

such property as may be expressly exempted therefrom.' The exemption must be clear and expressly stated in the statute and must be such only as the above section of the Constitution authorizes to be exempted."

While it is provided in said Section 4759, General Code, that real property vested in any board of education shall be exempt from taxation, the exemption must be such only as the Constitution authorizes to be exempted. Paragraph two of the syllabus of said case provides that:

"The provision in Section 2, Article XII of the Constitution, that institutions 'used exclusively for charitable purposes * * * may by general laws be exempted from taxation' does not authorize the general assembly to exempt from taxation the property of benevolent organizations not used exclusively for charitable purposes."

The inevitable conclusion is that the provision in Section 2, Article XII of the Constitution, that "public school houses * * * may by general laws be exempted from taxation" does not authorize the General Assembly to exempt from taxation the property invested in by boards of education not used exclusively for any public purpose. The question presented is whether or not it may be said that, as a matter of law, property acquired for a future public use, to-wit, to be devoted for school purposes, when necessity exists, is in contemplation of law "used exclusively for a public purpose."

This is the identical question raised in the Hamilton County Common Pleas Court in the case of *Board of Education vs. Hess, Auditor*, and the court therein held that said property acquired by the board of education for future building purposes and not used for any public purpose, was in contemplation of law not used exclusively for any public purpose.

It is therefore my opinion, based upon said decision, that the board of education of the city school district of Cleveland is not entitled to have said property exempted from taxation.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1366.

INHERITANCE TAX—REFUNDER DOES NOT BEAR INTEREST—ORDER
AND JUDGMENT OF COMMON PLEAS COURT ON APPEAL CERTIFIED TO PROBATE COURT FOR EXECUTION.

SYLLABUS:

1. *When the probate court determines the inheritance tax in an estate and an appeal is taken from the order of said court in sustaining or overruling exceptions filed to said order of determination the order and judgment of the common pleas court in said case should be certified to the probate court to be carried into execution.*
2. *When a refunding order is entered (other than a refunding order under Section 5343-1, General Code) the judgment against an estate for refunder should not bear interest.*

COLUMBUS, OHIO, December 14, 1927.

The Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

"The commission has this day been served with a certified copy of the entries of the courts of common pleas and of appeals of Cuyahoga County in the inheritance tax proceeding on the above estate. We note that the court not only modified the judgment of the probate judge as to the value of the property and the assessment of inheritance tax against the beneficiaries but proceeded in the same entry to order a refunder with interest using the following language:

'and the Tax Commission of Ohio is hereby ordered to direct the county auditor of Cuyahoga County to draw his warrant payable out of the proper fund in the treasury of said county for a refund to said executor of said sum of \$2,012.72, together with interest thereon hereafter at the legal rate allowable on judgments.'

Such a refunding order by the reviewing court and a direction to the state to pay interest is inconsistent with the practice hitherto. Since, however, no error was prosecuted from the judgment the commission is now somewhat at a loss to know the proper course to adopt or the proper advice to give judges and others. The matter of interest on refunders is one of great importance. In order therefore that we may be guided correctly, will you be good enough to advise us:

1. When an inheritance finding is modified, should the refunding order, if proper, be made by the reviewing court or by the probate court?
2. When a refunding order is entered (other than a refunding order under Section 5343-1) should it bear interest?"

This question arises in the determination of the inheritance tax in the estate of Levi Doan Johnson, deceased. The probate court of Cuyahoga County in determining the valuation of said estate, a portion of which consisted of the undivided interest in a parcel of real estate in the city of Cleveland, valued said undivided one-half interest in said real estate at \$271,858. Exceptions were filed to said finding of the probate court. Said exceptions were overruled and an appeal from said order overruling said exceptions was taken to the common pleas court. The common pleas court rendered judgment determining the value of said interest in the real estate at two hundred twenty-two thousand, six hundred twenty dollars (\$222,620) instead of the said sum of two hundred seventy-one thousand, eight hundred fifty-eight dollars (\$271,858) as found by the probate court. The common pleas court further found that the executor, under protest, had paid taxes upon the successions to said estate in the sum of eight thousand five hundred twenty-five dollars and thirty-two cents (\$8,525.32) and in addition had paid interest on said sum at the rate of eight per cent per annum from February 12, 1925, to June 3, 1925, amounting to the sum of two hundred six dollars and forty-six cents (\$206.46), and that the total so paid exceeded the amount of the tax found by the common pleas court to be due in the sum of two thousand twelve dollars and seventy-two cents (\$2,012.72). This last amount was ordered to be refunded and the Tax Commission of Ohio was ordered to direct the county auditor of Cuyahoga County to draw his warrant payable out of the proper fund of the treasury of said county for refund to said executor of said sum of two thousand twelve dollars and seventy-two cents (\$2,012.72), together with interest thereon thereafter at the legal rate allowed on judgments.

The Tax Commission of Ohio filed a petition in error in the court of appeals of Cuyahoga County and upon hearing thereof, said court of appeals being of the opinion that substantial justice had been done to the party complaining, the judgment of said court of common pleas was affirmed. Said court of appeals ordered

that a special mandate be sent to the court of common pleas to carry said judgment into execution. A certified transcript of the entries of the courts of common pleas and of appeals of Cuyahoga County in said proceeding was served upon the Tax Commission. The judgment of the common pleas court as affirmed by the court of appeals not only modified the judgment of the probate court as to the value of the property and the assessment of inheritance tax against the beneficiaries, but proceeded in the same entry to order a refunder with interest, using the language hereinbefore quoted in the Commission's communication.

Two questions are submitted to me for answer. The first reads: "When an inheritance tax is modified, should the refunding order, if proper, be made by the reviewing court or by the probate court?"

The order determining inheritance tax in the probate court may be modified by said court. In such instance the probate court should issue any refunding order; or the original order by said probate court could be attacked by petition in error, in which instance the probate court would also issue any refunding order as finally determined in said error proceeding.

It is evident, however, that your question has special reference to a case in which an appeal is taken from an order sustaining or overruling exceptions made to the order of the probate court in determining the inheritance tax. The judgment of the common pleas court in determining the inheritance tax upon appeal may be modified or reversed by the court of appeals and the action of the court of appeals may be sustained or overruled in the supreme court. Upon rendering judgment the court of appeals would issue its mandate to the probate court, and if overruling the judgment of the common pleas court, no further proceedings would be had in said court, but if said judgment of the common pleas court is sustained, the mandate would be to carry into execution the judgment of the common pleas court.

Your question is as to whether the common pleas court should order execution upon its said judgment commanding a refunder of the taxes paid or whether said judgment should be certified to the probate court to carry the same into execution.

Section 11211 of the General Code, provides that:

Upon the decision of a cause, appealed to the court of common pleas, the clerk shall make out an authenticated transcript of the order, judgment and proceedings of such court therein, and file it with the probate judge, who shall record it, and the proceedings thereafter be the same as if such order, judgment, and proceedings had been had in the probate court."

The question is as to the jurisdiction of the common pleas court to carry into execution its judgment rendered in the case appealed from the probate court. Section 8 of Article IV of the Constitution of Ohio provides as follows:

"The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators, and guardians, and such other jurisdiction, in any county or counties, as may be provided by law."

Under this section and Section 7, of Article IV of the Ohio Constitution, the probate court has capacity for receiving jurisdiction as great as that of the court of common pleas: *Railway vs. O'Hara*, 48 O. S. 343; *Bogard vs. Railway*, 64 O. S. 564.

It is noted under the provisions of Section 11211, General Code, that it is mandatory that when a decision is made in a cause appealed to the court of common pleas the clerk thereof shall make out an authenticated transcript of the order, judgment and proceeding and file it with the probate judge who shall thereupon proceed upon said judgment as though the same had been rendered in said probate court.

