ment were commenced prior to February 16, 1920. In the case of *State ex rel.* vs. *Zangerle, County Auditor,* No. 16578, (recently decided), the Supreme Court held that county commissioners are without authority to issue bonds bearing a rate of interest in excess of five per cent for road improvements the proceedings for which were commenced prior to February 16, 1920.

For the several reasons stated, I am of the opinion that said bonds are not valid and binding obligations of Williams county and advise the Industrial Commission not to accept the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1317.

INHERITANCE TAX LAW—PROBATE COURT HAS INHERENT POWER TO MODIFY OR VACATE AN ORDER DETERMINING SAID TAX AT TERM AT WHICH SUCH ORDER WAS ENTERED—ALSO HAS POWER TO CORRECT ENTRY OF ORDER DETERMINING TAX—HOW ORDER DETERMINING TAX CAN BE MODIFIED OR VACATED AFTER TERM AT WHICH ORDER MADE AND ENTERED.

1. *The probate court has inherent power to modify or vacate an order determining the inheritance tax at the term at which such order was entered.*

2. *Such court has inherent power at any time to correct the entry of an order determining inheritance tax to conform to the real order made by the court.*

3. *After the term at which an order determining inheritance tax is made and entered, a probate court has power to modify or vacate its order determining taxes by proceedings had in the same manner and for like cause as is provided for the modification and vacation of judgments and orders after term time in the court of common pleas.*

COLUMBUS, OHIO, June 8, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your letter of recent date requesting the opinion of this department, as follows:

> "Some question has been made as to the extent of the power of the probate court, and the procedure to be adopted, to modify its determination of inheritance tax:
>
> 1. During the term at which such determination was made.
> 2. After the term at which it was made.
> 3. Before the tax has been certified and paid.
> 4. After such payment has been made.
>
> A concrete case now presents itself. In connection with the estate of W an adjudication of inheritance tax was made on March 1, 1920, and the same was paid shortly thereafter. On May 8th it was discovered by the commission that owing to a misstatement of fact made in good faith by one of the interested parties the court had exempted a large amount of property against which tax should have been assessed.
>
> Seeking to have this corrected the Tax Commission desires to have you advise as to its right to intervene at this time, the authority of the court to modify its entry and the proper procedure to be followed."

The inheritance tax law itself is silent so far as express provision for the case which you mention is concerned. The following provisions of the act must, however, be taken into account and given such application as may be due them:

"Section 5340. The probate court of any county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent, on the succession to whose property a tax is levied by this subdivision of this chapter, or to appoint a trustee of such estate, or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine the questions arising under the provisions of this subdivision of this chapter, *and to do any act in relation thereto authorized by law to be done by a probate court in other matters or proceedings coming within its jurisdiction;* and if two or more probate courts shall be entitled to exercise such jurisdiction, the court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other probate court. Such jurisdiction shall exist not only with respect to successions in which the jurisdiction of such court would otherwise be invoked, but shall extend to all cases covered by this act, to the end that succession inter vivos, taxable under the provisions of this subdivision of this chapter, may be reached thereby."

"Section 5345. From the report of appraisal and other evidence relating to any such estate before the probate court, such court shall forthwith upon the filing of such report, by order entered upon the journal thereof, find and determine, as of course, the actual market value of all estates, the amount of taxes to which the succession or successions thereto are liable, the successors and legal representatives liable therefor; and the townships or municipal corporations in which the same originated. Provided, however, that in case no application for appraisement is made the probate court may make and enter such findings and determinations without such appraisement. Thereupon the judge of such court shall immediately give notice of such order to all persons known to be interested therein, and shall immediately forward a copy thereof to the tax commission of Ohio, together with copies of all orders entered by him in relation to or affecting in any way the taxes on such estate, including orders of exemption. If it shall appear at any stage of the proceedings that any of such persons known to be interested in the estate in an infant or of unsound mind, the probate court may if the interest of such person is presently involved and is adverse to that of any other persons interested therein, exercise the powers provided for in sections 11249 and 11253, inclusive, of the General Code."

Section 5346 provides for exceptions to the appraisement and determination of taxes.

Section 5347 provides for payment of the tax.

Section 5348 provides for appeals "from the final order of the probate court under section 5346 of the General Code in the manner provided by law for appeals from orders of the probate court in other cases."

The foregoing are substantially all the procedural provisions of the inheritance tax law in so far as it deals with the judicial functions of the probate court in the determination of the tax. It might be argued from the fact that the proceeding is of peculiar character and that special provision is made for parties in certain instances and express provision is made for appeals, that the inheritance tax law in this respect is exclusive of all other statutes which might conceivably apply; so

that its silence in the respect involved in your questions is equivalent to a negation of the power of the court to modify its final order under any circumstances. That is to say, a special proceeding being provided for, and no express power of modification or rescission being vested in the court, the court once it has acted would be functus officio and its power would be at an end.

But the special provision for appeal is not of great significance in this connection, as an appeal involves jurisdiction of another court; and the special provision for incompetent parties is not of great significance when the ex parte character of the proceedings is taken into account. It would be true that if the statutes as a whole manifested an intent to provide an exclusive procedure this intent should be given effect. But no such intent is manifest. Opposed to the inferences which have just been discussed is the express language of section 5340 above quoted, to the effect that the probate court in the exercise of its jurisdiction under the inheritance tax law shall have power "to do any act in relation thereto authorized by law to be done by a probate court in other matters or proceedings coming within its jurisdiction." The general assembly evidently contemplated the possibility of modification of judgments after judgment rendered, for although the tax can not be paid until it has been determined by final order of the probate court, it is provided in section 5339 of the General Code that

> "If after the payment of any tax, in pursuance of an order fixing such tax, made by the probate court having jurisdiction, such order be *modified* or reversed on due notice to the tax commission of Ohio, the said commission shall, unless further proceedings on appeal or in error are pending or contemplated by order direct the county auditor to refund such amount * * * * * *."

The section from which quotation has just been made affords, on the other hand, what is perhaps the strongest argument against the exercise of the power which you question, in that it expressly provides for a particular case, as follows:

> "Where it shall be shown to the satisfaction of the probate court that deductions for debts were erroneously allowed, such probate court may enter an order assessing the taxes upon the amount wrongfully or erroneously deducted."

But this provision must be understood in its peculiar setting. The inheritance tax law offers every encouragement for the prompt payment of the tax, and for this purpose the practice is and has been to estimate the debts of the decedent in advance of the final settlement of the accounts of the administrator or executor. A large possibility of error is thus introduced; but should it appear that debts estimated in good faith have been nevertheless erroneously allowed in the sense that they prove to be less than estimated, the mistake or error would not be one of the kind which in the exercise of any possible power the probate court could correct. Therefore it is appropriate to make special provision for such cases to conform to the policy of the act, which makes for prompt settlement of the tax in advance of the possibility of certainly determining all of the facts upon which the amount of the tax may depend.

It is concluded therefore that the express language of section 5340, above quoted, and the inferences arising from certain portions of section 5339 which have been quoted are such as to show that the general assembly intended that the probate court, in the exercise of its judicial functions in connection with the determination of inheritance taxes, should have all the power, authority and juris-

diction which the probate court as a court has in other matters coming within its jurisdiction.

We are thus referred to the code of civil procedure in so far as it relates to the probate court. We find from such reference that the probate court is not given any peculiar or special power with respect to the correction or modification of its judgments and final orders after they are rendered. In this respect it is believed that section 11212 determines the power of the probate court by reference to the code of civil procedure relating to the common pleas court, when it provides that

> "The provisions of law governing civil proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court, when there is no provision on the subject in this title."

This section, then, refers us on to the powers of the common pleas court and the provisions in respect thereto.

In the first place, it is the well understood common law that during the term at which a judgment or order is made and entered the court retains control thereof, and may upon its own motion or otherwise rescind its action and substitute other action therefor. The probate court undoubtedly has this power in connection with its jurisdiction under the inheritance tax law.

> Huntington vs. Finch, 3 O. S. 445;
> Manufacturing Co. vs. Sweney, 57 O. S. 169.

Again, in case there is actually a mistake in the entry of a judgment or order it may be corrected at any time, as any court of record has power to make its records speak the truth. These powers are inherent in courts of record having terms, and exist without express provision of statute in the absence of statutory provision to the contrary.

Your first question is, of course, answered by these statements, and your other questions are likewise answered as to the correction of mere clerical errors in the entry of the order. The example which you give shows, however, that you have in mind a modification more fundamental than the mere correction of an error in the entry of the order. Special provision is made by the code of civil procedure for such cases occurring after the term at which the judgment was rendered, the common law power expiring at that time in accordance with the principles laid down. The cases in which such action may be taken are provided for by section 11,631 of the General Code. The provision is as follows:

> "The common pleas court, or the court of appeals may vacate or modify its own judgment or order, after the term at which it was made:
> 1. By granting a new trial of the cause, within the time and in the manner provided in section eleven thousand five hundred and eighty.
> * * * * * *."

The whole section might be quoted to cover the several cases which might arise, but the foregoing quotation will be enough in connection with the specific question which you present.

