

"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."

Because of the punctuation or lack of punctuation of this clause, it is somewhat ambiguous. Doubt exists as to the modifying effect of the phrase "on due notice to the tax commission of Ohio." The notice herein required may be a pre-requisite to the modification or reversal, or a pre-requisite to the refunder. In the opinion of this department the latter of the two interpretations is correct in spite of the lack of a comma after the word "reversed" which would be necessary in order to make the clause convey clearly the meaning which is believed to be the true one. But as has been seen, notice to the Tax Commission is required by other sections to support the jurisdiction to modify exercised by the court in which the order was rendered. The order being nugatory for reasons above given, the Commission in the opinion of this department would be within its rights in refusing to issue the refunding order. Such a course on the part of the Commission would probably lead to an action in mandamus to test the question, and if this department is correct in its conclusion hereinbefore expressed, the facts would constitute a defense to such an action, because the order of the court would be a nullity.

However, the safer procedure would seem to be that suggested in the Commission's third question, and particularly the first of the two alternatives therein suggested. The person against whom a void judgment has been rendered or a void order taken, is not required to submit himself to the peril involved in ignoring such a void judgment or order, but may make a direct attack upon it in the court in which it was rendered and predicate error upon the refusal of that court to sustain his position. In other words, a judgment void because of lack of jurisdiction of the subject-matter is likewise erroneous and may be directly attacked as well as collaterally attacked. By pursuing the policy of direct attack the Commission will accord to the court which has acted the proper degree of courtesy, and in the opinion of this department, succeed in raising in the reviewing court (should that be necessary) the same question that would be raised in a mandamus case, without incurring any of the risk that would be incurred by the opposite course.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*

3291.

OFFICES INCOMPATIBLE—SUPERINTENDENT OF CITY SCHOOLS—  
MEMBER OF BOARD OF TAX COMMISSIONERS IN SUCH CITY  
(SINKING FUND TRUSTEE).

*Under the provisions of section 4526 G. C., setting forth the powers and duties of the board of tax commissioners in a city, the position of superintendent of city schools is incompatible with the office of member of the board of tax commissioners (4523) in such city, and the two positions may not be held by one and the same person at the same time.*

COLUMBUS, OHIO, July 3, 1922.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department reading as follows:

"We are enclosing herewith communication received from the mayor of the city of P., Ohio, relative to the superintendent of schools of the city school district of P. acting as trustee of the sinking fund of said city, and are respectfully requesting your opinion on same."

The statement of the mayor enclosed by you reads as follows:

"The superintendent of the city school district several years ago was appointed one of the trustees of the sinking fund for the city proper, and under section 4523 et seq. of our Code he thereby became a member of the board of tax commissioners for the city proper, and by virtue of section 7614 of our Code he was made a member of the board of commissioners of the sinking fund for his own school district.

Quaere: Are not these four positions, to wit, (a) Superintendent of the schools (thereby agent of the board of education), (b) trustees of the sinking fund of the city proper, (c) a member of the board of tax commissioners for the city proper, (d) a member of the board of commissioners of the sinking fund for his own school district, incompatible and renders his prior appointment illegal?

"By virtue of section 7614 the superintendent passes upon the amount of his own school budget, and the amount of the sinking fund thereof to the detriment of the sinking fund necessary for the absolute needs of the city proper and the tax for general purposes and thereby creates a situation which may rob the city of the necessary levy for general purposes within either the five, ten or fifteen mill limitation, for the levy fixed by said trustees, both for the school district and city, are to be fixed before any other levy is made.

"I think that the former opinion of the Attorney-General holding that a member of a board of education cannot be a member of the sinking fund is analogous to this quaere herewith presented and places the superintendent of the schools in the same category of cases."

Pertinent sections of the law are as follows:

"Section 7614: The board of education of every district shall provide by a tax levy for the payment of the annual interest on its bonded indebtedness, for the payment of its serial bonds as they mature, and for a sinking fund for the extinguishment of its other bonded indebtedness, which funds shall be managed and controlled by a board of commissioners designated as the 'board of commissioners of the sinking fund of \_\_\_\_\_' (inserting the name of the district), which shall be composed of five electors thereof, and be appointed by the common pleas court of the county in which such district is chiefly located, except that, in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of the school district. Such commissioners shall serve without compensation and give such bond as the board of education requires and approves. Any surety company authorized to sign such bonds may be accepted by such board of education as surety. The cost thereof, together with all necessary expenses of such commissioners, shall be paid by them out of the funds under their control." (H. B. 33, 109 O. L., 345.)

"Section 4523: In each city, the trustees of the sinking fund shall be a board of tax commissioners, but as members of such board they shall receive no compensation for their services." (96 v. 38.)

