the matter of handling the bond and coupon account, and the general tendency is to the effect that such an account is embraced in the depositary agreement.

Consideration of the character of such funds as trust funds, and the purpose of these sections, leads me to the conclusion that monies credited to a bond and coupon account by a city depositary are public funds and, as such, draw interest.

Respectfully,
JOHN G. PRICE,
Attorney-General.

972.

MUNICIPAL COURT OF ALLIANCE—JUDGE NOT ENTITLED TO ALLOWANCE BY COUNTY COMMISSIONERS IN PLACE OF FEES IN FELONIES WHERE STATE FAILS OR IN MISDEMEANORS WHERE DEFENDANT PROVES INSOLVENT—UNDER SECTION 3016 G. C. NO COSTS PAYABLE TO JUDGE FROM COUNTY TREASURY IN FELONIES WHERE DEFENDANT IS CONVICTED—ALSO SAME RULE WHERE THERE IS NO CONVICTION BUT RECOGNIZANCES FORFEITED AND COLLECTED.

1. *The judge of the municipal court of Alliance is not entitled to an allowance by the county commissioners in place of fees in felonies where the state fails or in misdemeanors where the defendant proves insolvent.* (*Section* 3019).

2. *Under section* 3016 *no costs are payable to the judge of the municipal court from the county treasury in felonies where the defendant is convicted or in other cases where there is no conviction, but recognizances are forfeited and collected.*

COLUMBUS, OHIO, January 29, 1920.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department on the question submitted to you by Hon. W. S. Ruff, prosecuting attorney of Stark county, as follows:

> "I wish that you would give me a ruling with reference to the payment of costs of preliminary hearings in criminal cases heard in the municipal court of the city of Alliance.
>
> Section 3016 and following sections do not include municipal courts. We have a municipal court in the city of Alliance and another is to be established January 1st in the city of Massillon. I have been in doubt as to whether I had the right to allow the county to pay to the municipal court the costs in preliminary hearings. I trust that you will find it convenient to give me a ruling at an early date."

Your inquiry does not state whether it is "costs under section 3016 or an allowance "in place of fees" under section 3019 which is involved. Mr. Ruff's letter refers to the matter as "costs in preliminary hearings" but it also refers to "section 3016 and following sections." So that it becomes necessary to consider the question with reference to both of these sections.

Sections 1479-195 et seq. (Alliance municipal court act), sections 3016 et seq. and section 4581 G. C. are pertinent.

The Alliance municipal court act is found in 107 O. L., p. 660. Section 2 of that act relates to the election, term, salary and qualification of the judge of the municipal court. It is noted that the judge's salary is payable from four sources, viz., from the municipal treasury, Lexington township, Washington township and the city of Alliance.

Section 3 of the act confers upon this court "the same jurisdiction in criminal matters and prosecutions for misdemeanors for violations of ordinances as mayors of cities and any justices of the peace."

Section 3 of the act also confers the same jurisdiction on the municipal court which the police courts now or may hereafter have.

Section 4 of the act gives such judge power to "summon and impanel jurors, tax costs; * * * and may exercise all powers which are now or may hereafter be conferred upon police courts or are necessary for the exercise of the jurisdiction herein conferred and for the enforcement of the judgments and orders of the court."

In section 27 the powers and duties of the clerk of such court are defined. In part it provides that he

> "shall receive and collect all costs * * * and pay the same quarterly to the treasurer *of the city of Alliance* and take his receipt therefor, * * * and shall on the first Monday of each term of court make to the city auditor a report of all receipts and disbursements for the preceding term."

Section 31 of the act in part provides:

> "In criminal cases all fees and costs shall be the same as fixed with respect to police courts."

Without quoting further from this act, it is to be noted that it is not a law of a general nature; that a part of the judge's salary is paid by Stark county; that the municipal court is the successor to the police and justice of the peace courts and that all fines and costs are to be paid to the city treasurer, no part thereof being paid into the county treasury.

Section 3016 provides that:

> "In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, *so that such costs may be paid to the county from the state treasury.* In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

It is to be noted that in this section the municipal court is not provided for or mentioned in express terms and that the cases therein referred to are felonies in which there have been convictions, and in all other cases, in which there is no conviction but in which recognizance has been forfeited and collected, so that the state is not put to expense for costs.

Section 3018 provides that in felonies the witness fees shall be paid notwithstanding the state fails to convict.

Section 3019 provides:

> "In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session,

> may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

It is to be noted here that the cases in which such allowance may be made are felonies where the state fails, and misdemeanors wherein the defendant proves insolvent, and that the provision here is for "an allowance * * * in place of fees to such officer.

Of course it is to be borne in mind that theoretically the officers referred to will collect their fees from the prosecuting witness in cases where conviction is not had and from the defendant in the misdemeanors referred to, but the legislature undoubtedly was aware of the fact that a number of cases, in the course of the year, are brought before such courts in which it is impractical, if not impossible, to collect such fees, and having provided in section 3016 for the payment of costs in certain cases where the county is re-imbursed, and followed this with the prohibition of section 3017 that "in no other case shall any cost be paid" to such officer, the legislature by 3019 intended to provide some compensation for the officers "in place of fees," which were taxable but not collectible in such cases. In section 3019, as in the sections immediately preceding it, there is of course no express reference to the municipal court.

In Commissioners (Butler County) vs. State ex rel. Primmer, 93 O. S. 42, a case involving a question somewhat similar to the one here presented was decided. The defendant Primmer was the city solicitor of Hamilton, Butler county, and filed his petition in the court of common pleas of that county, praying for a writ of mandamus against the county commissioners requiring them to allow and fix his compensation for services as prosecuting attorney in the municipal court of Hamilton and to command the county auditor to issue his warrant for said services.

A demurrer to the petition was sustained in the common pleas court and it reached the supreme court on the question of whether the city solicitor could recover for services performed as police prosecutor in the municipal court of Hamilton under section 4307, which provided that the city solicitor should designate one of his assistants to act as prosecuting attorney of the police or mayor's court and should receive for this service such compensation as council may prescribe, and "such additional compensation as the county commissioners shall allow." The city solicitor contended that after the enactment of the Hamilton municipal court act, by which the police court of Hamilton was succeeded by the municipal court and in which municipal court act it provided (section 1579-142 G. C.) that the city solicitor should be the prosecuting attorney of the municipal court, he was entitled to such compensation as though municipal courts were named in section 4307.

The commissioners defended on the ground that section 4309 did not authorize the allowance of additional compensation for services performed in the municipal court, as that court was not named or referred to in section 4307, nor was there any other section of the statutes relating to the county commissioner's power and duties which authorized them to fix and allow additional compensation.

The court in a per curium opinion points out, at pages 44 and 45:

> "It is claimed, however, that there is no provision here for compensation from the board of county commissioners and failing to mention the same, although mentioning his allowance from the council in city cases, the presumption arises that this was intended as exclusive and that he should, therefore, receive no compensation from the county. However, his allowance of compensation from county *is fixed by the general section heretofore quoted*, 4307, supra, and if the special act is to control as to compensation it should have expressly provided that such compensation should be in full for

all services rendered, *or used other apt words excepting it from the operation of the general statute.*"

The court in the concluding paragraph reasons thus:

> "This being a state statute, providing for compensation for services rendered to the state, it should be so construed as to have *uniform operation* as far as practicable *throughout the state.* Such construction should be given the special act as to the city of Hamilton as to conform to the general purpose of the general act and allow equal compensation for equal service throughout the state."

In this connection it should be borne in mind that section 4307 defines the duties of a municipal officer and is a law of a general nature, the validity of which requires uniform operation throughout the state, and that in the creation of the Hamilton municipal court act no change was made in any way with reference to the duties or the compensation of the city solicitor, whose office was not created in the municipal court act, but, as pointed out, was the subject of general legislation. There was no provision in the municipal court act then for any part of his salary to be paid by the county, though that subdivision of the state received the benefit of his services in state cases.

But can it be said that this case is parallel to that which may be supposed to arise on the facts as presented here? The following facts distinguish such a case from the Hamilton case:

1. The Alliance municipal court act is not a law of a general nature, such acts being special and in theory at least adapted to the needs and wishes of each locality where created, whereas section 4307 is a general law. This distinguishes the present question from the Hamilton case and the court's reasoning on the desirability and necessity of uniform operation throughout the state is inapplicable, as municipal court acts may differ very greatly and uniform operation would be impossible and probably undesirable.

2. Under section 4307, in the Hamilton case, the court was dealing with the matter of compensation from the county for services performed directly in its behalf, viz., legal services as police prosecutor in state cases in police or mayor's courts. The state could have cast this duty upon the county prosecuting attorney with or without additional compensation, to be paid him from the county treasury, but it chose to provide by this section that for such services as police court prosecutor, the city solicitor should receive "such additional compensation as the county commissioners shall allow."

3. The subject of this provision is direct compensation from the county for services of a salaried officer who is not authorized as such to charge fees and which fees are not chargeable in the first instance as part of the costs.

In section 3019 some of the judicial officers there named doubtless receive their compensation, in whole or in part, in fees collected from the litigants and its purpose is manifestly to make up to such officers an allowance "in place of fees" for such cases where the fees are not so collected. This is consistent with section 3017, prohibiting the payment of any *costs* to such officers from the county treasury, except as provided in section 3016.

In the Alliance act it is specifically provided that a part of the salary of the judge shall be paid by the county, indicating (if the questionable similarity of section 3019 to 4307 is for the present assumed), that the legislature in the Alliance act have used "apt words excepting it from the operation of the general statute" as stated in the Hamilton case. In this connection section 27 of the act, supra, may be recalled, which

provides that all fines and costs collected shall be paid into the city treasury, while under section 4599 police court fines in state cases are payable to the county.

It is believed that these essential differences prevent the application of the principle announced in the Hamilton case and that so far as the allowance to the judge of the municipal court under section 3019 is concerned, it is the opinion of the attorney-general that the judge of the municipal court of Alliance is not entitled to an allowance by the county commissioners in place of fees in felonies where the state fails or in misdemeanors where the defendant proves insolvent.

But as to the payment of costs under section 3016, a somewhat different situation exists. Here the county collects such costs from the state when the convicted felon is delivered into the state's custody, and in the other cases where there is no conviction, but in which a recognizance is forfeited and collected, the county collects from the signer of the recognizance. In either case the costs are not ultimately borne by the county but are in effect collected from the state, the accused or his bondsman. If the costs are legally taxed in the first instance, it would seem to follow that the county could disburse the costs so collected to the persons entitled thereto.

On this phase of the question, under section 3016 there would be more plausibility for insisting upon the application of the Hamilton case, as the question of the relative benefit received or burden sustained by the county from the creation and maintenance of the municipal court would not be present, as the county in paying these costs under this section is not paying from its own funds, as already pointed out.

Are municipal court costs legally taxable in criminal cases? Section 31 of the Alliance act (supra), fixes the fees in criminal cases as those fixed "with reference to police courts." Section 4580, relating to police courts, provides for the payment of witness fees in such courts. That part of section 4581 which is pertinent is "other fees in the police court shall be the same in state cases as are allowed in the probate court or before justices of the peace in like cases."

At this point it may be pointed out that the fees allowed in the probate court and in the justice court are fixed by different statutes and are not the same.

In the case of Haserodt vs. State ex rel, 6 O. A. R, 354, the city of Cleveland brought an action to compel the county auditor and treasurer to pay to the city treasurer certain costs which had accrued to the chief of police in criminal cases in the police court of that city. By cross petition the chief of police and trustees of the police relief fund also claimed the costs. The trustees claimed by virtue of an agreement among members of the police department, so that their claim was based upon the right of the chief of police to such costs. The chief's claim, as shown in the statement of the case at page 356, was:

> "That he was entitled to said costs under the provisions of section 3016 and 4581 G. C. and relies upon these sections as authority for fixing and allowing fees to a chief of police for services in a police court."

The city claimed under section 4213, which provides that "all fees pertaining to any office shall be paid into the city treasury."

Section 36 of the Cleveland municipal court act (now 1579-40 G. C.), relating to fees in criminal cases in the municipal court, was identical to section 31 of the Alliance act.

The court disposed of the city's claims summarily on the authority of Portsmouth vs. Milstead, et al, 8 C. C. (n. s.) page 11, as section 4213 was held in that case, which was affirmed without report in full in 76 O. S., 597, not to apply to fees earned in state cases, but applicable only to fees in prosecutions under city ordinances.

The court also considered the case of Delaware vs. Matthews, 13 C. C. (n. s.) 539, and concluded that the observation of the court in that case, which was somewhat at variance with the conclusion of the Cleveland court of appeals, was mere dictum.

The case of State ex rel. vs. Kleinhoffer, 92 O. S., 163, was also considered, and after quoting from this case the court of appeals held:

> "We think this language of the court is equivalent to a holding that if the section there under consideration could be construed as providing that humane officers should receive the same fees as a sheriff or constable for like services, it would be inoperative because of its indefiniteness."

In the next paragraph the supreme court's reasoning is applied to section 4581 with the result that the court concluded:

> "Now the provisions of section 4581, aforesaid, present precisely this situation, for the most that may be claimed for this section as authority for fixing and allowance of fees to a chief of police is that it provides that such fees shall be the same as those of a sheriff or constable in the probate court or before a justice of the peace. We regard the reasoning of the court in the case last cited as conclusive against any claim that said section 4581 is effective in furnishing statutory authority for the fixing of fees in state criminal cases in a police court to the chief of police for services rendered therein."

This application is based on the fact, as pointed out more explicitly on pages 357 and 358, that the fees in the probate court and the justice court are not the same and that the statute in this regard is fatally defective.

Again, on page 362, the court state unqualifiedly:

> "There is no statute fixing the fees in a police court of any police officer in state criminal cases."

As to section 3016, the court pointed out at page 360 that its provisions

> "do not furnish such authority, for its provisions are intended only to authorize the payment of such fees from the county treasury and imply that *under some other statute* may be found the authority for fixing said fees."

While the question is not entirely free from doubt, this decision of the Cleveland court of appeals is rendered under statutes and on facts similar to those presented here, and was decided after the Hamilton case in 92 O. S. (supra), and in the absence of any later judicial construction overruling or modifying that holding, it is the opinion of the attorney-general that:

Under section 3016 no costs are payable to the judge of the municipal court from the county treasury in felonies where the defendant is convicted or in other cases where there is no conviction but recognizances are forfeited and collected.

Respectfully,

JOHN G. PRICE,

Attorney-General.