

5088.

JUDGE—SALARY OF POLICE COURT OR MUNICIPAL JUDGE  
—MAY NOT BE CHANGED BY LEGISLATIVE AUTHORITY  
OF CHARTER MUNICIPALITY—O. A. G. 1917, VOL. 1, p. 161,  
OVERRULED.

*SYLLABUS:*

*The legislative authority of a charter municipality is not authorized to change the compensation of judge of its police or Municipal Court and make it effective during the term for which he was elected. Opinions of Attorney General for 1917, Vol. I, page 161, overruled.*

COLUMBUS, OHIO, January 10, 1936.

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

GENTLEMEN: I acknowledge receipt of your communication which reads as follows:

“We are inclosing letter from our examiner, and brief prepared by D. J. Miller, Police Judge of Cleveland Heights, relative to the matter of increasing or decreasing the salaries of officials of the city elected or appointed for a fixed term. We are also inclosing charter and salary ordinance of this city.

The question on which your opinion is respectfully requested, is as follows:

Question: When a charter provides that a police judge shall be elected for a term of four years and that his compensation be fixed by ordinance of council, but does not contain the provision that the salary of the official shall not be increased or decreased during his term, as provided in Article II, Sec. 20 of the Constitution, and in Section 4213 of the General Code, has council legal authority to change the compensation of this officer during the term for which he was elected?”

Your question refers to the office of judge of the police court of the city of Cleveland Heights.

It has been held that under Sections 3 and 7 of Article XVIII of the Constitution, charter municipalities are authorized to determine what officers shall administer their government, which shall be appointed and which elected and to prescribe the method of their election which may

be inconsistent with statute. *Fitzgerald v. Cleveland*, 88 O. S. 338; *State, ex rel. v. George*, 92 O. S. 344; *State, ex rel. v. Hildebrandt*, 100 O. S., 339. The following is stated in the case of *State, ex rel. v. Edwards*, 90 O. S., 305:

“That provisions adopted by a city might differ from the general laws within the limits defined was not only expected but the very purpose of the amendment was to permit such differences and make them effective.”

In view of the home rule decisions in this state, Section 4213, General Code, which provides that:

“The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury.”

would probably not control in a charter municipality, but it is not necessary to decide this question for the purpose of this opinion.

It has been held in the case of *State, ex rel. v. Hutsinpuller*, 112 O. S. 468, that in view of Section 1 of Article IV of the Constitution, only the legislature may create courts inferior to the Courts of Appeals and that municipalities have no power by charter or otherwise to create courts. The following is stated in the opinion in this case:

“A court is an instrumentality and an incident to sovereignty and is the repository of its judicial power. It is the agency of the state by means of which justice is administered, and is that entity in the government to which the public administration of justice is delegated and committed. \* \* \*

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.”

The police court of Cleveland Heights, a charter city, was created by the legislature in 1925 in accordance with the power vested in it by the Constitution. Such court is given jurisdiction of all offenses under any ordinance of the city, of all misdemeanors committed within the limits and such further jurisdiction in all criminal cases conferred upon mayors' and police courts of cities.

Section 20 of Article II of the Constitution reads as follows:

“The general assembly, in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

It has been held that this section refers only to those offices created by, and the salaries of which are to be fixed by the General Assembly. *State, ex rel. v. Board of Education*, 21 C. C. 785.

In *State, ex rel. v. Bernon*, 127 O. S. 204, it was held that a judge of the police court of the city of Cleveland Heights is an elective municipal officer whose nomination is governed by the charter of the city.

In the case of *State, ex rel. v. Wall*, 17 N. P. (N. S.) 33, affirmed by the Court of Appeals and referred to with approval in *State, ex rel. v. Bernon*, *supra*, it was held that a judge of the Municipal Court of Dayton is a municipal officer and that the legislature may delegate to council the power to fix his compensation.

I am of the view that neither of these cases is applicable to the question here involved. While judges of such courts are municipal officers, nevertheless such officers are creatures of the legislature, which may either fix the compensation thereof or delegate that power to the legislative authority of the municipality.

