However, this department feels constrained to go a step further and to point out that the Commission has unquestioned authority to create a board of advisers, to serve without compensation. So much, therefore, of the Commission's recent resolution as creates the board of advisers would, if standing by itself, be lawful. The enclosed copy of the Commission's resolution, however, shows that the two acts of the Commission cannot be readily separated. Therefore, in the opinion of this department, the entire resolution was nugatory.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3290.

INHERITANCE TAX LAW—PROBATE COURT—WHERE MORE THAN YEAR AFTER AN ORDER DETERMINING SAID TAX ENTERED BY PROBATE COURT, THE SAID COURT ON MOTION AND WITHOUT NOTICE TO TAX COMMISSION MODIFIED SUCH ORDER BY REDUCING TAX AND DIRECTING REFUNDER—CERTAIN PROPERTY APPEARED TWICE IN APPLICATION—PROCEDURE FOLLOWED ILLEGAL—HOW TO PROCEED.

Where more than a year after an order determining inheritance tax was entered by a probate court, the said court on motion, and without notice to the Tax Commission of Ohio, modified such order by reducing the tax and directing a refunder of the excess on the ground that certain property had by mistake and inadvertence appeared twice in the application for determination.

Held:

1. *That at the date of the filing of the motion the probate court was without jurisdiction to act upon it.*

2. *The probate court is without power to modify an inheritance tax determination in any case and at any time after the expiration of the term at which the same is made, without first giving the Tax Commission notice of the proceedings to secure such modification, unless the Commission is itself the applicant; in which event, all other persons interested in the determination of the tax should be likewise notified.*

3. *The order of the probate court made on such motion being void, it is not binding upon the Tax Commission so as to make it necessary for the Commission to issue a refunding order under section 5339 G. C., but as a matter of practice, a motion should be filed in the probate court to set aside the modifying order, and in the event such motion is overruled, error should be prosecuted to the common pleas court.*

COLUMBUS, OHIO, July 3, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The Commission has requested the opinion of this department upon the following questions:

"On the 2nd day of August, 1920, the probate court of Cuyahoga county determined inheritance tax in connection with the above estate in the sum of $2,083.63.

No exceptions were filed and no appeal taken.

On November 15, 1920, the tax was paid.

On the 1st day of May, 1922, a motion was filed by the executor of the estate in which he alleged that a certain item of property consisting of certain shares of stock or unpaid earnings held by the decedent in The Albert Rees Davis Company, having a value of $16,250.00 appeared twice in the application for determination of tax and that as a result the actual market value of the estate as found by the court was excessive resulting in an over assessment of tax for which he asked a refunder.

No notice of this motion was served on the Tax Commission.

On the first day of May, 1922, said probate court found the allegations of such motion to be true and directed a refunder to be made as prayed for in the sum of $446.95.

A copy of the entry of the probate court directing the refunder was received by the Tax Commission on the 6th day of May, 1922, being the first notice which the commission had of such application and order for refunder.

The Commission now desires your advice as to the regularity of this procedure in the following particulars:

1. Has the probate court jurisdiction at this late date to receive, consider and allow a motion to set aside its former entry and direct a refunder to be made?

2. If such jurisdiction or power exists can it be exercised without first giving this Commission notice of such motion?

3. In the event the Commission desires to contest the matter, what course should it follow? Should it file a motion in the probate court to set aside the entry of May 1, 1922, preparatory to filing a petition in error in the court of common pleas. or may it appeal at once from the last judgment of the probate court?

4. Or is it sufficient for the Commission to refuse to grant its order directing the county auditor to refund such excess amount as is required by section 5339?

We are somewhat at a loss to know the correct practice to be followed when it is sought by interested parties to have the determination of inheritance tax modified after the same has been entered other than in the method of filing exceptions under section 5346. We are hence submitting the above to you for a full examination, as it presents what may be an extreme case, the application for modification and refunder not being presented until some eighteen months or more after the original adjudication."

It has been heretofore held by this department (Opinions, Attorney-General, 1920, Vol. I, page 650) that:

"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."

This conclusion, reached with considerable hesitation, in view of the peculiar nature of the proceedings for the determination of the inheritance tax and the doubt as to whether they are adversary in the complete sense, is further supported by a provision of the statute not directly referred to in the opinion quoted, viz., section 11643 of the General Code, a part of the chapter relating to other relief after judgment, which provides as follows:

"The provisions of this chapter shall apply to the supreme court and probate court, so far as they may be applicable to their judgments or final orders. In estimating time, the probate court, for this purpose, will be considered as holding, in each year, three terms, of four months each, the first commencing on the first law day in January of each year."

At all events, the questions now submitted will be discussed on the assumption that the general conclusions reached in the former opinion are correct.

In the case inquired about the probate court undertook to afford relief by way of modification of its own order, upon motion, without the service of the notice required in case of an original proceeding, and more than a year after the rendition of the final order. Moreover, the modification is apparently based upon a mistake of fact, and yet no new trial was granted, but the modification or amendment was made *ex parte.*

It is apparent, therefore, that section 11631 and succeeding sections of the General Code were not complied with. In the first place, the case comes under none of the headings mentioned in section 11631 unless it be the first one. The section provides in full 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.

2. By a new trial granted in proceedings against defendants constructively summoned as provided in section eleven thousand two hundred and ninety-six.

3. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.

4. For fraud practiced by the successful party in obtaining a judgment or order.

5. For erroneous proceedings against an infant or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.

6. For the death of one of the parties before the judgment in the action.

7. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

8. For errors in a judgment, shown by an infant within twelve months after arriving at full age as prescribed in section eleven thousand six hundred and three.

9. For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

10. When such judgment or order was obtained, in whole or in part, by false testimony on the part of the successful party, or any witness in

his behalf, which ordinary prudence would not have anticipated or guarded against, and the guilty party has been convicted."

The intervention of a mistake of this character is not a "mistake, neglect or omission of the clerk." It is not an irregularity; it is not a fraud; it is not an unavoidable casualty or misfortune preventing the party from prosecuting or defending; it is not based upon perjury. At best, it is a ground for new trial, it being possible to consider the facts recently discovered as "newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at the trial" (section 11576 G. C.).

But if it is considered as a ground for new trial, then the application for such new trial must under section 11580 referred to in section 11631, be filed "not later than the second term after the discovery, nor more than one year after final judgment was rendered," and as stated in the former opinion, like notices must be given as were given at the initiation of the former proceeding. In this case, however, the final order was reopened more than three terms and more than one year after it was rendered, and no such notices were given.

Even if the circumstances could be brought within some of the other paragraphs of section 11631, the action of the probate court must be stamped as unauthorized. While the time limitations on the commencement of proceedings under these other paragraphs all exceed one year (see section 11640 G. C.), yet the lack of notice is fatal on any hypothesis. Section 11634 provides that proceedings under the third paragraph of section 11631 shall be by motion upon reasonable notice to the adverse party or his attorney in the action. No such notice was given in the case about which the Tax Commission inquires. Proceedings under any of the remaining paragraphs must be "by petition verified by affidavit" (section 11635) on which "a summons shall issue and be served as in the commencement of an action." In the former opinion the requirement for the issuance and service of a summons was held to be satisfied in cases of this character by giving the notice required for the initiation of proceedings determining inheritance tax in the first instance.

It is clear, therefore, that the only sections of the statute under which authority could be claimed for the probate court to make such a correction were not complied with. Reference may be made to what appears to be a special act found in 108 O. L., Part 2, page 1167, which provides as follows:

> "That whenever an administrator, executor or trustee of an estate shall, in pursuance of an order or judgment of a court, have paid collateral inheritance taxes to the county treasurer of the county in which the estate is located, under the provisions of the statutes relating to collateral inheritance taxes before the same were amended by the act passed May 8, 1919, and the probate judge of said county shall thereafter have judicially determined that the whole or a part of said taxes ought not to have been paid, and said person is ordered to refund the whole or part of said taxes to the heirs, the county auditor shall, upon application, draw his warrant on the county treasurer, and the county treasurer shall refund out of the funds in his hands or custody, to the credit of inheritance taxes, such equitable proportion of the taxes, without interest, and be credited therewith in the accounts required to be rendered by him; but no such application for refunder shall be made after one year from the date of such judicial determination."

This act, whatever its effect, relates only to collateral inheritance taxes, and does not apply to the case under consideration.

We are thus remitted to the inquiry as to whether or not the provisions of section 11631 and succeeding sections of the General Code are exclusive. Decisions will be found in which it has been declared that these provisions are cumulative and not exclusive.

Darst vs. Phillips, 41 O. S. 514;
Coates vs. Bank, 23 O. S. 415.

These two cases decided by the Supreme Court will, however, when examined be found to hold that the statutory provisions regulating relief after judgment are not exclusive and cumulative only in the sense that they do not exclude—and are in addition to the jurisdiction of a court of equity to enjoin the enforcement of a judgment procured by fraud, or without jurisdiction. Neither of these decisions is authority for holding that the court that rendered the judgment has any other power than that which the statute gives to it to modify a judgment after term time. As stated in the former opinion, every court of record has the inherent power to make its record speak the truth, which it may exercise at any time, though even this is doubtful in Ohio in view of the third ground of relief provided for in section 11631 of the General Code above quoted. It is apparent, however, that in this case the order has been changed and not merely the record of it. In the opinion of this department the statutes above quoted and referred to, do exclusively govern and regulate the power of the court which rendered a judgment or made a final order to amend, modify or vacate its own judgment after the expiration of the term at which it was rendered. Any other interpretation or application of these sections would render the regulatory provisions thereof meaningless. It is true that some lower court decisions will be found in which, relying upon the general statement in the Supreme Court decisions above referred to, to the effect that these provisions are cumulative merely, such courts have held that jurisdiction exists in a court of record to vacate, modify or amend judgments after term time on grounds other than those enumerated in section 11631. See Bank vs. Muller, 7 N. P. (N. S.) 313. But such decisions are not warranted by the cases on which they rely, and in the opinion of this department are erroneous.

Accordingly, it is the opinion of this department that the probate court of Cuyahoga county had no jurisdiction to act upon the motion made on the first day of May, 1922, and that its order made in response to that motion was wholly void and of no effect. This conclusion is based upon the reason that the alleged mistake constituted, if anything, a ground for new trial of the proceedings to determine the tax and the time within which a new trial could have been applied for had expired. This conclusion answers the Commission's first question in the negative, and makes it unnecessary to consider the second question at all. If this department had been able to reach the conclusion that the circumstances of this case come within any of the last eight groups enumerated in section 11631, the Commission's second question would have been raised, and this department would have been constrained to hold that though jurisdiction would in that event have existed, it could not have been exercised without first giving the Commission notice of the motion. Having reached the conclusion that the order of the probate judge is wholly void and not merely erroneous, this department would have to advise as a matter of law that the procedure suggested in the Commission's third question is technically unnecessary, in the event that the Commission desires to contest the matter, and that it would be sufficient for the Commission to proceed in the manner suggested in the Commission's fourth question, by simply refusing to act under section 5339 of the General Code. The section provides in part as follows:

"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 commisioners* (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: