instalment is still unpaid and a lien. It also notes that the 1927 real estate tax, amount yet undetermined, is a lien.

The encumbrance estimate submitted bears No. 3980, is dated December 22, 1927, bears the certification of the Director of Finance under date of December 23, 1926, and appears to be in regular form.

The blank form of deed submitted with the abstract and encumbrance estimate contains a description of the premises proposed to be conveyed, and corresponds with the description attached to the encumbrance estimate. Since the deed is not further prepared or executed, this department cannot pass upon the same.

The abstracter's certificate shows no examination made in the United States court, and that the examination was made in the name of record owners only, and only for the period during which each one respectively held said title.

The abstract of title, encumbrance estimate and blank deed form are returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

573.

FEES—TAXED IN FAVOR OF MAYORS UNDER SECTION 4270, GENERAL CODE, AND ERRONEOUSLY DEPOSITED IN THE CITY TREASURY MAY BE ALLOWED BY THE LEGISLATIVE BRANCH OF CITY AND PAID TO MAYORS CLAIMING SAME.

SYLLABUS:

1. *Claims for fees, by mayors of cities where such fees have been taxed in favor of such mayors as provided by section* 4270, *General Code, and which have been erroneously deposited in the city treasury may be allowed by the legislative branch of the city government and paid to such mayors.*

COLUMBUS, OHIO, June 6, 1927.

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

GENTLEMEN:—I am in receipt of your communication requesting my opinion as follows:

> "In the case of State ex rel. vs. Nolte, 111 O. S. 486, the Supreme Court decided that mayors of cities were entitled to fees in state cases tried by them.
>
> Prior to the date of this decision and subsequent to the amendment of section 4270 G. C., 108 O. L. 1203, such fees were paid into the city treasuries in accordance with the law as construed by the Attorney General in Opinion No. 1393 to be found at page 735 of the opinions for 1920.
>
> Since the decision such mayors have retained fees in state cases and may have filed claims for those erroneously deposited in the city treasuries. Some of these claims have been allowed and paid. The question now arises whether such claims not paid may be legally allowed and paid at this date in view of the decision of the United States Supreme Court on March 7th, 1927, in the case of Tumey vs. State of Ohio."

Section 4270, General Code, as amended (108 v. Part II, 1208) became effective on June 20, 1920. This section provides as follows:

"All fines and forfeitures in ordinance cases and all fees collected by the mayor, or which in any manner comes into his hands, due such mayor or to a marshal, chief of police or other officer of the municipality and any other fees and expenses which have been advanced out of the municipal treasury, and all moneys received by such mayor for the use of the municipality, shall be by him paid into the treasury of the municipality on the first Monday of each month, provided that the council of a village may, by ordinance, author ize the mayor and marshal to retain their legal fees in addition to their salaries, but in such event a marshal shall not be entitled to his expenses. At the first regular meeting of council in each and every month, he shall submit a full statement of all moneys received, from whom and for what purposes received and when paid into the treasury. Except as otherwise provided by law, all fines and forfeitures collected by him in state cases together with all fees and expenses collected, which have been advanced out of the county treasury, shall be by him paid over to the county treasury on the first business day of each month."

Some question arose as to the proper interpretation of the above statute with respect to its provisions relating to the fees of a mayor of a city which accrue upon the trial of state cases. The attorney general in an opinion under date of July 20, 1920, Opinions, Attorney General, 1920, Vol. I, page 735, held that:

"Under the provisions of section 4270 as amended in H. B. 294 the mayor or chief of police of a city may not legally retain for his own use fees assessed in state cases. Such fees should be paid into the municipal treasury except in cases where fees are advanced by the county treasury, in which case they should be remitted to the county treasury."

Upon the question being presented to the Supreme Court of Ohio it was held in the case of *State, ex rel. Nead* vs. *Nolte*, Mayor, 111 O. S. 486:

"Section 4270, General Code, as amended (108 O. L., Pt. 2, p. 1208), imposes no duty upon the mayor of a municipality to pay into the city treasury the fees taxed in favor of such mayor in the hearing of state cases."

