished the amount of the estate inherited. Recently, these representatives of the estate have come into the Probate Court of this county again and secured there an amended entry modifying the former order as to inheritance taxes and directing a refund. We are enclosing herewith a copy of this amended Journal Entry. You will note that this provides for a refunder in the sum of \$69,011.55. The estate claims that one-half of this sum is due from the County and State and the other half is due from the Village of Hudson. We understand that the County has paid back its alleged half.

There is still in question the one-half claimed from the Village of Hudson, Ohio, which amounts to \$34,505.78. There is a sufficient amount in the Sinking Fund to pay the one-half of the Village's half of this refund, to-wit:—\$17,252.89. This could be accomplished by the sale of Ottawa County Bonds in the sum of \$9500.00 and Shaker Heights Village Bonds in the sum of \$9000.00 held by the Sinking Fund, Trustees in said Village. There is no money with which to pay the one-half of the Village's share of said refunder out of the General Fund, said fund being at present quite inadequate for the general running expenses of the Village. Will you please advise the Village officials concerning the following questions:—

1. Is the Village liable for the payment of one-half of this refunder?

2. Can the money in the Sinking Fund be applied in payment of this refunder ordered by the Probate Court?
3. If said money in the Sinking Fund can be applied in payment of the half of the Village's share of the refunder, will a suit on behalf of the estate and against the Village be necessary to justify said payment?
4. How can the half of the Village's portion of said refunder, which went into the General Fund of the Village, be paid by the Village, if the Village is liable for any part of said refunder?
5. How can a Village, or other political subdivision, protect itself against such a condition as the Village of Hudson now finds itself?

We will appreciate your careful direction in this matter and have asked the foregoing questions merely as suggestive of the information desired and will welcome any further suggestions which you may give us. It might be well to add that the Village of Hudson is a small Village with a small income and that the burden which this refunder places upon said Village, if the Village is liable therefor, is of serious moment because of the smallness of the municipality. Even if bonds should be issued by said Village to pay a large judgment and be spread over a period of five years, it would take by far the greatest part of the present income of said Village to pay said bonds alone out of the General Fund."

The statutory provisions governing the distribution of inheritance taxes at the time of the death of said James W. Ellsworth were those of section 5348-11, General Code, as enacted by the act of May 8, 1919, 108 O. L., Part I, 575. This section of the General Code reads as follows:

"Fifty per centum of the gross amount of any taxes levied and paid under the provisions of this subdivision of this chapter shall be for the use of the municipal corporation or township in which the tax originates, and shall be credited, one-half to the sinking fund, if any, of such municipal corporation or township, and the residue to the general revenue fund thereof; the remainder of such taxes, after deducting the fees and costs charged against the proceeds thereof under this subdivision of this chapter, shall be for the use of the state, and shall be paid into the state treasury to the credit of the general revenue fund therein."

From the facts stated and recited in the communication of the Solicitor of the village of Hudson, and in the journal entry of the order of the Probate Court of Summit County, referred to therein, it appears that after the inheritance taxes on the successions under the last will and testament of James W. Ellsworth had been determined by said court, and had been paid by the executor of said estate, and distributed in the manner provided by section 5348-11, General Code, above quoted, the executor of said estate was required to pay a federal estate tax, as well as inheritance and transfer taxes, in other states of the Union and in foreign countries with respect to the transfer of property upon which inheritance taxes had previously been determined and paid in this state, in such amounts as to call for a refunder of inheritance taxes theretofore paid in this state, in the sum of \$69,011.55; which refunder in the amount stated was, I am advised, approved by the Tax Commission of Ohio.

In this situation, and with respect to the questions presented in the communication of the village solicitor, above referred to, the statutory provisions found in sections 5339 and 5348-12, General Code, are pertinent. These sections of the General Code read as follows:

Sec. 5339. "If any debts shall be proven against the general estate after the determination of inheritance tax has been made, an application for modification of such order of determination may be filed. Of this application and of the hearing thereof the tax commission shall have notice. If the court finds that the tax has not been paid and that the adjudication as made should be amended, it shall so order and shall furnish the commission with a copy of the entry of determination as amended. But if the tax as assessed has been paid the court shall make an order of refunder of such a part of the amount paid as is in excess of what should have been assessed. It shall further find the successors who are entitled to share in such refunder and the particular township or municipality against which such refunder is chargeable.

