

Commission under date of November 1, 1937, being Opinion No. 1418.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said county.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*

2504.

PROBATE JUDGE—FEE—INHERITANCE TAX PROCEEDING—FINDING—SECTION 5348-10a G. C.—ONLY ONE FEE MAY BE PAID IN PROCEEDING—FEES PAID SHALL BE IN LEGAL AMOUNT AND AUTHORIZED BY LAW—O. A. G. 1925, PAGE 208 OVERRULED WHERE INCONSISTENT HEREWITH.

*SYLLABUS:*

1. *A probate judge performs services which entitle him to draw a fee of five dollars in each inheritance tax proceeding in his court in which taxes are assessed and collected, and a fee of three dollars in each such proceeding in which no such tax is found due, when he makes an actual finding as a court, in the determination of an application pending before him, concerning whether or not inheritance taxes are due on a specific estate, under the provisions of Section 5348-10a, of the General Code.*

2. *Only one fee shall be paid to the probate judge in the determination of any inheritance tax proceeding pending in his court, regardless of whether or not there has been a change of the incumbent of the office during the period of time that such inheritance tax proceeding is pending.*

3. *When a determination has been made by a probate judge as to whether or not inheritance taxes are due or not due by an estate, as provided by Section 5345-4, of the General Code, and such determination is entered as a matter of record, then and in that event only, is a probate judge entitled to collect the fee provided by Section 5348-10a, of the General Code.*

4. *A fee shall be paid to the probate judge entitled thereto, in the determination of inheritance tax proceedings pending in his court in every instance, providing same is in the legal amount and is at the time authorized by law to be paid.*

*Opinion of the Attorney General, 1925, page 208, overruled in so far as inconsistent herewith.*

COLUMBUS, OHIO, May 24, 1938.

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

GENTLEMEN: This will acknowledge receipt of your letter of recent date in which you ask my opinion on the following:

"In several counties in the state our examiners have found that the probate judges have retained the fee provided for in Section 5348-10a, General Code, in inheritance tax proceedings in cases where the application to determine the tax was filed during the term of the judge's predecessor.

In such cases the judges contend they performed all of the services required by the inheritance tax law except the mere filing of the application, and are entitled to receive and retain such fees.

May we refer you to Opinion No. 2374, (Opinions of the Attorney General for 1925).

We request that you advise whether we should continue to follow this ruling in such cases; or do you desire to reconsider this question?"

Section 5348-10a, of the General Code of Ohio reads as follows:

"For services performed by him under the provisions of this chapter each probate judge shall be allowed a fee of five dollars in each inheritance tax proceeding in his court in which tax is assessed and collected and a fee of three dollars in each such proceeding in which no tax is found, which fees shall be allowed and paid to such judges as the other costs in such proceedings are paid but are to be retained by them personally as compensation for the performance by them of the additional duties imposed on them by this chapter. Provided always, however, that the amount paid to any probate judge under this section shall in no case exceed the sum of three thousand dollars in any one year."

In Opinions of the Attorney General for 1925, at page 208, the then Attorney General had under consideration certain questions which were propounded by your Bureau relative to the administration of the provisions of Section 5348-10a, of the General Code of Ohio, as it relates to the fees of probate judges to be charged in inheritance tax proceedings pending in his court. In that opinion the question was asked:

"In case a probate judge by reason of a vancancy came into office after the passage of the act and has been receiving for his own use the fees provided therein and his successor was elected, taking office on the 9th day of February, 1925, would such successor be entitled to receive and retain for his own use the fees in proceedings filed prior to February 9th, and pending but not determined on that date, or would the probate judge whose term expired February 9th be entitled to the fees?"

In the consideration of the above question by the then Attorney General, the following reasoning was adhered to:

"(a) One fee covers all services which may be performed in a given proceeding under the Inheritance Tax Law; it is a lump sum covering all services;

(b) There is no provision for apportioning the fee between two judges for services respectively performed in any one case;

(c) A probate judge in order to draw the prescribed fee must have performed all of the services in that particular case;

(d) Each case begins with the filing of the application to determine the tax.

Reasoning from the foregoing, it follows that:

(a) If the services are partly performed by a probate judge and finished by his successor, each of whom would have been entitled to the fee for the entire services, after February 9th, neither is entitled to the prescribed fee \* \* \*

As between two probate judges who would each be entitled to the fee if he had performed the entire service, neither is entitled to the fee for the partial performance of said services."

In Opinions of the Attorney General for 1921, at page 1027, wherein the then Attorney General had under consideration certain questions propounded by your department in regard to the interpretation to be placed on this same statute then in effect the following is found:

"The fee under the new law is expressly to be 'for services performed by him (the probate judge) under the provisions of this chapter.' This means that the fee attaches to any and all services of that character. *It could not have been the intention of the legislature to authorize the taxation and collection of two fees for the same services.* The principle to be applied is that the provisions of the new Section 5348-10a constitute a special rule in

regard to compensation for services in inheritance tax cases, and become an exception to the general provisions of the sections regulating the fees of probate judges as judicial and clerical officers.”

