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APPROVAL, BONDS OF DEFIANCE COUNTY, OHIO—$6,961.65.

COLUMBUS, OHIO, March 24, 1927.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

237.

APPROVAL, BONDS OF MARION TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO—$200,000.00.

COLUMBUS, OHIO, March 24, 1927.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

238.

APPROVAL, BONDS OF YORK TOWNSHIP RURAL SCHOOL DISTRICT, BELMONT COUNTY, OHIO—$3,000.00.

COLUMBUS, OHIO, March 24, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

239.

MUNICIPAL COURT OF MARION—MAY PROMULGATE RULES FIXING DIFFERENT SCHEDULES FOR FEES AND COSTS—MUST NOT EXCEED FEES AND COSTS PROVIDED FOR LIKE ACTIONS AND PROCEEDINGS BY GENERAL LAW.

SYLLABUS:

By virtue of Section 1579-801, *General Code, the municipal court of the city of Marion may, in its discretion, promulgate rules fixing a schedule of fees and costs to be taxed in prosecutions for minor traffic violations, and a different schedule for prosecutions for misdemeanors of a more serious nature, provided such rules do not fix the amount of such fees and costs to exceed that provided for like actions and proceedings by general law, including Section* 3005, *General Code.*

COLUMBUS, OHIO, March 26, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your communication in which you inquire whether or not the municipal court of Marion may establish a schedule of

fees and costs for minor traffic violations, and a different schedule for misdemeanors of a more serious nature.

The special act creating the municipal court of Marion, enacted July 21, 1925, being Sections 1579-561 to 1579-812, both inclusive, of the General Code, by its terms delegates to the court authority to establish a schedule of fees and costs to be taxed in all actions and proceedings, provided only that such fees and costs may not be fixed in an amount to exceed fees and costs provided for like actions and proceedings by general law.

The section of the code with reference thereto is 1579-801, which reads in part as follows:

> "* * * In criminal proceedings all fees and costs shall be the same as now fixed in police courts of cities, provided, however, that the municipal court, in lieu of the aforesaid methods of taxing costs, by rule of court may establish a schedule of fees and costs to be taxed in all actions and proceed ings, in no case to exceed fees and costs provided for like actions and pro ceedings by general law."

The Constitution of Ohio in Article IV, Section 1, provides:

> "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law."

By virtue of the grant of legislative power thereby given the Legislature of Ohio has from time to time established various courts inferior to the courts of appeals, defined their jurisdiction, provided for their organization and prescribed rules of procedure for the exercise of their powers.

All of such inferior courts which have been so established have been limited in their jurisdiction to territory which was not co-extensive with the territorial boundaries of the State of Ohio.

It has been urged that such legislation, dealing with a subject not available, and operative alike in all parts of the State is prohibited by Article II, Section 26 of the Constitution of Ohio which requires uniformity in operation throughout the State of Ohio of laws of a general nature, and this contention has been made in several cases which have been passed upon by the Supreme Court of Ohio.

In 1896 the legislature by appropriate legislation, created a court of insolvency limited in its jurisdiction to the county of Cuyahoga. The Constitution of 1851 as amended in 1883 which was operative at the time of the passage of this act contained a provision of like import to that of Article II, Section 26 of the Constitution of 1912, which has been heretofore referred to, and it was contended in the case of Ohio ex rel Attorney General vs. Bloch, 65 O. S., 370 that the act creating the court of insolvency for the county of Cuyahoga was unconstitutional for the reason that it dealt with a subject that was general in its nature and for this reason could not be confined to such local operation as that within the territorial limits of one county. This contention, however, was not sustained by the court which held that the language of the Constitution in Article IV, Section 1, supra, vested in the legislature full power to determine what other courts it would establish and that it might establish local courts if deemed proper, either for separate counties or districts, and define the jurisdiction and method of administration of such courts; and that in the enactment of laws relating thereto it is not subject to the limitation imposed upon the legislative power in requiring all laws of a general nature to have uniform operation throughout the state.

The only limitation placed upon the exercise of this power of the legislature is

that the courts so established shall be inferior to the courts of appeals, subject of course, to the qualifications that no legislature can alter the judicial system established by the Constitution, nor interfere with the courts designated by that instrument as the recipients of the judicial power.

Apparently, there could have been but one purpose in making this special grant of legislative power and that was to enable the legislature to meet the public needs for additional courts as they might arise in different parts of the state.

The doctrine of the Bloch case has been cited with approval, and its principles followed in many later decisions. See State ex rel Fox, vs. Yeatman, 89 O. S. 46; In re Hesse, 93 O. S. 233; Kelley, Judge, vs. State, ex rel, 94 O. S. 336; Miller, Receiver, vs. Eagle, 96 O. S. 106; State ex rel D'Alton, Etc. vs. Ritchie, et al., 97 O. S. 46; Schodt Motor Truck Company, vs. Dengenhardt, 10 Ohio App. 104; and Hull vs. Kauffman, 31 O. C. D. 291.

It has been well settled that laws creating courts inferior to the courts of appeals even though their jurisdiction is limited in territorial extent, are not unconstitutional and authority is given to the legislature by virtue of Article IV, Section 1 of the Constitution of Ohio to establish such courts, and to provide for their organization and due administration.

The right to assess court costs, both in civil and criminal cases, was unknown at common law and courts derive such right only by virtue of statute. It has, however, been well recognized that the legislature has the power to fix by statute rules for taxing costs, both as to manner and amount. In fact our entire criminal code in Ohio is statutory, and the legislature has, by virtue of its legislative powers, control of all matters pertaining to the defining of crimes, and the method of enforcing the laws or pertaining to prosecutions for violation of the criminal laws of the state, including the regulation of costs, limited only in this respect to such limitations as may be imposed by the Constitution of the United States and the Constitution of the State of Ohio.

In carrying out this power, it cannot be gainsaid but that it may classify crimes on whatever basis it sees fit, as for instance into the well known classes of felonies and misdemeanors.

Having this authority to fix schedules of costs to be taxed in criminal cases with the authority to classify crimes, it would seem to necessarily follow that it may if it chooses fix different schedules of costs for different classes of crimes.

There is no constitutional inhibition upon such action, nor can I conceive of any reason why the powers of the legislature should not include the power to enact legislation classifying crimes and fixing different methods of prosecutions, and different schedules of costs to be taxed therein, so long as no constitutional rights are invaded.

Having satisfactorily determined that the fixing of schedules of court costs and the manner of taxing them in criminal causes is a proper subject for legislation, and that in enacting such legislation legislatures may classify crimes and fix different schedules of costs for different classes of crimes, the question naturally arises whether it is such a subject for legislation as may be delegated to the court, or whether the fixing of such schedules is a pure legislative function and is not a proper subject to be delegated to a part of the judicial branch of the government.

Before discussing this question, it is well to observe that the legislature has not in the enactment of the statute under consideration granted to the municipal court of Marion the full power to determine what costs and fees shall be taxed in all cases but has provided that within certain limits the court may in its discretion fix a different schedule than that which the legislature had provided for in the general law applicable to all municipal courts. The legislature has fixed the amount of costs and fees to be taxed in all cases in all municipal courts and in addition has authorized the municipal court of Marion to use its discretion with reference thereto, to the extent that it may reduce the amount so fixed if and when in its discretion the ends of justice will thereby be met and the due administration of the function of the court thereby enhanced.

Even though the fixing of schedules of costs to be charged in criminal cases does savor of the exercise of a legislative power it cannot be said for that reason alone that this statute is unconstitutional. It is of importance to note the absence of a distributive clause in the constitution of Ohio although such a clause appears in the constitution of most of the states. It is nevertheless true in the American theory of government that each of the three divisions of the government, to wit: the legislative, executive and judicial, must be protected from encroachments by the others so far that its integrity and independence may be preserved. It is said by Judge White in State ex rel. vs. Harmon, 31 O. S. 250 that:

> "The distribution of powers among the legislative, executive, and judicial branches of the government, is, in a general sense, easily understood; but no exact rule can be laid down, a priori, for determining, in all cases, what powers may or may not be assigned by law to each branch.
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> The power of allotting to the different departments of government their appropriate functions is a legislative power; and in so far as the distribution has not been made in the constitution, the power to make it is vested in the general assembly, as the depository of the legislative power of the state."

So that when we come to the boundary line of legislative power and it is difficult to determine whether an act is wholly within the legislative domain or entirely within the judicial boundaries, the constitution not having clearly defined its position, it is within the power and duty of the legislature to determine to which department it shall belong. It follows that if the power conferred by this act upon the municipal court of the city of Marion is not judicial in its character, it is nevertheless within the constitutional right of the general assembly to confer upon the court this power because it is in the nature of rules for the administration of justice and in aid of executing or expressing the legislative will with reference to fixing the amount of costs to be charged in all cases coming within the jurisdiction of the Municipal Court of Marion.

In the case of Fairview vs. Giffee, 73 O. S. 183, in which there was under consideration the constitutionality of an act of the legislature conferring upon the common pleas court the power to detach unplatted lands from cities and incorporated villages and attach the same to adjacent townships and it was contended that this act imposed legislative power upon the judiciary. The court said:

> "It would be difficult, if not quite impossible, to maintain that the detachment of territory embraced within the limits of a municipal corporation is not within the legislative power conferred on the general assembly. At least, it seems to be the settled law of this jurisdiction that the legislature may either attach or detach territory adjacent to a municipality. But that is not the proposition which is involved in the decision of this case. The question to be determined here is whether or not the legislature, in providing the conditions and limitations under which the legislative will may be carried out in a general law, may choose the judicial department as its instrumentality.
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> The foundation of the argument against the constitutionality of this act is laid upon the doctrine of the distribution of governmental powers and functions. It seems to be assumed that the separation of executive, legislative and judicial powers is complete and distinct under the constitution. Theoretically it is so; but in practice it is not so and never was so; and by the best modern writers on political science it is recognized to be practically impossible to distinctly define the line of demarcation between the different departments of government.
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> It was long ago convincingly pointed out by Bentham that the work

of the judiciary is, in its final analysis, chiefly judicial legislation; and a distinguished publicist of the present day, Prof. Goldwin Smith, has declared that, 'the separation of the executive power from the legislative is a dream, though Montesquieu has established the belief that it is one of the great securities of liberty'.

The power of defining the functions of the executive and judicial departments is clearly a legislative power, which, under the constitution of Ohio, is only limited by the general principle that a grant of general powers to any department constitutes of itself an implied exclusion of all other departments from the exercise of such powers."

There is no express constitutional provision in Ohio granting to the general assembly the power to fix court costs in criminal cases.

I am unable to find in any of the reported cases or in any discussion of the subject, where this particular question as to whether the fixing of court costs was a pure legislative function that could not be exercised by a court or delegated to it has been raised, yet such rules of court have been upheld by the courts without discussion of the question of whether or not the court in promulgating such rule was legislating or merely laying down a rule for the due administration of the functions of the court. Bond vs. United R. R. of San Francisco, (Cal.) 128 Pac. 786; Salt Lake City vs. Redwine, 23 Pac. 756, 6 Utah 335.

The Legislature of Ohio has provided by general law, Section 3005 of the General Code, a schedule of fees to be taxed as costs in criminal cases in municipal courts, and this law must govern the taxing of such costs by the municipal court of Marion unless its provisions have been superseded by some later enactment.

Section 3005 of the General Code, supra, was passed in 1921. Section 1579–801, supra, was enacted in 1925.

Construing these two enactments in *pari materia*, I think it is clear that the policy evinced by the legislature discloses that the provisions of the general act pertaining to costs in criminal cases in municipal courts were superseded by the provisions of the Marion Municipal Court Act.

In the case of City of Cincinnati vs. Holmes, 56 O. S. 104, Judge Minshall adverts to the following rule of construction in such cases:

"I know of no rule of construction of statutes of more uniform application than that later or more specific statutes do as a general rule, supersede former and more general statutes so far as the new and specific provisions go."

The general rule upon the subject is stated thus:

"Where there is one statute dealing with a subject in general comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together, and harmonized, if possible, with a view to giving effect to consistent legislative policy but to the extent of any necessary repugnance between them the special will prevail over the general statute." 36 Cyc. 1151.

I find no provision of law to the effect that costs and fees must be uniform in all criminal cases nor any limitation on the power of the court in making such rules as is provided for in section 1579–801 of the General Code, except the one set out in the statute to the effect that no schedule may be established fixing fees and costs in an amount exceeding those provided by general law in like cases.

The legislature has here delegated to the court the same power to fix a schedule of fees as it has itself, and in my opinion the legislature may classify crimes and provide a schedule of fees and costs to be taxed in prosecutions growing out of each class, and I

am of the opinion that the court under the power delegated to it may by rule do the same so long as such rules do not fix the amount of such fees and costs to exceed those provided for like actions and proceedings by general law, including Section 3005, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

240.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE WATTS AND SUHRBIER COMPANY OF TOLEDO, OHIO, TO CONSTRUCT PLUMBING, HEATING AND VENTILATING AND ELECTRICAL WORK FOR ANNEX TO MEN'S HOSPITAL, TOLEDO STATE HOSPITAL, TOLEDO, OHIO, AT EXPENSE OF $26,626.00—SURETY BOND EXECUTED BY THE METROPOLITAN CASUALTY INSURANCE COMPANY.

COLUMBUS, OHIO, March 26, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Highways and Public Works, and The Watts and Suhrbier Company, of Toledo, Ohio. This contract covers the construction and completion of Combined General, Plumbing, Heating and Ventilating and Electrical Contract for Annex to Men's Hospital, Toledo State Hospital, Toledo, Ohio, and calls for an expenditure of twenty-six thousand six hundred and twenty-six dollars ($26,626.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. There has further been submitted a contract bond upon which the Metropolitan Casualty Insurance Company of New York appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General

241.

COMMISSIONER OF SECURITIES—NOT AUTHORIZED TO ACCEPT CONTINUATION OF ORIGINAL BOND RESTRICTING MAXIMUM LIABILITY OF SURETY COMPANY TO $10,000.00—MUST BE A SEPARATE BOND FOR EACH LICENSING PERIOD.

SYLLABUS:

Under Section 6373-3 (d), General Code, the commissioner of securities is not authorized to accept from a licensed dealer, upon renewal of license, a certificate of continua-