Exceptions may be filed to such order of refunder by the tax commission or by any interested party and appeal or error may be prosecuted as from an original determination of tax. On receipt by the tax commission of a copy of such refunding order it may make an order confirming the same and transmit it to the probate court, which order and a copy of the order of refunder shall be filed by the court with the county auditor who shall thereupon draw his warrant for the proper amount of refund which warrant shall be paid by the county treasurer out of any moneys in his hands to the credit of inheritance taxes. Similar proceedings for modification and refunder may be had in connection with any estate when after the assessment or payment of tax, a similar tax is assessed and paid in a foreign state or country on any of the successions taxed in this state.

If after the payment of any such tax in pursuance of an order fixing the same, such order, after due notice to the tax commission and opportunity to be heard, be modified or reversed, in a manner provided by law, by the probate court having jurisdiction or by any court to which the proceeding may have been taken on appeal or error, the commission on notice from the probate court having jurisdiction, shall, unless further proceedings on appeal or error are contemplated, direct a refunder of the proper amount to be made in the same manner as hereinbefore provided.

Where it shall be shown to the satisfaction of the probate court that deductions for debts were erroneously allowed or that assets exist which were not taken into consideration when tax was determined, such court may enter an order assessing the taxes upon the amount wrongfully or erroneously deducted or upon such omitted assets."

Sec. 5348-12. "At each semi-annual settlement provided for under this subdivision of this chapter, the county auditor shall certify to the auditor of any other county in which may be located in whole or in part, any municipal corporation or township, to which any part of the taxes collected under this subdivision of this chapter, and not previously accounted for, is due, a statement of the amount of such taxes due to each municipal corporation or township in such county entitled to share in the distribution thereof. The amount respectively due upon such settlement to each such municipal corporation or township

in the county in which the taxes are collected shall be paid upon the warrant of the county auditor to the treasurer or other proper officer of such municipal corporation or township. The amount of any refunder chargeable against any such municipal corporation or township at the time of making such settlement, shall be adjusted in determining the amount due to such municipal corporation or township at such settlement; provided, however, that if the municipal corporation or township against which such refunder is chargeable is not entitled to share in the fund to be distributed at such settlement, the county auditor shall draw his warrant for the amount thereof in favor of the county treasurer payable from any undivided general taxes in the possession of such treasurer, unless such municipal corporation or township is located in another county, in which event the county auditor shall issue a certificate for such amount to the auditor of the proper county, who shall draw a like warrant therefor payable from any undivided general taxes in the possession of the treasurer of such county; and in either case at the next semi-annual settlement of such undivided general taxes, the amount of such warrant shall be deducted from the distribution of taxes of such municipal corporation or township and charged against the proceeds of levies for the general revenue fund of such municipal corporation or township."

Under the provisions of section 5338, General Code, all inheritance taxes upon the determination thereof are required to be paid by the person or persons charged with the payment of said taxes, to the treasurer of the county who, it is assumed, keeps said money in a special undivided inheritance tax fund as is apparently authorized and required by section 5625-9, General Code, which provides, among other things, that each political subdivision shall establish a special fund for each class of revenue derived from a source other than the general property tax, which the law requires to be used for a particular purpose.

Section 5339, General Code, above quoted, provides that inheritance tax refunders may be ordered and paid in cases where, (1) debts shall be proven against the general estate after the determination of the inheritance tax has been made, and such tax has been paid; and (2) when after the assessment and payment of such tax, a similar tax is paid in a foreign state or country on any of the successions taxed in this state. As above noted, the refunder order made in the case here presented was predicated upon the subsequent payment by the executor of a federal estate tax on the estate of said James W. Ellsworth (which federal estate tax was a debt against said estate within the purview of the inheritance tax laws of this state) and upon inheritance and transfer taxes subsequently paid in other states and countries on transfers of property taxed in this state.

With respect to the payment of said refunder order, it will be noted that section 5339, General Code, provides that on receipt by the Tax Commission of copy of such refunder order such Tax Commission may make an order confirming the same and transmit it to the Probate Court, which order of the Tax Commission and a copy of the estate refunder order made by the Probate Court are to be filed by the court with the county auditor, "who shall thereupon draw his warrant for the proper amount of refund which warrant shall be paid by the county treasurer out of any moneys in his hands to the credit of inheritance taxes."

It thus appears that so far as the executor of the estate of James W. Ellsworth is concerned, he is entitled to payment on said refunder order, and to the

full amount thereof from the undivided inheritance tax fund in the hands of the Treasurer of Summit County.