Your second question is, when a refunding order is issued, (other than a refunding order under Section 5343-1, General Code) should it bear interest. In the instant case the order was for a refunder and interest on said amount refunded from the date of said order of refunder at the legal rate allowable on judgments and the question arises as to whether or not the state is required to pay interest on judgments. It was held by our supreme court in the case of *State ex rel. vs. Board of Public Works*, 36 O. S. 409, that :

“In the absence of a statute requiring it, or a promise to pay, interest cannot be adjudged against the state for delay in the payment of money.”

and in the third paragraph of the syllabus of said case, it is stated that :

“The state is not bound by the terms of a general statute, unless it be so expressly enacted.”

The court also stated :

“In view of these principles we must hold that the state, as a debtor, is not within the purview of the statute above quoted, and cannot be adjudged to pay interest upon any claim against her in the absence of a promise, expressly or impliedly, to do so; and it is not claimed that any such promise has been made to relators.”

In the case of *Industrial Commission vs. Phillips*, 114 O. S. 607, the court held at page 623, that :

“The court has reached the conclusion that there is no authority of law for the industrial commission to pay interest on deferred payments of awards made by it. The industrial commission is a part of the executive department of the state government and its powers are limited by constitutional and statutory enactment. Until the legislature has seen fit to make provision for the allowance of interest, we are of the opinion that no such right exists. It follows, therefore, that this claim for interest upon judgments rendered in these cases must be denied, and with this modification the former judgments are adhered to.”

It is therefore evident that where inheritance taxes have been paid and the court thereafter orders a refunder of a part or all of said taxes, interest against the state may not be allowed in said orders of refunder. The exception to the foregoing rule is found in Section 5343-1 of the General Code, which provides as follows :

“When the court makes the final assessment and determination of tax in accordance with the ultimate succession as provided in Section 5343 and shall determine the assessed amount if any, paid under the temporary order and for which refunder should be made, this amount so determined shall bear interest, to be computed by the court and included in the order of re-

funder, at the rate of three per cent per annum from the date of the payment thereof pursuant to the temporary order until the date on which the final assessment and determination is made, but in no case longer than one year after the happening of the contingency, or the termination of the condition, by reason of the existence of which the temporary order was made, to be charged equally against the state and the township or municipality sharing in the tax and to be paid as other refunders. Interest at the same rate shall also be allowed and paid on all excess amounts which may hereafter be found to have been paid in under temporary orders prior to the time at which this act takes effect but in such cases such interest shall begin to run from the taking effect of this act only."

It will be noted that this section has reference only to inheritance taxes paid under a temporary order under the provisions of Section 5343, General Code, which relates to the taxation of estates dependent upon contingencies, conditions, etc. There is therefore an express provision for the allowance of said interest. The Tax Commission is a part of the executive department of the state and its powers are limited by constitutional and statutory enactment. It therefore may not order or allow interest to be paid by the state unless expressly authorized to do so. With the exception of the provisions of Section 5343-1, General Code, there is no authority granted the state Tax Commission to order interest to be paid upon refunders.

It is therefore my opinion:

(1) That when the probate court determines the inheritance tax in an estate and an appeal is taken from the order of said court in sustaining or overruling exceptions filed to said order of determination the order and judgment of the common pleas court in said case should be certified to the probate court to be carried into execution.

(2) That when a refunding order is entered (other than a refunding order under Section 5343-1, General Code) the judgment against an estate for refunder should not bear interest.

Your questions as you state are asked for the future guidance of the Commission, and the answers herein are so intended. The judgment in the instant case is *res adjudicata*.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1367.

INSURANCE CORPORATION—REQUIRED TO COMPLY WITH INSURANCE LAWS OF OHIO—MUST BE DULY LICENSED IN OHIO TO TRANSACT BUSINESS.

SYLLABUS:

An Ohio corporation proposing to transact the business of insurance in Ohio is required to comply with the insurance laws of this state, and to be duly licensed by the insurance department of Ohio to transact its appropriate insurance business.

COLUMBUS, OHIO, December 14, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows: