State of Ohio to the City of Cincinnati" under the various leases theretofore made. In this phrase last above mentioned there is a recognition on the part of the Legislature that the lands that were described in said leases were conveyed to the City of Cincinnati, which again supports the contention that all of said lands so included were intended to be included under the terms of the act.

Based upon the foregoing, you are specifically advised that in my opinion:

1. The lands to which you refer in your communication, and which were, as you state, included in the amended lease from the State to the City of Cincinnati were authorized to be so conveyed by the act of 1911 and the acts amendatory thereof and supplementary thereto.

2. When such lands are sold by the State of Ohio under the provisions of the act of the 87th General Assembly, found in 112 O. L. 210, the City of Cincinnati, is entitled to have the amount realized from the sale of said lands deducted from the principal sum as fixed by the appraisers upon which the said city pays a rental of four per cent for the use of the lands retained by it for street and boulevard purposes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3111.

ORDINANCE—VILLAGE MAY ENACT AND ENFORCE ORDINANCE CONCERNING TRAFFIC AND POLICE REGULATION—COSTS MUST COMPLY WITH STATUTORY SCHEDULE.

SYLLABUS:

1. *When an ordinance of a village provides a different sum to be taxed as costs for the violation of a traffic ordinance, than is provided by the general statutes, such ordinance is a police regulation in conflict with general law, within the meaning of Section 3, of Article XVIII, of the Ohio Constitution, and the fee schedule provided by the statutes should be followed.*

2. *Such an ordinance will not be invalidated in so far as it defines an offense and prescribes a penalty therefor.*

COLUMBUS, OHIO, January 8, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your recent letter, the pertinent part of which reads:

> "Council of the Village of ---------- adopted an Ordinance providing in part that persons convicted of the violation of certain traffic regulations 'may be fined not less than $2.00, which amount shall include all costs, nor more than $25.00, which amount shall be in addition to costs.'
>
> QUESTION: In view of the statutory provisions, may the mayor of the village legally assess a fine, including costs, in accordance with the provisions of the ordinance which will be less in fact than the costs authorized by statute?"

I am also in receipt of your supplemental letter enclosing traffic ordinance, which letter reads:

"Supplementing our letter of August 9, 1928, which is returned herewith, please be advised that the traffic regulations referred to in said letter are those adopted by council of the village of ---------- and incorporated in a traffic code. We are enclosing herewith copy of ordinance referred to in our letter."

I assume that the village in question is a duly organized municipal corporation.

It is believed to be pertinent to consider Section 3 of Article XVIII of the Ohio Constitution which reads:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

There are no statutes establishing a municipal court for the village in question. Therefore, the power of the village to enact ordinances regulating traffic and the imposing of fines and costs for violation thereof is the exercise of a local police measure under the provisions of the section of the constitution above quoted. The ordinance in question manifestly is a local police measure and the provisions of the constitution above mentioned, require that it be not in conflict with general law. The question presented, therefore, is whether there are existing statutes fixing the amount of costs and fees in criminal cases applicable to such a village.

Section 4556 of the General Code, reads:

"The fees of the mayor, in all cases, shall be the same as those allowed justices of the peace, and the fees of the marshal, chief of police, and other police officer serving writs or process of the court, in all cases, shall be the same as those allowed constables."

It will be noted that Section 4556, supra, specifically provides that the fees of the mayor, in all cases, shall be the same as those allowed justices of the peace, and the Legislature has specifically designated the amount of costs and fees that justices of the peace may charge.

Section 1746, General Code, reads:

"For their services in criminal proceedings, when rendered, justices of the peace shall tax as costs and collect from the judgment debtor, except as otherwise provided by law, the following fees, and no more: * * * "

It will be noted that Section 4556, supra, likewise makes provision that the fees of the marshal, chief of police and other police officers serving writs or process of the court shall be the same as those allowed constables; and the Legislature has fixed and designated the fees and costs of a constable, in Section 3347, General Code, which provides:

"For services actually rendered and expenses incurred regularly elected and qualified constables shall be entitled to receive the following fees and expenses to be taxed as costs and collected from the judgment debtor, except as otherwise provided by law: * * * "

Likewise, in the general provisions of the Code with reference to felonies and misdemeanors, Section 12375 provides:

"In all sentences in criminal cases, including violations of ordinances, the judge or magistrate shall include therein, and render a judgment against the defendant for the costs of prosecution; and, if a jury has been called in the trial of the cause, a jury fee of six dollars shall be included in the costs, which when collected shall be paid to the public treasury from which the jurors were paid."

In view of the fact that Section 4556, supra, fixes the fees of the mayor the same as those provided for justices of the peace, by reference, and the latter officials hear only state cases, the question will logically arise as to whether the fees in ordinance cases are included within the terms of Section 4556, supra. The legislative history of the section last mentioned forces the conclusion that ordinance cases are included. Originally the said section in part provided:

"The costs of the mayor and other officers, in all cases, shall be fixed by ordinance, but in no case greater than the fees for similar services before justices of the peace. * * * "

It appears that this section is the authority for the fees of the mayor in both ordinance and state cases, and the section in its original form left the discretion as to the amount of fees to the municipality so long as it did not provide fees in excess of those provided by the general statute for a justice of the peace. Said section was amended in 1919 (108 v. Pt. 2, 1210) to read substantially as it now reads. Therefore, it seems clear that it was the intent of the Legislature in its amendment of said section to eliminate the power of the municipality to fix the costs in ordinance cases; and it further appears to have been its intent to fix the fees of the mayor in "all cases", that is, both state cases and ordinance cases, as provided therein.

It will be further noted that there is a distinction between a fine and costs. The following is quoted from an opinion of the Attorney General, reported in Opinions of Attorney General for 1920, Vol. II, page 866:

"Fines and forfeiture are clearly distinguishable from fees, costs and expenses."

It will therefore appear that the statutes authorizing municipalities to provide fines for the violation of ordinances do not authorize them to fix the costs that are to be taxed by the mayor in ordinance cases.

I have heretofore quoted Section 3 of Article XVIII of the Constitution of Ohio, extending the right of Home Rule to municipalities. In view of the fact that the Legislature has, by the provisions of the statutes hereinbefore referred to, fixed the fees magistrates are authorized to tax and collect, it becomes necessary to determine whether a municipality may, by ordinance, provide other fees than those so fixed by statute.

In the case of *State ex rel.* vs. *Hutsinpiller,* 112 O. S., 468, the court had under consideration the right of a municipality, by charter, to create a municipal court. It had been very forcibly argued that the right of local self government extended to the exercise of judicial authority as well as legislative and executive. The court, however, reached the opposite conclusion, the following excerpts from the opinion being sufficient to indicate the reasons therefor:

"It is urged on behalf of the defendant that this authority of municipalities to exercise 'all powers of local self-government' carries with it a sovereign power in itself, and that the creation of a court is one of the incidents thereto, especially if construed with reference to matters pertaining to purely local affairs.

* * * * * *

It is argued that the amendments to the Constitution in 1912 thus took from the General Assembly the exclusive power to establish courts inferior to courts of appeals, and by implication granted to municipalities power to establish courts inferior to the courts of appeals, as they saw fit, as an incident to the power of local self-government granted to municipalities under Section 3, Article XVIII.

This is a construction with which we cannot agree, for it allows, by implication only, the municipalities of the state the freedom to exercise this incident of sovereignty, to wit, creation of courts. A power so extraordinary and vital should not rest upon any less foundation than express grant or clear and necessary implication, and we find neither in the Constitution.

* * * * * *

The judicial power of the State is distinct from the executive and the legislative, and as one of the highest elements of sovereign power can only be created in strict conformity to the manner indicated by the rules laid down in the expression given to sovereignty by the people themselves, to wit, the Constitution. This judicial power has been cared for by the organic law, and is beyond the control of municipalities, which, after all, are only agents of the state for local governmental purposes. Section 1, Article IV, is a special provision of the Constitution that has to do with the creation of courts, and as such supersedes the general power of local self-government, as granted in Section 3, Article XVIII.

* * * * * *

Local self-government does not extend so far as to override plain constitutional limitations."

It is accordingly clear that the power of local self-government granted by the constitution to municipalities does not extend to the exercise of judicial power and hence whatever authority exists with relation to the judiciary must be sought in the constitution, and, if not there found, must be denied to municipalities.

Court costs are so necessarily incident to the exercise of judicial power as to impel the conclusion that, by a process of reasoning similar to that adopted by the court in the case just under consideration, the right to prescribe such costs is a matter of state-wide concern upon which municipalities are not authorized to legislate in the absence of specific statutory sanction. Since the Legislature has denied to municipalities any authority with respect to costs, the conclusion is inescapable that, in view of the conflict existing between the statutory provision and the terms of the ordinance, the statute must prevail.

However, it may be pointed out that the fact that the fees provided are inconsistent with the provisions of the general law would not invalidate the provisions of said ordinance defining the offense and fixing the penalty thereof.

Section 3628 of the General Code, which is a part of Chapter 1 of Division II of said General Code, found under the heading "Enumeration of Powers", provides:

"To make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine

shall not exceed five hundred dollars and such imprisonment shall not exceed six months."

It seems clear that a municipality may pass an ordinance such as the one under consideration and provide a fine for the violation thereof, even though the state should have provided an offense for a similar act by statute. See Opinions of the Attorney General for 1919, Vol. II, page 1539.

It is believed, therefore, that the part of the ordinance in question that defines an offense and fixes the fine for a violation thereof is not invalidated because of the fact that the provision relating to fees to be taxed by the mayor is inconsistent with the general law.

In view of the foregoing, you are specifically advised that:

1. The village council can not by ordinance fix the fees to be taxed by a mayor in either ordinance or state cases different than those provided in Section 4556 of the General Code.

2. An ordinance attempting to fix such fees will not be invalidated to the extent that it defines an offense and provides a fine for the violation thereof, but is inoperative in so far as it attempts to fix the mayor's costs.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3112.

APPROVAL, ABSTRACT OF TITLE TO LAND OF EARL CHEATWOOD IN UNION TOWNSHIP, SCIOTO COUNTY.

COLUMBUS, OHIO, January 8, 1929.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your communication of recent date enclosing a corrected abstract of title, warranty deed, and other files relating to the proposed purchase of a certain tract of one hundred acres of land owned by one Earl Cheatwood in Union Township, Scioto County, Ohio, which property is more particularly described in Opinion No. 2776 of this department directed to you under date of October 25, 1928.

An examination of the corrected abstract of title shows that said Earl Cheatwood has a good and merchantable fee simple title to the lands and premises here in question, free and clear of the objection to the title noted in said former opinion of this department on the original abstract of title submitted. The only exception now noted affecting the title to said lands is that arising with respect to the taxes on said lands for the year 1928, which taxes amounting to $6.21 are a lien on said lands.

The warranty deed signed by said Earl Cheatwood and Mary E. Cheatwood, his wife, conveying said property to the State of Ohio, as well as Encumbrance Estimate No. 4265 and the certificate of the Controlling Board, were each and all approved in the former opinion of this department above referred to.

I am herewith returning to you corrected abstract of title, warranty deed, encumbrance estimate and Controlling Board certificate.

Respectfully,
EDWARD C. TURNER,
Attorney General.