Section 5348-12, General Code, above quoted, provides the manner in which the undivided inheritance tax fund of the county shall be reimbursed with respect to that part of any refunder paid therefrom which shall be chargeable against any municipal corporation or township. This section provides that at each semi-annual settlement, the time of which is fixed by section 2596, General Code; the amount of any refunder chargeable against any municipal corporation or township at the time of such settlement, shall be adjusted in determining the amount due to such municipal corporation or township, and that if the municipal corporation or township against which such refunder is chargeable is not entitled to share in the inheritance tax fund to be distributed at such settlement, the county auditor shall draw his warrant for the amount of the refunder chargeable against such municipal corporation or township "in favor of the county treasurer payable from any undivided general taxes in the possession of such treasurer". The section further provides that in such case "at the next semi-annual settlement of such undivided general taxes, the amount of such warrant shall be deducted from the distribution of taxes of such municipal corporation or township and charged against the proceeds of levies for the general revenue fund of such municipal corporation or township".

Applying the statutory provisions above quoted and discussed to the questions presented in the communication from the Solicitor of the village of Hudson, it follows that the executor of the estate of James W. Ellsworth, deceased, was and is entitled to the payment of the refunder order made in this case, to the full amount thereof, out of the undivided inheritance tax fund of Summit County; that upon such payment, the county auditor of said county is required to reimburse the undivided inheritance tax fund of such county, to the extent of the amount of said refunder chargeable against the village of Hudson, by executing his warrant in this amount in favor of the county treasurer against the undivided general tax moneys in the county treasury; which general tax moneys of the county are to be reimbursed at the time of the next semi-annual settlement by deducting from the amount of general tax moneys which will be due to the village of Hudson the amount paid from the undivided tax moneys of a county for and on account of that part of said inheritance tax refunder chargeable to said village.

Inasmuch as it does not appear that that part of the inheritance tax refunder chargeable to said village which is represented by an amount equal to one-half thereof now in the sinking fund of said village, is needed for the retirement of bonded indebtedness, it is suggested that if the refunder chargeable against said village, is paid in the manner above indicated, said moneys in the sinking fund, amounting to the sum of \$17,252.89, be transferred to the general fund of the village in the manner provided for by section 5625-13, General Code. It is to be noted, however, that this section only permits such transfer in the event that all indebtedness, interest and other obligations for the payment of which either the sinking fund or the bond retirement fund exists have been paid. Your communication is not clear on this point and accordingly the availability of the foregoing suggestion is contingent upon the existence of conditions just indicated.

The above discussion affords, I believe, sufficient answer to the questions presented in the communication, above quoted, other than the last question therein

stated, which question I do not deem within my province to discuss on the present occasion.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3508.

APPROVAL, ABSTRACT OF TITLE TO THREE TRACTS—DISAPPROVAL, TITLE TO ONE TRACT OF LAND OF DENNIS ALLGIER IN UNION TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, August 14, 1931.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication from your office submitting for my examination and approval an abstract of title, warranty deed, encumbrance estimate No. 818 and authorization of the board of control relating to the proposed purchase of four certain tracts of land in Union Township, Scioto County, Ohio, which tracts of land are owned and held of record by one Dennis Allgier and are more particularly described as follows:

“FIRST TRACT: Situate on the left hand fork of Pond Creek and beginning at a stone in the line of Edwin Knapp’s line and Henry M. Swords line; thence south from a stone in the bed of the creek 88 poles to a chestnut tree and stake. Thence east 28 poles to a black oak and one pine bush. Thence north 88 poles to a stone. Thence west 28 poles to the beginning near the Township Road. Containing 15 acres more or less, and being parts of Surveys Nos. 15830 and 13915.

SECOND TRACT: Beginning at a stone corner of John W. Swords land; thence west with William McClain’s line 33 poles to a stone; thence south 75 poles more or less to a gum tree on top of Buck Lick Ridge; thence east with Andrew J. Kirkendall’s line 33 poles more or less to a stone in John W. Sword’s line; thence north with said line 75 poles more or less to the beginning, containing 12 acres more or less.

THIRD TRACT: Being part of Survey Nos. 15830 and 15836 bounded as follows: Beginning on the top of Buck Lick Ridge and running south 37½ poles to a stone on the James O’Harah line; thence east 75 poles more or less to John W. Sword’s line; thence north 25 poles more or less to the top of Buck Lick Ridge; thence 75 poles more or less along the top of Buck Lick Ridge to the place of beginning containing 15 acres more or less.

FOURTH TRACT: Being two acres of land in Survey No. 14900, sold to D. Allgier on December 20, 1911, by the Auditor of Scioto County, Ohio at forfeited land sale.”

Upon examination of said abstract of title, I find a number of irregularities in the early history of the title to each of the first three tracts above described. However, on account of the great lapse of time since said irregularities occurred in the chain of title to these particular parcels of land, I feel that any exceptions predicated upon such irregularities may be safely waived. In this view,