"Section 4526: Upon receipt of the levies made by the council, as provided by law, the board of tax commissioners shall consider them and within ten days after such receipt shall return them to the council with its approval or rejection and, in case of rejection, giving its reasons therefor. It may approve or reject any part or parts thereof, and the parts rejected by such board shall not become valid levies unless the council of such municipality shall thereafter, by three-fourths vote of all members elected thereto, adopt such levy or part thereof. If the board of tax commissioners approve such levies, or if it neglects to return them with its approval or rejection within such ten days, they shall be valid and legal. In no case shall the board of tax commissioners have authority to increase such levy." (96 v. 38.)

While section 7614 was amended in 109 O. L., p. 345, investigation will show that the provision that the board of commissioners of the sinking fund of the school district shall be composed of five electors and that in a city or village school district the board of commissioners of the sinking fund of the city or village "may be the board of the school district," was unchanged. Thus prior to its amendment in 109 O. L., p. 345, section 7614 G. C., as amended in 97 O. L., 352, read as follows in its first sentence:

"The board of education of every district shall provide a sinking fund for the extinguishment of all its bonded indebtedness, which fund shall be managed and controlled by a board of commissioners designated as the 'board of commissioners of the sinking fund of \_\_\_\_\_' (inserting the name of the district), which shall be composed of five electors thereof, and be appointed by the common pleas court of the county in which such district is chiefly located, except that, in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of the school district."

The former opinion of this department, holding that a member of a board of education cannot be a member of the sinking fund trustees of a city, was issued on February 15, 1910, and appears at page 1041, Opinions of the Attorney-General for 1910-1911. The following excerpt is taken from that opinion as appearing on page 1043, to wit:

"The acceptance by the person in question of his office as member of the board of education of the city school district would *ipso facto* vacate his membership on the municipal board of sinking fund trustees, if the two positions are incompatible. While the authorities have failed clearly to define the tests of common law incompatibility, it seems to me that it may safely be said that, when a sound public policy as evinced by the statutes defining the duties of two officers would seem to prohibit one person from discharging both sets of duties, the offices should be regarded as incompatible; and although the contingency which would give rise to the incompatibility would, in the nature of things, seldom arise, and might be very remote in point of fact, nevertheless the incompatibility exists."

The opinion of the Attorney-General in 1910 on this question was based very largely upon the provisions appearing in the Paine law, 99 O. L., 562, 565, an act providing for classified civil service employes in municipalities of the state. The Paine law provided that the president of the board of education of the city school

district, and the president of the board of sinking fund commissioners (evidently alluding to the sinking fund trustees) should be two of three members of an ex-officio board, whose power and duty it was to appoint the civil service commissioners of the city. This appointing board, under the Paine law, did not discharge all of its duties at once but was rather a continuing body, because the same section provided that the civil service commissioners "may be removed by the appointing commission." The question was raised in 1910 as to whether a member of the board of education, who was also a member of the sinking fund trustees of the city, might not have two votes out of the three, whose duty it was to appoint the civil service commission under the Paine act, for the member of the board of education might be elected president of the board of education and he might be elected president of the board of sinking fund trustees, in which event the very condition discussed would clearly obtain. Since the Paine law is no longer in existence in the state, having been succeeded by the provisions of the state civil service act (486 et seq.); the reasoning appearing in the opinion of 1910 does not lie at the present time. However, other things do obtain which should be considered after a careful reading of section 4526, supra, wherein the incompatibility, if any, must be found.

As indicated heretofore, under the provisions of section 7614 G. C., in a city or village school district the board of commissioners of the sinking fund of the city "may be the board of the school district" and in the statement of facts furnished by the mayor it appears that under section 7614 "he (the superintendent of city schools) was made a member of the board of commissioners of the sinking fund for his own school district." Having been made a member of the sinking fund trustees of a city under section 4523 G. C., the city superintendent of schools thereby became a member of the "board of tax commissioners," which is an additional office recognized by the statutes, since he must take an additional oath under section 4524 to support the constitution of the United States and of this state and to faithfully and honestly perform his duties as such tax commissioner. Under section 4525 G. C. the city auditor is clerk of the board of tax commissioners and shall keep a full record of all proceedings of the board.

In analyzing section 4526 G. C. as to the powers and duties of the board of tax commissioners, it is found that upon receipt of the levies made by the council of the city the board of tax commissioners

"shall consider them and within ten days after such receipt shall return them to the council with its approval or rejection, and, in case of rejection, giving its reasons therefor. It may approve or reject any part or parts thereof and the parts rejected by such board shall not become valid levies unless the council of such municipality shall thereafter, by three-fourths vote of all members elected thereto, adopt such levy or part thereof. If the board of tax commissioners approve such levies, or if it neglects to return them with its approval or rejection within such ten days, they shall be valid and legal."

It thus appears that under the provisions of section 4526 G. C. the board of tax commissioners in a city may reject all of the levies made by the city council, or a part of the levies made by the city council, and that if any of the levies made by the city council and submitted to the board of tax commissioners are rejected by the latter board, such levies shall not become valid unless three-fourths of all members elected to the council adopt such levy or part thereof. In the case at hand the superintendent of city schools, an employe of the board of education, sits as a member of this board of tax commissioners; he sits as such member in a city where the city council is composed of persons belonging to three distinct political parties, and

*a three-fourths majority vote is not possible on all questions of city administration.* It must be remembered that in a city composing the majority part of a city school district there is an ever present struggle between the city council and the city board of education as to whether each shall be allowed all of the levies which it asks for. Thus in practice since the levies as a whole are limited in the taxing district, if the municipal levy is allowed in full, likely the school board levy must be decreased by those whose power it is to approve. Similarly, if the board of education's levy increases, very frequently just to that extent the levy allowed to the city council must be decreased for city purposes. It would appear to be sound policy that the board of tax commissioners, or the budget commission in a county, should not have among its members any person who has more interest on one side of the question than he would have on the other side of the question. The contemplation of the law is that this deciding body should be free and unencumbered in making its decisions and that no personal interest of any of the members of the board should exist. It is clear that if the board of education had one of its members on this board of tax commissioners and the city council did not (and it is not permitted to have), more than likely from the standpoint of law the interests of the board of education would receive prior consideration in the mind of the member of the board of tax commissioners, who is also a member of the board of education, when compared with the interests of the city proper, as submitted in the levies made by the city council.

The rule of incompatibility is that one office is incompatible with another office when it is subordinate to or a check upon the other. In the case at hand the city superintendent of schools, through a series of different sections of the law, dovetailing each into the other, occupies these four positions: (a) superintendent of city schools, (b) trustee of the sinking fund of the city proper, (c) member of the board of tax commissioners for the city proper (4523), and (d) a member of the board of commissioners of the sinking fund for the city school district (7614). To illustrate how this proposition might work out because of personal interest, the salary of the city superintendent of schools might be increased on the basis that the levy, or a portion of it made by the city council and submitted to the board of tax commissioners, would be rejected, in whole or in part, thereby giving the board of education additional revenue from which the increase for the city superintendent or school administration in the city school district could be secured. Here the superintendent of city schools, an agent of the board of education, sitting upon the board of tax commissioners, could vote to reject in whole or in part the levies submitted by the city council, thereby assisting in securing to the board of education, his employer, a better chance of securing an increased levy in which he may or may not be directly concerned. It would appear that if a person occupied a position as member of the board of tax commissioners in a city, he would have a check upon the amount of money which may be received by the board of education in a city school district in having its entire budget put through without being militated against by the needs of the city proper. It cannot be conceived that it would be proper for the board of education in a city school district to have a member of the board of tax commissioners in the city when one considers the power which is given the tax commissioners in section 4526 G. C. This being true the same rule would likely obtain in the case of an employe of the board of education. Under the provisions of section 7703 G. C. the superintendent shall "perform such other duties as the board determines," thus indicating clearly that the superintendent is the servant of the board of education and if he shall perform such other duty as the board determines the board of education might at some time send the superintendent, instead of one of its own members, before the county budget commission or even before the board of tax commissioners in a city school district, to make a plea for or

against certain levies which would affect one way or the other the budget desired by the board of education, and those connected with school administration. Speaking upon the superintendent of schools in a city school district, Opinion 422, issued on June 23, 1919, to the Superintendent of Public Instruction, uses the following language on page 685, Opinions of the Attorney-General, Volume I, to wit:

"The superintendent of a school district, as indicated before, has been employed primarily as the executive officer of the board of education in its dealings with teachers, parents and pupils. In a great many matters *he is the agent of the board of education* and it is through him that complaints are received from the public.

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Relative to question 3, which reads: 'what is the interpretation of that portion of section 7703, which reads "and perform such other duties as the board determines," this means that the superintendent, as an employe of the board of education, shall *perform any other duties that the board placed upon him* that are reasonable and within the scope of school affairs and which are not prohibited by statute."

In reply to your inquiry you are therefore advised that it is the opinion of this department that under the provisions of section 4526 G. C., setting forth the powers and duties of the board of tax commissioners in a city, the position of superintendent of city schools is incompatible with the office of member of the board of tax commissioners (4523) in such city, and the two positions may not be held by one and the same person at the same time.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*

3292.

#### BOARD OF EDUCATION—MAY NOT PAY MUTUAL TELEPHONE COMPANY ASSESSMENTS.

*A board of education may not pay mutual telephone company assessments.*

COLUMBUS, OHIO, July 3, 1922.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department on the question as to whether a board of education may pay mutual telephone company assessments. In answering this question your attention is invited to the recent decision of the Supreme Court in the case of Clarke vs. Cook, 103 O. S., —, decided on November 22, 1921, wherein a board of education was limited to doing those things for which authority was expressly granted by the statutes or could be clearly implied therefrom. Investigation shows that nowhere in the General Code is a board of education given any express authority to pay mutual telephone company assessments nor can such authority be implied. It is entirely possible that the reason for this failure to grant authority is because of the clear language of section 6 of article 8 of the Constitution of Ohio, which reads as follows: