

941.

MUNICIPAL COURT OF DAYTON—CLERK OF SAID COURT NOT ENTITLED TO BE PAID ANY PART OF HIS SALARY FROM COUNTY—SALARY ILLEGALLY PAID RECOVERABLE.

1. *The clerk of the municipal court of the city of Dayton is not entitled to be paid any part of his salary from the treasury of Montgomery county under sections 1579-74 and section 4592 G. C.*

2. *Such salary illegally paid by such county commissioners is recoverable under section 286 G. C.*

COLUMBUS, OHIO, January 15, 1920.

The 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 as follows:

“Question 1. Is the clerk of the municipal court of the city of Dayton entitled to be paid any part of his salary from the county treasury in view of the provisions of sections 1579-74 and 1579-75 G. C., 103 O. L., 392?”

Question 2. If your answer to the above is in the negative, can salary that he may have drawn from the county treasury be recovered from him?”

Sections 1579-46, 1579-88 (Dayton Municipal Court act), 4568 and 4592, relating to police clerks, section 286, and article X, section 5, of the constitution, are pertinent to your inquiry.

Section 1579-74 (103 O. L., 392) provides that the clerk of the Dayton municipal court shall “receive such compensation, payable out of the treasury of the city of Dayton, not less than \$2,000 per annum, payable in monthly installments as the city council or other legal authority may prescribe.”

Section 1579-75 confers upon the clerk all powers and duties of police clerks and provides that he shall “receive and collect all costs, fines and penalties; and shall pay the same quarterly to the treasurer of the city of Dayton and take his receipt therefor.”

Powers and duties of the clerk of police court are defined in sections 4590-2 and 4599 G. C.

In section 4592 of the police court sections, the compensation of the clerk is provided for in that he “shall receive for his services in city cases a fixed salary to be prescribed by ordinance, not to exceed \$2,000 per annum, and for state cases such further allowance not to exceed \$2,000 per annum, payable from the county treasury, as the county commissioners deem proper.”

It is at once apparent from an examination of the Dayton municipal court act that this court, so far as powers, duties and jurisdiction is concerned, succeeds the police court of Dayton. It is notable also that, unlike section 4592, section 1579-74 makes no provision for any allowance by the county commissioners from the county treasury for the clerk's salary.

It may also be pointed out that in this respect the municipal court act deals with the judge's salary differently, for in section 1579-49 there is provision for the county commissioners to allow and pay a part of the judge's salary from the county treasury. In this respect this section is similar to section 4568, relating to the compensation of judges of the police court, so that as before stated—and its significance

will justify the repetition—there is thus a clear distinction in the legislative treatment of the salary of the judge in the municipal court act from the salary of the clerk in that act.

It must also be borne in mind that the municipal court act is a special act, and as such will prevail over a former general section, in so far as they are irreconcilably opposed to each other. This is pertinent in view of the provisions of section 4599 of the police court act, which provides that the clerk of the police court shall pay the fines and costs collected in state cases into the county treasury and under section 4592, above quoted, such fines and costs are payable into the Dayton city treasury.

Section 5, article X, prohibits the payment of money from the county treasury except in pursuance of law.

Construing these sections literally, it is observed, first, that section 1579-74 makes no provision for paying any part of the municipal court clerk's salary from the county treasury; second, section 4592 relates to clerks of police courts and not to clerks of municipal courts.

On first impression this would bring us to a logical conclusion that the county commissioners of Montgomery county could not legally pay any part of the clerk's salary from the county treasury. However, in the case of *Commissioners vs. Primmer*, 93 O. S. 41, the supreme court in a per curium opinion held that the city solicitor of Hamilton was entitled to an allowance from the county treasury for services performed as police prosecutor in the municipal court of Hamilton.

The Hamilton municipal court act was passed after section 4307, which provided that the city solicitor, for his services as such police prosecutor, was entitled to "such additional compensation as the county commissioners shall allow."

The court's reasoning was that no provision being made in the later special act creating the Hamilton municipal court, and section 4307 being a general statute, there was no presumption that the later municipal court act was exclusive or in any way affected general section 4307. The court reasoned that 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 pointed out that the result of the opposite construction would result in the city solicitor receiving different compensation for the same service in different parts of the state, and on this reasoning the court held that the term "police court" used in section 4307 was to be construed as including municipal courts subsequently established unless there were "apt words excepting it from the operation of the general statute."

However, as pointed out in a recent opinion to your department, relating to the Alliance municipal court, uniformity with reference to city solicitors would be required, section 4307 being a law of a general nature, whereas each municipal court act is special. In the Dayton act attention has already been directed to the fact that while there was no provision made for the clerk receiving any compensation from the county treasury, the matter of the judge's compensation was not treated in this manner, and this, in connection with the fact that all of the fines and costs of the Dayton court are payable to the city treasury, would indicate that the legislature advisedly omitted the provision as to allowance from the county treasury for the clerk and in this fashion excepted it from the operation of the general statute, as pointed out in the *Hamilton case*.

For these reasons, in the absence of any later application and extension of the rule announced in the *Hamilton case*, this department is not of the opinion that that case controls the different facts involved in your inquiry, and a negative answer results.

Your second question inquires as to whether such salary drawn by the clerk from the county treasury may be recovered from him.

Based on the conclusion reached in answering your first question, it may be stated that such salary was drawn from the county treasury not by authority of law, as provided in section 5 of article X, referred to.

Section 286, as amended in 103 O. L., 507, provides that if your examiner's report "sets forth that any public money has been illegally expended," the prosecuting attorney "shall cause to be instituted, and * * * is hereby authorized and required so to do, civil actions in the proper court * * * for the recovery of the same, and shall prosecute, or cause to be prosecuted, the same to final determination."

It is believed that this section suggests an affirmative answer to your second question.

Respectfully,

. JOHN G. PRICE,
Attorney-General.

942.

MUNICIPAL CORPORATIONS—SECTIONS 3963 AND 14769 G. C. APPLICABLE TO MUNICIPALITIES WHICH DO NOT MAINTAIN MUNICIPAL WATERWORKS BUT BUY WATER FROM ANOTHER MUNICIPALITY OR PRIVATE COMPANY—SECTIONS APPLICABLE TO INSTITUTIONS THAT ADMIT PERSONS WHO ARE NOT RESIDENTS OF SUCH MUNICIPALITIES.

1. *Sections 3963 and 14769 G. C. apply to municipalities which do not maintain a municipal waterworks but buy their water for distribution from another municipality or private company and then make distribution to the inhabitants, charging and collecting therefor.*

2. *Opinion reserved as to second question.*

3. *Third question disposed of by case No. 2839, Camp Wise Association vs. Euclid Village, Cleveland court of appeals.*

COLUMBUS, OHIO, January 15, 1920.

The 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, as follows:

"*Question 1.* Do sections 3963 and 14769 G. C. apply to municipalities which do not maintain a municipal waterworks but buy their water for distribution from another municipality or private company and then make distribution to the inhabitants, charging and collecting therefor?

Question 2. Do such sections cover charitable institutions devoted to the relief of the poor, aged, infirm or destitute, or orphan or delinquent children, even though such institutions may be sectarian admitting and containing persons of only one sect or creed?

Question 3. Do such sections apply even though such institutions admit persons who are not or were not residents of such municipalities?"

The correspondence between your examiner and Mr. M., including a copy of the