

are executed, and with other statutory enactments relating to leases of this kind.

I am accordingly approving the leases above mentioned as to legality and form, as is evidenced by my approval endorsed thereon and upon the duplicate and triplicate copies of each of these leases, all of which are herewith returned to you.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

1312.

SHERIFF OF COUNTY AND DEPUTY OF TAX COMMISSION
OF OHIO INCOMPATIBLE.

SYLLABUS:

The sheriff of a county cannot accept appointment as a deputy of the Tax Commission of Ohio, in the collection of Use Tax assessments authorized to be collected under Section 5546-38, General Code, for the reason that the sheriff is charged by law with being the chief law enforcement officer of the county in which he was elected, and his serving as sheriff and as a deputy of the Tax Commission at the same time, creates an untenable condition which makes the holding of both such offices incompatible, and against the public interests.

COLUMBUS, OHIO, October 14, 1937.

HON. JOHN M. KIRACOFFE, *Prosecuting Attorney, Preble County, Eaton, Ohio.*

DEAR SIR: This will acknowledge receipt of your letter of recent date, which reads as follows:

"The sheriff of our county has requested your opinion on the following matter, to wit:

K. N. P., represented to be an attorney for the Tax Commission of Ohio, brought to the office of the sheriff of this county, J. F., an order from the Tax Commission, a copy of which I have enclosed, appointing K. N. P. and/or J. F., sheriff of Preble County; Ohio, as deputies under Section 3546-38, of the General Code of Ohio, to demand payment of certain Use Tax on an automobile purchased out of the State

of Ohio by J. W. H., of Eatno, Ohio, and, if not paid, to levy upon goods and chattels and make the same as under execution.

Before this order was brought to the sheriff demand had been made upon J. W. H. by K. N. P., who had been appointed.

Section 5546-38, says:

'After the amount of the assessment has become due and payable, the Commission by its deputies or deputy authorized by it for such purpose, shall forthwith call at the place of business of such person and in case of refusal to pay such assessment and penalty on demand, shall levy * *'

The sheriff is interested in knowing the following, to wit:

1. Is the sheriff acting as sheriff of Preble County, Ohio, if he proceeds under said order or is he merely a deputy of the Tax Commission?

2. Does the bond he has given as sheriff cover his acts while acting under such a designation?

3. Is the statute mandatory that J. F., sheriff of Preble County, Ohio, having been designated by the Tax Commission in such order, accept the appointment as deputy and proceed to make such demand and, if refused, the levy and sale?

4. Has the sheriff the right to refuse the appointment as the order is already in the possession of one of the persons designated as a deputy?

The situation is such that our sheriff is plenty busy having only one deputy, although he never refuses to do whatever might be his duty. As this is a case where a very unpleasant duty would be added to his many duties he already has, and is nothing more than *passing the buck*, I do not feel that it is mandatory for the sheriff to assume this extra work, which would be great here along the State line."

Your questions concern the method being used by the Tax Commission of Ohio, in the enforcement and collection of assessments levied by the Commission under the Ohio Use Tax Law. This law has been in effect since January 1, 1936. It was amended and extended for an indefinite period, on December 30, 1936. The provisions of the act are set forth in Sections 5546-25 to 5546-47, General Code, inclusive. Section 5546-38, General Code, provides the procedure the Tax Commission of Ohio is to use in the enforcement and collection of any tax assessment it levies under the provisions of the Use Tax Law. It reads as follows:

"All amounts assessed under this act, which are not paid to the treasurer of state by the person against whom such assessment has been made on the date when the same become due and payable, shall bear interest at the rate of twelve per centum per annum from and after such date until paid.

After the amount of the assessment has become due and payable, the commission by its deputy or deputies authorized by it for such purpose, shall forthwith call at the place of business of such person and in case of refusal to pay such assessment and penalty on demand shall levy on the moneys, goods and chattels, or other personal property of such person wherever found in this state. Such levy shall take precedence of all liens, mortgages, conveyances, or encumbrances hereafter taken on such moneys, goods and chattels or other personal property. No property of any such person liable to pay the tax, penalty and costs shall be exempt from such levy.