Section 11,631 thus refers us to section 11,580 of the General Code, which provides as follows:

> "When, with reasonable diligence, the grounds for a new trial could

not be discovered before, but are discovered after the term at which the verdict, report, or decision was rendered or made, the application may be by petition, filed not later than the second term after the discovery, nor more than one year after final judgment was rendered, on which a summons must issue, be returnable and served or publication made, as in other cases."

The grounds for a new trial are enumerated in section 11576 of the General Code, which provides in part as follows:

"A former verdict, report, or decision, shall be vacated, and a new trial granted by the trial court on the application of a party aggrieved, for any of the following causes affecting materially his substantial rights:

* * * * * *.

3. Accident or surprise which ordinary prudence could not have guarded against; * * *

7. Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at the trial. * * *."

The only embarrassment which arises here is the fact that in proceedings under the inheritance tax law no summons is issued or publication made. By analogy, however, it is believed that such notice as the inheritance tax law requires for initial determination of the tax must be given. In other words, the application must be made, as it were, *de novo*.

By this course of reasoning we are brought to the conclusion that if in the case submitted by you the fact that the interested party in good faith made a misstatement of fact is newly discovered evidence, which with reasonable diligence could not be discovered by the commission until after the term at which the order was made, grounds for a new trial in the proceedings to determine the tax exist, and the Tax Commission, being a party as much as any one else is a party under the statute, has the right to ask for the vacation of the order and for a new trial of the issues of fact.

The conclusion above reached is worked out on the language of the Ohio statutes as we find them, without any assistance from other sources. It is to be remarked, however, that the Ohio inheritance tax law and procedure thereunder in general are quite similar to those of New York. The New York inheritance tax law does not provide for any special method of reopening and vacating inheritance tax orders. The code of civil procedure of New York is similar to that of Ohio. Under statutes of this kind the regular statutory remedy for the modification of judgments, etc., has been held available in inheritance tax cases. See

Matter of Cameron, 97 App. Div. 436;
Matter of Boyle, 92 Misc. 143;
Matter of Scherer, 25 Misc. 138.

Nor does there seem to be any reason why the Commission is not a proper party to ask for a new trial. The decision against the state comptroller in *Matter of Gates*, 122 N. Y. Supp., 299, was based on the ground that the application was not verified and that the newly discovered evidence could have been discovered by the comptroller before the trial of the tax proceedings by the exercise of reasonable diligence.

It will be understood that the exact procedure is not the same in New York

as it is in Ohio, but otherwise the analogy seems close enough to justify the conclusion that the cases are in point.

See also: In re: Harkness, (Calif.) 169 Pac. 78.

In view of the express provisions of section 5339 above quoted the certification and payment of the tax would seem to be an immaterial fact. If too little has been paid, the final order of the probate court made after new trial may determine the tax correctly and give credit for the amount already paid without doing violence to any of the provisions of the statute. If too much has been paid section 5339, supra, provides for the case.

The procedure is as outlined in section 11580 by reference embodied in section 11631. That is to say, the application should be in the same form as the original application to determine the tax, like notice should be given and like proceedings had.

Though this opinion has been limited to the one set of facts, it is clear that in case of fraud practised by any party, or any of the other grounds expressly mentioned in section 11631 a like remedy is available, excepting that in such instances the proceedings to vacate must be by petition brought under section 11635 of the General Code.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1318.

MUNICIPAL CORPORATIONS—CITY MAY BY ITS CHARTER PROVISIONS REGULATE PUBLICATION OF ORDINANCES AUTHORIZING BOND ISSUES AND NOTICES OF BOND SALES—CONSTITUTIONAL PROVISIONS OF CHARTER CITIES AND GENERAL STATUTES GOVERNING PUBLICATION OF ORDINANCES AND BOND SALE NOTICES DISCUSSED.

The provisions of sections 3924 and 4228 G. C. relative to the duration of the publication of ordinances authorizing the issuance of municipal bonds and of notices for the public sale of such bonds do not constitute a limitation upon the powers of municipalities to incur debts within the meaning of Article XVIII, section 13 of the Ohio constitution.

A city may by the terms of its charter regulate the publication of ordinances authorizing the issuance of bonds and of notices of the sale of such bonds.

COLUMBUS, OHIO, June 8, 1920.

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

GENTLEMEN:—I have your letter requesting my opinion as follows:

"In view of the provisions of Article XVIII, section 13, of the constitution of Ohio and sections 3924 and 4228 G. C., and the further view that the provisions of the charter of a city having legally adopted home rule are 'All ordinances and resolutions shall be published once in one newspaper:'

1. Do the provisions of the charter or the provisions of statutes govern in the ordinance authorizing issuance of bonds in such charter city?