The effect of a decision construing a statute rendered by a court of competent jurisdiction is to say in substance that the statute always read as there interpreted. It would seem clear therefore that mayors of cities would be entitled to all the fees which had been taxed in favor of them in the hearing of state cases from the time of the enactment of section 4270 in its present form.

The relation borne by the mayor of a municipality to the fees accruing from the operation of the mayor's court in the hearing of criminal causes, is not contractual in its nature and the rights and liabilities of the parties as regards such fees are not to be measured by the rules of law applicable to the determination of rights existing between persons whose relation is that of contractor and contractee.

Hence, it cannot be said in cases wherein questions arise similar to that under consideration here that because the officer voluntarily paid over the fees instead of keeping them under the mistaken idea that he was not entitled to them, he cannot recover them.

Page on contracts, section 1567, in discussing the question of the recovery of moneys paid under mistake of law says:

"A public officer is paying out public funds and not his own, even though the loss, if any, would ultimately fall on him personally. This fact is held

> in most jurisdictions to entitle him in his official capacity to recover payments made under a mistake of law. Money paid by one public officer to another may be recovered even more readily than money paid by a public officer to one who is not."

Although I find no decided cases wherein the officer sought to recover fees which had been erroneously paid into the public treasury the books are full of cases where public officers had been paid fees and allowances which it later developed had been paid without authority of law and the courts have uniformly held that such fees might be recovered from the officer, and in actions therefor the fact that the payments had been made voluntarily under mistake of law was no defense.

Prior to the act of April 25, 1899 (93 v. 408) there was no remedy provided by which moneys having been illegally paid under mistake of law might be recovered by a political subdivision. However, it has never been contended that the right did not exist but only that prior to that time there was no remedy. See *Vindicator Printing Co.* vs. *State of Ohio*, 68 O. S. 362.

In considering this matter I am not unmindful of the fact that the Supreme Court in its decision of the case of *Cleveland* vs. *Luttner*, 93 O.S. 493, used this language:

> "A public officer is a public servant, whether he be a policeman of a municipality or the president of the United States. His candidacy for appointment or election, his commission, his oath in connection with the law under which he serves and the emoluments of his office constitute the contract between him and the public he serves."

In spite of the language of this opinion I am satisfied that when the mayor collects fees arising from the hearing of criminal causes in his court and pays them into the city treasury he does so as a public officer and not in his individual capacity, and if it later develops that he could have legally paid them to himself he still bears the relation of a public officer to such moneys and would be entitled to maintain an action as an individual against the municipality to recover the fees to which he is entitled.

The question arises whether or not the decision of the case of Tumey vs. State of Ohio would affect the right of the mayors to receive the fees which had been taxed in their favor in the hearing of state cases and whether in the face of this decision the authorities would be justified in paying such fees to the mayor after the same had been erroneously deposited in the city treasuries.

The Tumey case decided by the Supreme Court of the United States and reported in The Ohio Law Bulletin and Reporter for March 14, 1927, holds that a mayor of a village is disqualified to act as judge in the hearing of criminal cases when proper and seasonable objections are made if the collection of the fees taxed in favor of the mayor are dependent upon the conviction of the accused, as is the case under the present law in the trial of state cases before such mayor. This decision relates to the mayor of a village, but its principles and the reasoning of the opinion is applicable as well to mayors of cities.

There has been some conflict of opinion as to how far-reaching are the principles laid down in this decision. It is my opinion, however, that it makes no difference so far as the question before us is concerned even though the most extreme view which has been advanced with reference to this decision should be correct. It has been contended by some that the decision goes so far as to say that laws creating courts presided over by a judge who has a direct personal substantial pecuniary interest in reaching a conclusion against the accused in criminal proceedings are unconstitutional and such courts have no jurisdiction whatever and may not function in hearings involving criminal jurisdiction even though no objection is raised by the accused upon the trial.

In any case, however, it cannot be gainsaid that mayors' courts before the Tumey decision were *de facto* courts, and that mayors, while presiding as judges in such courts, were *de facto* judges, and as such their jurisdiction is not subject to collateral attack. See *State* vs. *Gardner*, 54 O. S. 24.

It has been consistently held by the courts that *de facto* officers are not entitled to compensation while so acting and cannot recover compensation or salary for services rendered while acting as such *de facto* officers, but if the compensation or salary is once paid to them, it cannot be recovered. See R. C. L., Public Officers, Section 321, and cases cited, the section reading as follows:

> "While it has frequently been held that the payment of the salary to an officer de facto actually exercising the functions of the office is a good defense to a subsequent suit by the officer de jure to recover such salary during the period of the latter's wrongful exclusion from the office, a different question is presented when the officer de facto attempts to bring suit for the compensation pertaining to the office. It is generally held that a de facto officer is not entitled to bring suit to recover compensation for his services although he has performed the duties of the office. He is required to prove his title to the office before he can recover, for when an action for salary is brought the title is in issue and must be established. It seems that this principle is to be enforced although there is no other claimant. The rule is placed on the ground that the compensation is an incident of the office and that one cannot sue to recover that which does not belong to him. But a salary which has been paid to a de facto officer cannot be recovered back by the government, at least where he has actually rendered the services for which he was paid. In other cases the view is maintained that where there is no adverse claimant to an office the de facto occupant is entitled to the compensation provided by law. And authority may be found for the view that one who becomes a public officer de facto without dishonesty or fraud, and who has performed the duties of the office, may recover the compensation provided by law for such services during the period for which they have been rendered."

Three Ohio cases bearing on this question are *State ex rel.* vs. *City of Newark*, 6 O. N. P. 523; *State ex rel. Winn* vs. *W. E. Wichgar, Aud.*, 17 O. C. D. 743; and *State ex rel. Will* vs. *Taylor, et al.*, 3 O. N. P. (N. S.) 505.

In the first of the cases cited in the opinion of the court it was said that two questions were presented by the demurrer to the petition, the second one being, "Is he as a de facto officer, having performed the services, entitled to the salary?" On this question the court said as follows:

> "But it is alleged in the petition, and it is not disputed in the answer, that he performed the duties of sanitary policeman during this month of December, and it is claimed that he was a de facto officer, and that, having performed these duties, notwithstanding the fact that he had no title, he is entitled to the salary.
>
> The only case I am able to find in Ohio upon this subject is in the case of State ex rel. Croni vs. Eshelby, 2 Ohio C. C. Rep., 468. It is upon a subject very closely allied to this. The syllabi are as follows:
>
> 'An officer, to be entitled to the salary of an office, must have qualified thereto in the manner provided by law.'
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> * * * * * * * * *
>
> This was a suit brought by a man who had been elected to an office, but

who had never qualified by giving bond, etc. Judge Swing, in the latter part of the decision, refers to a Michigan case, a Kansas case and several New York cases, and says: 'It seems to us to be the better doctrine, and we understand it to be a well settled principle, that the acts of a de facto officer are, in so far as the public is concerned, good, and must be recognized and treated as legal by the public. It is not the business of the public to run about and see whether or not this person or that is entitled to an office, or to wait to see whether the courts will give it to this man, or that. We go on the theory that the public is more interested than the individual, and its interests are first to be consulted. The public has the right to be first looked after. and the individual interest must be subordinated.

* * * * * * * *

Referring to the subject of de facto officers in 5 American & English Ency. 109, there is no case that is cited or to be found, according to that work, where a de facto officer—one simply de facto—is held to have the right to maintain an action for the recovery of the salary; but that the salary belongs to the person entitled to the office.

It is held according to these authorities that if payment is made to a party incumbent to the office, the disbursing officer is protected, because it is not his duty to hunt around and see who is the de jure officer; but that it is the right and the duty of the man who claims the office de jure to see that he occupies it, so far as payment of salary is concerned. It is held universally, so far as I have been able to find, that a de facto officer is not entitled to maintain an action for the salary."

In the opinion in the case of *State ex rel. Winn vs. Wichgar*, supra, which was a short per curiam, it was said as follows:

"A member of the board of health of a municipal corporation is an officer of such corporation, and under Lan. R. L. 10668 (R. S. 6976), to the appointment of district physician by such board during the term for which he was appointed or for one year thereafter, and although rendering services as such physician cannot recover compensation therefor."

In the case of *State ex rel. Will vs. Taylor, et al.*, supra, Judge Dillon of the Court of Common Pleas of Franklin county, said as follows:

"It cannot be claimed that it is the intention of the Constitution, Section 26, Article II, requiring all laws of a general nature to have a uniform operation, that each prosecuting attorney shall receive the same compensation, but whether this section be constitutional or not, it is not necessary here to consider. This statute has been in existence since 1862 and all the business of the state of Ohio, and of every prosecuting attorney in the state has been transacted thereunder. Compensation, therefore, paid to such officers, can not be recovered back on clearest principle, nor can any of the acts of these officers be impugned even if they should be held to have been acting *de facto*. This was the only statute in existence which provided compensation for the prosecuting attorneys of the state. And that a *de facto* officer is entitled to have considered and treated that, not only his services as such officer were legitimate, but also the compensation attached thereto, I think is fully sustained in the case of *State ex rel Attorney General* vs. *Beacon*, 66 O. S., 491."

This being the law it would appear that if the courts of last resort which have not

yet passed upon the question should eventually determine that the purport of the Tumey decision is to the effect that the statutes creating mayors' courts and investing them with criminal jurisdiction are unconstitutional and that the judges thereof were de facto officers instead of merely being disqualified to act when proper and seasonable objection was made, mayors could not enforce collection of their fees as against the persons against whom such fees had been taxed, but having once collected them the parties against whom they had been taxed and from whom they had been collected, could not recover them from the mayors. Having once collected them the mayor could keep them, although in reality he was not entitled to them. Neither, however, is the municipal treasury entitled to the fees. As between the mayor and the municipal treasury, the mayor has the superior right, but having collected the fees and paid them into the municipal treasury he would have no legal remedy whereby he might recover from the municipality. If the mayor should bring suit against the municipality to recover the fees which he had unwittingly turned over to the municipality the court upon finding that neither of them were legally entitled to the fees would leave the parties to the suit where it found them and dismiss the action.

However, in such a case the municipal government through its legislative branch, might recognize the superior right of the mayor to the fees in accordance with the decision of *State* vs. *Nolte*, supra, as a moral obligation and allow the mayor's claim for such fees.

Specifically answering your question, I am of the opinion that claims made by a mayor of a city for fees which he had taxed and collected in the hearing of state cases, and which he had erroneously turned over to the municipal treasury may lawfully be allowed by the legislative branch of the city government and paid to such mayor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

574.

BOARD OF HEALTH—CITY BOARD MAY NOT LEGALLY EXPEND FUNDS FOR PRINTING REPORT SHOWING ACTIVITIES OF SAID BOARD.

SYLLABUS:

A city board of health may not legally expend its funds to pay the cost of printing and distributing to the public a quarterly or other periodical report showing the activities of the board of health.

COLUMBUS, OHIO, June 6, 1927.

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

GENTLEMEN:—Acknowledgment is made of your recent request reading as follows:

> "Section 4476 G. C. reads:
>
> 'On or before the fifteenth day of January of each year, the board of health or health department shall make a report in writing for the preceding calendar year to the council of the municipality and to the state commissioner of health. Such report shall be on the sanitary condition and prospects of such municipality and shall contain the statistics of deaths, the action of the board and its officers and agents and the names thereof. It shall contain other useful information, and the board shall suggest therein any further legisla-