

If a court of competent jurisdiction should arbitrarily refuse to hear a case which either or both parties desire to be heard, such court may, by an action in *procedendo*, be compelled to proceed with such hearing and to adjudicate the rights of the litigants.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

2089.

COUNCIL—CITY OF MANSFIELD—NO AUTHORITY TO PROVIDE ALLOWANCE FOR AUTO BELONGING TO BAILIFF OF MUNICIPAL COURT.

*SYLLABUS:*

*The council of the city of Mansfield may not legally provide that an allowance of a specified sum per annum be paid to the bailiff of the municipal court of the city of Mansfield for the use of his automobile, in addition to the maximum salary prescribed by statute.*

COLUMBUS, OHIO, May 12, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication requesting my opinion, as follows:

“Section 1579-1017, G. C., 112 O. L. 335, reads:

‘The bailiff shall be appointed by the judge of the municipal court, and hold office during the pleasure of the court. He shall perform for the municipal court, services similar to those usually performed by the sheriff of courts of common pleas, and by the constable of courts of justices of the peace. Such bailiff shall receive such compensation, nine hundred dollars per annum, payable out of the treasury of the city of Mansfield, in monthly installments, as the council may prescribe. Before entering upon his duties, said bailiff shall make and file in the office of the auditor of the city of Mansfield, a bond in such sum of not less than two thousand dollars (\$2,000.00) as council may prescribe. The terms and conditions of said bond shall be subject to the approval of the judge of the court. The said bond shall be given to the state of Ohio and shall be for the benefit of the city of Mansfield and township of Madison and of any person who shall suffer any loss by reason of a default in any of the conditions of said bond. Every police officer of the city of Mansfield shall be ex-officio deputy bailiff of the municipal court and shall perform from time to time such duties in respect to cases within the jurisdiction of said court as may be required of them by said court to the clerk thereof.’

QUESTION: May the council of the city of Mansfield legally provide that an allowance of \$300.00 per annum for the use of his automobile be paid to the bailiff of the municipal court in addition to his salary of \$900.00 per annum?”

The Municipal Court of Mansfield, Ohio, was created by the 87th General Assembly in an act passed on April 21, 1927, entitled, “An Act—To provide for the estab-

lishment of a Municipal Court in and for the city of Mansfield, and township of Madison, Richland County, Ohio." (112 v. 323.) This act was codified as Sections 1579-978 to 1579-1030, inclusive, of the General Code.

Section 1579-1017, General Code, making provision for the appointment and compensation of a bailiff for the Municipal Court in question, is quoted in your letter, and it is unnecessary again herein to set forth this section. Your attention is, however, directed to that part of this section fixing the compensation of the bailiff, reading as follows :

"Such bailiff shall receive such compensation, nine hundred dollars per annum, payable out of the treasury of the city of Mansfield, in monthly installments, as the council may prescribe."

The only section of the act under consideration making any provision for accommodations and equipment for the court in question is Section 42, codified as Section 1579-1019, General Code, which reads :

"The council of the city of Mansfield and the trustees of the township of Madison shall provide suitable accommodations for the Municipal Court and its officers, including a private room for said judge and sufficient jury room. The council shall also provide for the use of the court the latest edition of the General Code of Ohio, complete sets of the reports of the Supreme Court and inferior courts of Ohio, and such other law books and publications as shall be deemed necessary, by the municipal judge, and shall furnish the necessary supplies, including telephones, stationery, furniture, heat, light and janitor service."

It will be observed that while the above section requires the council of the city of Mansfield and the trustees of the township of Madison, jointly to provide suitable accommodations, including a private room for the judge and sufficient jury room, and the council of the city of Mansfield to provide the necessary law books and publications and to furnish the necessary supplies, including telephones, stationery, furniture, heat, light and janitor service, no provision whatever is made for supplying an automobile, either by purchase or rental, or otherwise.

While this court is called the Municipal Court of the city of Mansfield, it is in reality a part of the judicial organization of the state, the court having jurisdiction beyond the territorial limits of the city. The establishment of this court, therefore, was a matter concerning which the city of Mansfield had no authority to act in so far as its home rule powers under the Constitution of Ohio are concerned. What was said with reference to the Municipal Court of Newark in Opinion No. 2042, rendered to your Bureau under date of May 1, 1928, is equally applicable here. In that opinion it was said :

"The act above noted, establishing the Municipal Court of Newark, Ohio, was passed pursuant to the authority of Section 1 of Article IV of the State Constitution, which 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.'

