

and July appropriations, may include within them the municipality's share of the proceeds of the automobile license tax which will come into the municipal treasury at the immediately subsequent February and August distributions (section 3797). The municipality may also if it forces itself in need of cash for expenditure between the time of passing the semi-annual appropriating ordinance and the time of semi-annual tax distribution, make an advance draft on the county treasury as early as the preceding December 20th or June 20th, to the extent of two-thirds of its share of the taxes now in question. (See section 2692, G. C.). It thus becomes plain that a semi-annual distribution of the taxes referred to in your letter will prove of as much service to municipalities and counties as would a monthly distribution, when account is taken of the fact that municipalities and counties are charged with the observance of the provisions of said sections 3797 and 5649-3d.

Hence, in specific answer to your questions you are advised that moneys coming into the county treasury by virtue of the law to which you refer are to be distributed at the regular semi-annual tax distribution periods, subject to advance draft by municipalities as mentioned in section 2692 G. C., and that such moneys may be expended only after appropriation in accordance with sections 3797 and 5649-3d.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1679.

LORAIN CRIMINAL COURT—CITY COUNCIL NOT AUTHORIZED TO
CREATE OR ESTABLISH POSITION OF CLERK IN SAID COURT.

The city council of Lorain is not authorized to create or establish the position or employment of clerk in the criminal court of Lorain, Ohio.

COLUMBUS, OHIO, December 4, 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:

“Under date of August 16th, we are in receipt of a letter from the city solicitor of Lorain, Ohio, as follows:

‘Mr. C. L. P., city auditor of this city, has called my attention to the status of the clerk in the office of the judge of the criminal court of this city, the matter having been brought to his attention by one G. E. H. of this city, who was active in the establishment of the criminal court here, the question being as to whether or not the city of Lorain had authority outside of the action of the state legislature in providing a stenographer, clerk or employe in the criminal court. My office has frequently held that the city council had no authority to establish an official clerk of the criminal court who could by virtue of his office be in a position to accept bonds, sign transcript or perform any other official duty, but the work in the office of the criminal judge on recommendation of the judge, had become such as to make it necessary to employ someone to do a part of the clerical work in the office, and the council, acting on this request, by ordinance established the position as follows:

That there be and there is hereby established the position of clerk in the office of the judge of the criminal court of the city of Lorain, Ohio, at a salary of \$90 per month, payable semi-monthly.

It was not the intention of council to provide a deputy or an official clerk in any sense of the word, but to provide an employe under the judge to do clerical work in the office, and this was consequently done. The intimation is that the city of Lorain would be without authority to create a position for such an employe or clerk without modification of the statutes, inasmuch as the criminal court was authorized by special statute passed some ten or twelve years ago, having in view the nature of the employment and the conditions which surround same and the fact that an official clerk is not employed nor such a position created, and being of the opinion that the city has the right to create a position such as above set forth, I am not in a position to advise the city auditor that this class of employment is illegal. However, inasmuch as the question has been raised by the auditor in a letter to me, I would ask you to kindly advise me as to your views in this connection, at your early convenience.'

We are respectfully requesting your written opinion as follows:

Question: Is the employment of the clerk in the criminal court of the city of Lorain, as described herein, legal?"

The position established or attempted to be established by the city council of Lorain is a clerkship in the criminal court of that city. This court was established by an act of the legislature in 101 O. L., page 385, being sections 14740-13 et seq., G. C. The act was amended in 103 O. L., 397, extending the territorial jurisdiction from the city of Lorain to the county of Lorain, and the term of office from two to four years, but in other respects remaining the same as enacted.

It is also noted that it was not the intention of council to provide a deputy or official clerk in the sense of creating an officer of the court, but rather to establish a position or employment to do clerical work in the office, and the question as it is understood by this department is as to the power of the municipality to create a position or employment in a state created court.

In McQuillin on Corporations, section 33, Vol. I, page 62, it is said:

"The primary and fundamental idea of a municipal corporation is an institution to regulate and administer the internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated or at all events not common to the state or people at large; but it is the constant practice of the states in this country to make use of the corporate instrumentality, or of its officers, to exercise powers, perform duties, and execute functions that are not strictly or properly local or municipal in their nature, but which are, in fact, state powers, exercised by local officers, within defined territorial limits, and it is important, * * * to keep this distinction in mind."

The same author distinguishing between state powers and municipal powers, also says:

"The line which separates the one from the other is often difficult to trace."

It being understood that the city of Lorain is not a charter city on the latest holding of the supreme court, as we understand it, it does not "have authority

to exercise all powers of local self-government," as provided in section 3 of Article 18 of the constitution, free from the restraint or control of the legislature. So we must look to the municipal statutes for the power of the city to create offices, positions or employments, and particularly for that power to create an employment in the criminal court of Lorain.

Section 4214 G. C. gives the city council power "except as otherwise provided in this title," to "determine the number of officers, clerks and employes in each department of the city government." It is to be noted here that the law contemplates the appointment of employes in the various departments of the municipal government, and this section can be effective to authorize the employment under consideration only by concluding that the position under consideration is a part, and in one of the departments of, the municipal government.

It is noted that in section 14740-13, the judge of the criminal court "shall have jurisdiction of any offense under any ordinance of the city of Lorain."

By section 14740-20 it is provided that such judge shall be elected by the electors of the city, and by section 14740-22 it is provided that "the bond and compensation of such judge shall be fixed by the council."

The next section provides that the city solicitor of the city of Lorain shall be the prosecuting attorney in such court.

This court is established by a special act, which by its explicit terms is applicable only to the city of Lorain. It is a part of Chapter I, title 9, of Municipal Corporations, and under the chapter head of "Police Courts," follows the different special acts creating police courts in various cities of the state. In all its essential characteristics it is the same as the previously created police courts, but bears the name of a criminal court. Whether or not the officers and employes of these specially created courts will ultimately be held to be officers and employes of the state or of the municipality, is not free from doubt. The office of judge of this particular court has many of the earmarks of a municipal office, which officer is elected by the voters of Lorain. His bond and compensation is to be fixed by the council and he is given jurisdiction to try ordinance cases for the city.

But by the amendment above noted, the territorial jurisdiction is not coterminous with the city, as such jurisdiction is confined only to the limits of the county. Taking this into consideration with the fact that if the office be regarded as a local and municipal office, then except as to charter cities making provisions otherwise, a law creating a municipal office is a law of a general nature and must have uniform operation in the state. Considered in this light and as a state office, section 4214 would not authorize the creation of a position or employment in the court, as such court would not be in any department or a part of the municipal government.

The legislative scheme concerning those courts seems to be that in the chapter above referred to they are created by special acts, which acts are not entirely uniform. It will be noted that some of these acts are more or less meager in detail, as to powers and procedure. However, in chapter 2, beginning with section 4567, the legislature, it would seem, has supplemented these individual provisions by the sections 4567 et seq., relating to "each municipality where a police judge is provided by law." The first sentence of this section provides that the judge shall be chosen for a term of four years. This is inconsistent with the Lorain act as it stood before amendment. Section 4568 provides a general rule for fixing the compensation of police judges within certain limitations, and other sections follow making provisions more in detail for the discharge of the duties of such courts. This is followed by Chapter 3, beginning with section 4590, which from its terms relates to "each municipality where a clerk of police court is provided by law." This is followed by other sections relating to the duties and powers of such clerk,

but in none of these sections is there any provision for the city council to appoint assistants or create positions in this particular court, whether it be regarded as a police court or not, and after considering all of these sections, this department is unable to find any authority on the part of the city council to create this position. It may be of some value to your correspondent to suggest for his consideration the possibility of requiring the performance of the duties involved in the position under consideration by a clerk in the department of public safety, if under this act, as it practically operates, the city's interest is sufficient and the emergency justifies, until some relief may be obtained by legislative action.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1680.

COUNTY SOLDIERS' RELIEF COMMISSION—MAY PURCHASE LAND
FOR BURIAL OF SOLDIERS UNDER SECTIONS 2943 ET SEQ. G. C.

The County commissioners are not authorized to purchase land and dedicate it for the use of burial of soldiers, indigent or otherwise, but the county soldiers' relief commission may make such purchase under sections 2943 et seq. G. C., payment for which shall be made by the warrant of the county auditor from the general county fund.

COLUMBUS, OHIO, December 4, 1920.

HON. THOMAS A. JENKINS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department from which the following is taken:

"The local post of the American Legion wishes to have a certain plot of ground in the local cemetery set apart for use as a burial ground for soldiers. This cemetery is a joint cemetery of the city and township. It is sought to have the county commissioners purchase this plot of ground from the cemetery trustees, and then dedicate it for the purpose indicated above. It is the intention that this ground be then used as a burial place for any soldier whose relatives wish him to be buried therein, regardless of the financial abilities of said soldier. * * * The county commissioners have adopted a resolution providing for the purchase of said land, and for payment of the same by paying one-fourth cash and by issuing notes for the balance * * *. In view of the facts will you kindly advise me as to the following:

First: Can the county commissioners purchase land and dedicate the same for use of burial of soldiers other than indigent soldiers?

Second: Would not the county commissioners be required to have certificate of auditor to effect that money was in the treasury or else in process of collection before any such obligation could be lawfully incurred?"

Provision is made in sections 4154 et seq. for township, village and city cemeteries and for the union of municipalities and townships for what are termed union cemeteries. Provision is also made in sections 10093 et seq. for the main-