In the case of *State, ex rel. v. Auditor*, 7 O. S. 334, the following is said:

“The constitution has in terms forbidden the general assembly to vacate the office of a judge of a court established by the constitution, but has not in terms placed any limit upon the powers of that body over the office of judges of courts established by itself.”

In the case of *State, ex rel. v. Beaman*, 16 O. App. 70, the following was held:

“Section 20, Article II of the Constitution of Ohio, embraces judges of the Superior Court of Cincinnati and judges of the Municipal Court of that city, and by virtue of the provisions of that section the judges of those courts in office when legislation is enacted increasing judicial salaries are not entitled to such increase during their then existing terms of office.”

This case was affirmed in 105 O. S. 652, as follows:

“It is ordered and adjudged by this court, that the judgments of the said Court of Appeals be, and the same hereby

are affirmed; this court being unanimously of the opinion and finding that the statute involved in these cases has no application to the facts here involved because of the provisions of Section 20, Article II, of the Constitution of Ohio."

Cincinnati was not a charter city at that time but that fact is immaterial if Section 20, Article II of the Constitution is applicable.

In the case of *State, ex rel. v. Thatcher*, 116 O. S. 113, Section 1558-48, General Code, delegated to the commissioners of Franklin County and to council of the city of Columbus, a charter city, the power to fix the compensation of judges of the Municipal Court at not less than a certain minimum salary. The county commissioners and the city council both increased their portion of said salary and the court held that such increase could not apply to the incumbents. The court said:

"This court has heretofore, in the case of *State, ex rel. Dempsey, v. Zangerle, Aud.*, 114 Ohio St., 435, 151 N. E., 194, in effect declared a similar statute to be valid. But neither that case nor any other case decided by this court has ever approved any statute, or any other legislative authority or *quasi* legislative authority, to increase the salary of any officer during an existing term of office. The action of the board of commissioners and of the city council, in so far as it applies to judges of the Municipal Court of the city of Columbus who were in office at the time of the enactment of such provisions and the making of such appropriations, is in violation of the provisions of Section 20 of Article II of the Constitution of Ohio".

It follows, therefore, that Section 20 of Article II of the Constitution is applicable to the office here involved. Furthermore, Section 1579-658, General Code, with reference to the office of municipal judge of the city of Cleveland Heights, reads as follows:

"The judge of the police court shall receive such compensation per annum, payable out of the treasury of the city of Cleveland Heights, as the council may prescribe, and in addition thereto such further compensation per annum, payable out of the treasury of Cuyahoga County, as the county commissioners of such county may prescribe; said compensation to be payable in twelve equal monthly installments and shall not be increased or diminished during said judge's term of office. Said judge shall not be entitled to receive compensation of any character other than that above provided for."

The legislature could either fix the salary of this office or delegate that power to the city and when it determined to delegate this power, it had the right to place such limitations thereon as it deemed advisable.

In Opinions of the Attorney General for 1917, Vol. I, page 161, the following was held:

“The city council of the city of Springfield may change the amount contributed by the city to the salary of the police judge of that city, so as to make such change effective during the term of the incumbent, provided that the amount of such contribution does not exceed two thousand dollars.”

This opinion held that neither Section 4213, General Code, nor Section 20 of Article II of the Constitution was applicable. The statute delegating the power to fix the salary of the office involved in said opinion contained no prohibition against the change of salary during the term as does Section 1579-658, General Code, but in view of the above decisions holding Section 20 of Article II of the Constitution applicable to such an office, I am unable to agree with the conclusion reached in said opinion.

I am of the opinion, therefore, that council of the city of Cleveland Heights is not authorized to change the compensation of judge of the police court and make it effective during the term for which he was elected.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5089.

APPROVAL—PROPOSED AGREEMENT FOR SEPARATION OF GRADES OF TRACKS IN VILLAGE OF FOSTERS, WARREN COUNTY, OHIO—PENNSYLVANIA RAILROAD COMPANY.

COLUMBUS, OHIO, January 10, 1936.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration a proposed agreement by and between the Director of Highways and the Pennsylvania Railroad Company, in the matter of the separation of grades of the tracks of said company and State Highway No. 10 in the unincorporated Village of Fosters, in Warren County, Ohio.

After examination, it is my opinion that said proposed agreement is