It should be noted that Section 5348-10a, *supra*, contains the statement:

“For services performed *by him* under the provisions of this chapter. *Each probate judge shall be allowed a fee of five dollars in each inheritance tax proceeding* in his court \* \* \*” (Italics the writer’s.)

In connection with the above, it should be noted that the term “in each inheritance tax proceeding” is used in describing the limitation that is to be placed on the fee to be paid the probate judge for services performed by him in the administration of inheritance tax laws which he is required by this chapter to administer. It should be further noted that the words, “for services performed by him” precede the words, “each probate judge.” This would seem to definitely establish that only one probate judge is referred to, in so far as the allowance of an inheritance tax fee is concerned.

In the interpretation of the phrase, “in each inheritance tax proceeding” it necessarily follows that some limitation shall be placed on just what is to be included within the meaning of the term “proceeding.” In Bouvier’s Law Dictionary, Vol. 3, page 2730, the term “proceeding” is defined to include the following:

“In its general acceptance, the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing them. It includes certified copies of pleadings in which the case was tried. *School District No. 49 vs. Cooper*, 44 Neb., 714, 62 N. W., 1084.”

Webster’s New International Dictionary defines the term “proceeding,” as follows:

“The course of procedure in an action at law; any step or act taken in conducting litigation.”

Webster’s 20th Century Dictionary defines the term “proceeding” as follows:

“In law, the course of steps or measures in the prosecution of actions as directed by the court; the performance of an act; an act to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right.”

Under the provisions of Section 5345-4, of the General Code, an executor, administrator or such other person or corporation as may be in possession of property, the succession to which is subject to inheritance taxes, are required to file an application for the determination of inheritance taxes upon the decedent's estate with the probate court having jurisdiction within a period of one year after the decedent's death. In event the executor or administrator or other person or corporation fails to file such application within one year of the decedent's death the Tax Commission of Ohio is authorized to execute and file an application for determination of inheritance taxes in such estate. This section then provides:

“And the tax shall be forthwith determined by the probate judge.”

In my opinion, the inheritance tax proceeding in a probate court is not a proceeding on which a probate judge is entitled to his inheritance tax fees until there is an actual determination made by the probate judge as to whether or not there is inheritance tax due on such estate succession. The filing of the application for determination of inheritance tax requires the performance of no services in so far as the official action of the probate court is concerned. It is only when he makes an actual determination as to whether or not the estate is subject to such taxes that he has performed services which will allow him a fee of five dollars in event taxes are assessed and collected, or a fee of three dollars in event no tax is found due.

Therefore, in specific answer to your inquiry it is my opinion that:

1. A probate judge performs services which entitle him to draw a fee of five dollars in each inheritance tax proceeding in his court in which taxes are assessed and collected, and a fee of three dollars in each such proceeding in which no such tax is found due, when he makes an actual finding as a court in the determination of an application pending before him concerning whether or not inheritance taxes are due on a specific estate, under the provisions of Section 5348-10a, of the General Code.

2. Only one fee shall be paid to the probate judge in the determination of any inheritance tax proceeding pending in his court, regardless of whether or not there has been a change of the incumbent of the office during the period of time that such inheritance tax proceeding is pending

3. When a determination has been made by a probate judge as to whether or not inheritance taxes are due or not due by an estate, as provided by Section 5345-4, of the General Code, and such determination is entered as a matter of record, then and in that event only, is a probate judge entitled to collect the fees provided by Section 5348-10a, of the General Code.

4. A fee shall be paid to the probate judge entitled thereto, in the determination of inheritance tax proceedings pending in his court in every instance, providing same is in the legal amount and is at the time authorized by law to be paid.

Opinion of the Attorney General, 1925, page 208, overruled in so far as inconsistent herewith.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

2505.

APPROVAL—BONDS, SHAKER HEIGHTS CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, \$1,000.00, PART OF ISSUE DATED NOVEMBER 1, 1930—OPINION No. 873, MAY 25, 1933, OVERRULED.

COLUMBUS, OHIO, May 24, 1938.

*Retirement Board, State Public School Employes Retirement System,  
Columbus, Ohio.*

GENTLEMEN :

RE: Bonds of Shaker Heights City School Dist., Cuyahoga County, Ohio, \$1,000.00.

I have examined the transcript relative to the above bonds purchased by you. These bonds comprise part of an issue of school building bonds, Series C, in the aggregate amount of \$1,040,500, dated November 1, 1930, bearing interest at the rate of  $4\frac{1}{2}\%$  per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said school district.