The commission shall give like notice of the time and sale of the personal property to be sold under this act, as in the case of sale of personal property on execution. All provisions of law applicable to sales of personal property on execution shall be applicable to sales under this act, except as herein otherwise provided; all moneys collected by the commission shall be paid into the state treasury.

The person against whom such assessment has been made may appeal from an assessment by the commission to the court of common pleas in the same manner and form as that provided in Section 5611-2 of the General Code of Ohio."

Attached to your communication is a copy of the journal entry and order issued by the Tax Commission of Ohio, relative to the enforcement and collection of this particular Use Tax Assessment, which reads as follows:

"In the Matter of the Enforcement June 8, 1937, of Assessment against
J. W. H.,
Eaton, Ohio.

The Tax Commission coming on this day to consider the matter of enforcement by levy of assessment of J. W. H., Eaton, Ohio, Serial No. 176, filed with the Commission on May 28, 1936.

In accordance with the provision of Section 5546-38, of the General Code of Ohio, this Commission does hereby ap-

point and authorize K. B. P., attorney of this Commission, and/or J. F., sheriff of Preble County, Ohio, as its deputy or deputies, to forthwith call at the place of business or residence of the consumer set forth in this entry and demand payment of the assessment, penalty and interest, as herein set forth.

In case of refusal by said consumer to pay such assessment, penalty and interest on said demand, K. N. P., attorney and/or J. F., sheriff of Preble County, Ohio, shall levy on said consumer's moneys, goods and chattels, or other personal property of such consumer wherever found in this state, and proceed to sell such personal property levied upon as may be necessary to satisfy such assessment and penalty herein set forth, in the amount of Thirty dollars (\$30.00), together with interest therein at 12% per annum from the 28th day of May, 1936, and costs of this action in accordance with laws of State of Ohio.

I hereby certify the foregoing to be a true and correct copy of the order of the Tax Commission of Ohio, this day made, with respect to the above matter.

G. A. E.,
Secretary."

Section 2834, General Code, covers the duties of the sheriff as to the execution and returning of process. It provides:

"The sheriff shall execute every summons, order or other process, make return thereof as required by law and exercise the powers conferred *and perform the duties enjoined upon him by statute* and by the common law." (Italics the writers.)

Section 2824, General Code, requires that each sheriff, within ten days after receiving his commission, and before the first Monday of January next after his election, shall give bond "*for the faithful performance of the duties of his office.*"

In your first question you ask:

"Is the sheriff acting as the sheriff of Preble County, Ohio, if he proceeds under said order, or is he merely a deputy of the Tax Commission?"

A review of Section 5546-38, General Code, shows no mention of the word "sheriff" therein. It only provides:

“The commission by its deputy or deputies authorized by it for such purpose shall forthwith call at the place of business of such person and in case of refusal to pay such assessment and penalty, on demand, shall levy on the moneys, goods and chattels or other personal property of such person wherever found in this state.” (Italics the writer’s.)

This section further provides :

“The commission shall give like notice of the time and sale of personal property to be sold under this act, as in the case of sale of personal property on execution.”

The same section also provides :

“All provisions of law applicable to sales of personal property on execution shall be applicable to sales under this act, except as herein otherwise provided ; all moneys collected by the commission shall be paid into the state treasury.” (Italics the writer’s.)

Section 11664, General Code, authorizes the issuance of a writ of execution. It should be noted that it provides :

*“The writ of execution against the property of a judgment debtor issuing from a court of record, shall command the officer to whom it is directed, that of the goods and chattels of the debtor he caused to be made the money specified in the writ, and for want of goods and chattels, he cause his lands and tenements to be sold for cash. * *”* (Italics the writer’s.)

Section 11666, General Code, provides :

*“The officer to whom a writ of execution is delivered shall proceed immediately to levy it upon the goods and chattels of the debtor. * *”*

Section 11667, General Code, provides :

“When a sheriff, coroner, or other officer, by virtue of an execution, levies upon goods and chattels which afterward remain upon his hands unsold for want of bidders, * he may take of the defendant a bond with security, * *”* (Italics the writer’s.)

A review of the above sections, together with a review of the other sections of the General Code applicable to the sale of personal property on execution, fails to show where the sheriff in his capacity as sheriff of a county, is required to levy or execute a writ of execution against the property of a judgment debtor, except when such writ issues from a court of record. The Tax Commission of Ohio is not a court of record, and being a creature of statute has no authority except that specifically given it by statute.

In this connection, it should be noted that Section 5546-38, General Code, *supra*, after providing the procedure for the collection of an assessment levied by the Tax Commission *by its deputy or deputies*, specifically authorizes such deputy or deputies in case of the refusal of such person to pay such assessment and penalty on demand, *to levy on the moneys, goods and chattels or other personal property of such person wherever found in this state*, to satisfy the same.

A sheriff is the chief law enforcement officer of the county in which he is elected. He has a full time job to perform, and is subject to call at all hours of the day or night.

This leads me to a consideration of the question as to whether or not a sheriff of a county in accepting such an appointment as a deputy of the Tax Commission, in the enforcement and collection of a particular tax assessment levied by the Commission, is attempting to do two jobs or perform two tasks at the same time, one as an officer of the Tax Commission, and the other as sheriff of the county, which are incompatible. In other words, is it possible for the sheriff to be a sheriff and also a deputy of the Tax Commission of Ohio at the same time?

In the case of *State, ex rel. Attorney General vs. Gebert*, 12 O. C. C. (N. S.), 274, the Court in its opinion held:

“Offices are considered incompatible when one is subordinate to or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both.”

In Opinions of the Attorney General for 1915, Volume I, page 758, the then Attorney General held:

“It is against public policy for a person acting as sheriff to be appointed as humane officer.”

In the body of the opinion it was held:

“There is no statutory inhibition against a sheriff acting as humane officer, nor against a humane officer acting as

sheriff; nor am I able to find that the one office is in any way a check upon the other.

However, under the provisions of Section 2833, G. C., the sheriff is required to 'preserve the public peace.' In view of the fact that the sheriff is made the conservator of the public peace of his county, he should be accessible both day and night and be at all times subject to call.

The law making it the duty of the sheriff to preserve the public peace and, therefore, be at all times subject to call differentiates said officer from the other county officers, and being so subject I am of the opinion that it is against public policy that he should hold any other public office which would interfere with his duties as sheriff, as above indicated."

With this reasoning I fully concur, and believe the same applicable to the questions at issue in this opinion.

In Opinions of the Attorney General for 1918, Volume I, page 120, the then Attorney General held:

"The sheriff of a county may not be appointed or act as probation officer."

From a review of the foregoing authorities, together with a review of the specific provisions contained in Section 5546-38, General Code, relative to the collection of the tax assessments, I am forced to the conclusion that the sheriff of a county cannot accept appointment as deputy of the Tax Commission of Ohio, in the collection of Use Tax assessments authorized to be collected under Section 5546-38, *supra*, for the reason that the sheriff is charged by law with being the chief law enforcement officer of the county in which he was elected, and his serving as sheriff and as a deputy of the Tax Commission, at the same time, creates an untenable condition which makes the holding of both such offices incompatible and against the public interests. However, in my opinion, the sheriff of a county can and should cooperate with any duly authorized deputy of the Tax Commission, in the enforcement of the Use Tax Law, and should aid in every reasonable way such deputy or deputies in the administration of the law and in the collection of any assessments levied against any persons who are residents of the county, over which such sheriff has jurisdiction.

Therefore, in specific answer to your inquiry it is my opinion that, a sheriff of a county cannot accept appointment as a deputy of the Tax Commission of Ohio, in the collection of Use Tax assessments authorized to be collected under Section 5546-38, General Code, for the reason that

the sheriff is charged by law with being the chief law enforcement officer of the county in which he was elected, and his serving as sheriff and as a deputy of the Tax Commission, at the same time, creates an untenable condition which makes the holding of both such offices incompatible and against the public interests.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1313.

APPROVAL—BONDS OF VILLAGE OF BAY, CUYAHOGA
COUNTY, OHIO, \$32,500.00.

COLUMBUS, OHIO, October 14, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Village of Bay, Cuyahoga County, Ohio,
\$32,500.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of re-funding bonds, Series A of 1937, in the aggregate amount of \$123,800, dated October 1, 1937, bearing interest at the rate of 4% 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 a valid and legal obligation of said village.

Respectfully,

HERBERT S. DUFFY,
Attorney General.