

contract to make a will was broken by the promisor, so that the promisee claimed as creditor. It was distinguished in the *Kidd case*, otherwise similar, on the ground that the consideration in the *Baker case* had completely passed and it created a debt payable out of the estate. The distinction is between a contract which at the time it is entered into was purely executory and one whereby a debtor agrees to make a devise or bequest in payment of an antecedent debt and then fails to carry out his contract. This is the distinction made in Gleason and Otis on Inheritance Taxation, pp. 140-141.

In short, it is believed that the authorities will not sustain the distinction drawn in the text of Blakemore and Bancroft, which applied to the contract now under consideration would possibly produce an opposite result, inasmuch as the testator by his contract expressly agreed "not to sell, encumber or in any way dispose of any of the real estate now owned by him." This stipulation could only apply to the real estate, and not to the personal property. Moreover, while the testator agrees not to dispose of any property "now owned by him," his agreement to make a will extends to all real property which he may have at death, and it is conceivable that he might have inherited or otherwise acquired other real property than that owned by him at the time of the contract, though this does not appear from the statement of facts. At all events it is believed that the weight of authority, and so far as investigation has shown the unanimous voice of the adjudicated cases, sustains the imposition of the tax upon the successions created by the will of White.

In arriving at this conclusion the effect of the fact that the contract was made prior to the date when the inheritance tax law was passed and became effective has not been overlooked, as the above excerpts from the Kansas case will show.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1802.

OFFICES COMPATIBLE—DISTRICT SUPERINTENDENT OF SCHOOLS—
 CLERK OF BOARD OF EDUCATION IN HIS SUPERVISION
 DISTRICT.

Where it is physically possible for one person to discharge the duties of a district superintendent of schools, and the duties of clerk of one of the boards of education in his supervision district, such positions are compatible, and may be held by one and the same person at the same time.

COLUMBUS, OHIO, January 21, 1921.

HON. BYRON A. FOCHE, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department upon the following statement of facts:

"We have three district superintendents of rural schools in Sandusky county, Ohio. In one of these districts, the district superintendent is acting with a salary as clerk of the township board of education. Is it compatible with the law that a district superintendent of rural schools act as clerk for compensation, of the township board of education, said township being within the district superintendent's district?"

It is presumed that this question has arisen because of the holding in Opinion 986, issued on February 4, 1918, and appearing at page 223, Vol. 1, Opinions of the Attorney-General for 1918, the syllabus of which reads:

“A teacher may not, while employed by the board of education of a school district, as a teacher in the schools of said district, be elected to the position of clerk of said board.”

In the above opinion the positions of teacher and clerk, where employed by the same board, were found to be incompatible because of the provisions of section 7786 G. C., providing that the teacher should file with the clerk of the board of education his certificate or a true copy thereof, as well as “such reports as are required by the superintendent of public instruction and the board of education.” If a teacher were the clerk of the board of education, he would thus be filing his certificates and his reports with himself. If the district superintendent in a supervision district was compelled to file his certificate with the clerk of a certain board of education in his supervision district, or, on the other hand was required to make reports to the clerk of any one of the boards of education in his supervision district, then the provisions of section 7786 G. C. would also apply to the district superintendent, if such district superintendent was to receive his warrant for pay from such clerk. However this condition does not obtain, as far as the district superintendent is concerned, for there is no provision of law that he shall file his certificate with any of the boards of education in his supervision district, nor where he shall make the reports to any particular clerk of a board of education in his district, as required in section 7786 G. C.

Under the provisions of section 4739 G. C., the district superintendent is elected by the presidents of the village and rural boards of education within such district, except in those cases where the supervision district contains three or less rural or village districts, when the boards of education of such school districts, in joint session, shall elect such superintendent. Apparently there is no circumstance that would arise as to where a clerk of one of the boards of education in a supervision district would have any vote or voice in the election of a district superintendent. The compensation of the clerk of the board of education is paid by the board of education of that particular school district and he is elected for a definite term not to exceed two years. There is no contract entered into between the clerk and the board of education, while on the other hand contracts between district superintendents and boards of education, aside from the facts appearing in the minutes, frequently are prepared and signed because the district superintendent, under the provisions of section 4741 G. C. can be re-elected in his district for a period not to exceed three years. Under the provisions of section 4743 G. C. the compensation of the district superintendent is fixed at the same time that he is appointed and by the same authority, that is to say, the group of school districts which constitute the supervision district, as represented by their presidents in meeting assembled. The compensation of the district superintendent is paid out of the county board of education fund on vouchers signed by the presidents of the county board, and thus the clerk of any local board of education has nothing to do with the issuing of vouchers for the pay of any district superintendent. A portion of the salary of the district superintendent is paid by the state through the county board of education, and the remaining portion is paid from the county board of education fund by prorating that portion among the village and rural districts in the supervision district, “but the county board of education must take into consideration and use any funds secured from the county dog and kennel fund or from any other source and which is not already appropriated before the amount is prorated to the various rural and village districts. (4744-1, 108 O. L., Part I, p. 704.)

The duties of the district superintendent are largely set forth in section 7706 G. C., which says in part:

"He shall report to the county superintendent annually, and oftener if required, as to all matters under his supervision. He shall be the chief executive officer of all boards of education within his district and shall attend any and all meetings. He may take part in their deliberations, but shall not vote. * * *"

It would thus appear that since he is the chief executive officer of all boards of education in his district and is required to attend any and all meetings of the various boards of education in his supervision district, it might be physically impossible to be present at these meetings of the various boards if their day of meeting was the same.

Section 4747 G. C. reads:

"The board of education of each * * * village and rural school district shall organize on the first Monday of January, after the election of members of such board. One member of the board shall be elected president, one as vice president, and a person who may or may not be a member of the board shall be elected clerk. * * * The board shall fix the time of holding its regular meeting."

It thus would appear that as to those meetings following the organization meeting in January, the various boards of education would set their own time and the meetings of boards in some particular supervision districts might never conflict as regards time. However, all boards in a supervision district do meet or should meet on the first Monday of January for the purpose of organization, and it is at once apparent that the district superintendent, even though the chief executive officer of all the boards of education in his district, might not be able to attend "all meetings" of the boards of education in his supervision district on that particular day.

The well known rule of incompatibility is that

"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." (State vs. Gebert, 12 C. C. (n. s.) 275.)

In the case at hand as to whether a district superintendent could act as clerk of a board of education in his supervision district, it would appear that if it were physically possible to perform the duties of both, as provided by law, other incompatibility would not exist because neither of these positions can be said to be subordinate to or in any way a check upon the other, as set out heretofore.

It is therefore the opinion of this department that where it is physically possible for one person to discharge the duties of a district superintendent of schools, and the duties of clerk of one of the boards of education in his supervision district, such positions are compatible and may be held by one and the same person at the same time.

Respectfully,
JOHN G. PRICE,
Attorney-General.