Section 15 of the same Article provides that :

'Laws may be passed \* \* \* to establish other courts, whenever two-thirds of the members elected to each house shall concur therein.'

The Municipal Court of Newark, Ohio, provided for by this act, is a part of the judicial organization of the state, and its establishment was a matter concerning which the city of Newark had no authority to act so far as its home rule powers under the constitution were or are concerned. *State ex rel. vs. Yeatman*, 89 O. S. 44, 47; *State ex rel. vs. Hutsinpillar*, 112 O. S. 468."

Since there is no statutory authority for any expenditure of the funds of the city of Mansfield for the purpose of providing an automobile, and since the home rule provisions of Article XVIII of the Constitution of Ohio do not here apply, I am inclined to the opinion that the council of the city of Mansfield is without authority to provide an automobile for the use of the bailiff. Obviously, therefore, council would be unauthorized to rent a private machine belonging to the bailiff or to pay him for the use thereof.

Moreover, the compensation to be paid to the bailiff is, as above pointed out, fixed by Section 1579-1017 of the General Code at nine hundred dollars (\$900.00) per annum, and this salary could not in any event be increased by paying to the bailiff a lump sum per year for the use of his machine.

In connection with your question your attention is directed to Section 3017, General Code, contained in Ch. 2, Div. III, Tit. X, Part 1 of the General Code, entitled "Fees and Costs," which provides:

"In all state cases any wholly salaried minor court officer charged with the execution of a warrant to arrest or order of commitment shall receive from the county treasury the actual necessary expense of executing such writs upon specifically itemized bills, verified by his oath, and certified to by the proper magistrate, court or clerk thereof, and in like manner such expense shall be paid from the municipal treasury when incurred in ordinance cases."

This section was construed in a former opinion of this department, viz.: Opinion No. 2429, Vol. II, Opinions, Attorney General, 1921, at page 852, wherein the following language appears:

"Construing this section, it would seem that it was the legislative intent to definitely distinguish between the 'expense' incurred in the execution of the writs for warrants to arrest and orders of commitment in ordinance cases, and the similar expense incident to the execution of the same in state cases, as well as to limit the payment of such expenses to such minor court officers, as those whose compensation was wholly that of a salary. *It may also be observed in similar connection that the words 'actual necessary expense' as used in this section apparently are intended to mean only that bare and necessary expense as was actually required for the proper execution of the writ, and are not intended to include any other additional fee or cost which in similar cases might be taxed or collected by the officer executing the writ.*

It is thought that the section cited clearly provides for the payment of the expenses under consideration by expressly providing that in ordinance cases such expenses are to be paid from the municipal treasury, while in all state cases payment of the same shall be made from the county treasury."

You will note that the allowance for actual necessary expenses provided for by Section 3017, supra, is not a "fee" for official service, as that term commonly is used, but a reimbursement to such officers *for actual necessary expenses*. Such allowances are, therefore, without the provisions of Section 1579-1015, General Code, requiring the clerk of the Municipal Court of Mansfield to "collect all fines, costs and penalties" and to pay, on the first business day of each calendar month to the treasurer of the city of Mansfield "all moneys collected by his office for official services."

Specifically answering your question, it is my opinion that for the reasons above stated the council of the city of Mansfield may not legally provide that an allowance of a specified sum per annum be paid to the bailiff of the Municipal Court of the city of Mansfield for the use of his automobile, in addition to the maximum salary prescribed by statute.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

---

2090.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO, THE CITY OF COLUMBUS AND THE INDIANA, COLUMBUS AND EASTERN TRACTION COMPANY FOR THE ELIMINATION OF GRADE CROSSING ON WEST BROAD STREET IN THE CITY OF COLUMBUS, OHIO.

COLUMBUS, OHIO, May 12, 1928.

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

DEAR SIR:—You have submitted for my approval a contract by and between the city of Columbus, the State of Ohio, acting by and through George F. Schlesinger, Director of Highways, and J. H. McClure, Receiver for the Indiana, Columbus and Eastern Traction Company.

This contract pertains to the elimination of the grade crossing over the tracks of the C. C. C. & St. L. R. R. on West Broad street in the city of Columbus, Ohio, which said West Broad street has heretofore been designated by the Director of Highways as an extension of State Highway No. 1, within said city.

I have carefully examined said contract and finding it in proper legal form I hereby approve and return the same to you.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

---

2091.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN CUYAHOGA, LAWRENCE, LORAIN AND WARREN COUNTIES.

COLUMBUS, OHIO, May 12, 1928.

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