In Opinion No. 2049 it was held:

"In all state cases, by the terms of Section 4270, General Code, the mayor of a city or village is entitled to hold the legal fees taxed in his favor."

I am, therefore, of the opinion in specific answer to your question that a mayor of a village in the trial of cases based on the violation of a state statute is entitled to the legal fees taxed in his favor and may retain those fees for his individual use. In ordinance cases he is required to pay all fees collected by him into the treasury of the municipality on the first Monday of each month.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2794.

CANAL LANDS—LEASE OF SAME.

SYLLABUS:

A lease of a portion of the Miami and Erie canal lands, lying within the limits of a village and as to which property such village has made application to lease, cannot be surrendered and a new lease executed under the provisions of House Bill No. 162 of the 86th General Assembly (111 O. L. 208), where the property covered by the lease was not, prior to January 1, 1925, improved by the construction of railway tracks thereon, or by the erection of substantial buildings thereon, other than buildings erected for use of gasoline or oil filling stations.

COLUMBUS, OHIO, October 29, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

"By lease dated August 6, 1915, the State of Ohio, by John I. Miller, Superintendent of Public Works of Ohio, and duly approved by the Governor and Attorney General, leased to The Ohio Electric Railway Company, of Cincinnati, Ohio, a right-of-way for a single track electric railway over that portion of the outer slope of the towing path embankment of the Miami and Erie Canal, in the Village of Miamisburg, Montgomery County, commencing at a point in the outer slope of said towing path embankment 250 feet north of the north corporation line of said village and extending thence south over and along the outer slope of said towing path embankment a distance of 8550 feet.

By restriction No. 10 in the lease, it was mutually agreed between the parties of the first and second parts that the electric railway company should construct its road bed upon the lands leased, 'lay its tracks thereon and have its cars operating regularly over the same on or before the 10th day of July, 1918, but if the party of the second part shall fail to comply fully with this provision, then and in that event this lease shall automatically expire on the 10th day of July, 1918, and said second party shall immediately vacate said premises and yield possession thereof to the Superintendent of Public Works or his authorized agent without contest.'

At the time that this lease was made the electric railway company was having difficulty in renewing its franchise or right-of-way over the streets of the village of Miamisburg. The lease was evidently taken as a precaution against the possibility of the village and the railway company being unable to reach an agreement as to the terms of a franchise. The company and the village, however, did reach an agreement and its tracks remained upon the streets of the village as theretofore.

The railway company, though, continued to pay the annual rental of five hundred ($500.00) dollars, as stipulated in the lease and a sort of tentative understanding was had that their lease would be extended from time to time so as to enable them to change the location of their tracks, so as to occupy the outer slope of the towing path of the canal at any time it saw fit.

Under the provisions of Section 9 of House Bill 162 (O. L. 111, pp. 208, 214), the Cincinnati and Dayton Traction Company, which succeeded to all the rights of the Ohio Electric Railway Company in this lease, by virtue of certain sales made by the receiver of the Ohio Electric Railway Company to the said Cincinnati and Dayton Traction Company, and having continued to pay the annual rental thereon, filed, a short time subsequent to the passage of the act referred to above, an application with the Superintendent of Public Works for permission to surrender its existing lease and take a new lease in lieu thereof.

The question that we are asking you to determine is whether or not, in view of the provisions of paragraph 10 of the restrictions in the lease, they are entitled to a renewal under the terms of the act referred to above.

This restriction was intended to automatically terminate the lease on or before July 10, 1918, if they failed to construct the road bed and lay the tracks thereon over the outer slope of the towing path embankment, as described in the lease.

The question at issue is whether or not they have, in fact, a lease such as would entitle them to a renewal under the terms of this act.

I am transmitting herewith a copy of the original lease, which you will kindly return along with your opinion when it is rendered."

As I understand the facts, the Interurban Company has not improved the portion of the canal lands which were originally leased under date of August 6, 1915. Your specific question is whether under the facts set forth there exists a lease such as will entitle the company to a renewal under the terms of the special act of the Legislature, found in 111 O. L., p. 208, et seq.

You suggest, as bearing upon the question, the fact that the lease contained a restriction by the terms of which the lease was to automatically expire in the event that the company did not lay its tracks on or before the 10th day of July, 1918. You call attention to the fact that in spite of this clause, and the fact that the tracks were never laid, the state has been continuously accepting rentals under the terms of this lease.

It is also to be noted that the lease was given to the Ohio Electric Railway Company and that it was subsequently transferred by receivership sale to The Cincinnati & Dayton Traction Company, although the lease specifically prohibited its assignment or transfer without the written consent of the Superintendent of Public Works. As I understand it, this consent has never been given but rentals have been accepted from the assignee, The Cincinnati & Dayton Traction Company. In view of the provisions of law applicable, I deem it unnecessary to consider the effect of the

possible violation of these two provisions of the lease and the subsequent acceptance of rental thereafter by the state in reaching an answer to your inquiry.

While it is unnecessary to quote the provisions of the said act of the Legislature, it may be well to summarize the principal portions thereof. By Section 1 the Miami and Erie Canal, including all the canal feeders, basins, etc., was definitely abandoned for canal purposes, subject to certain rights. By Section 5 authority was given to any city, village or other political subdivision, desiring to lease any portion of the canal property lying within or adjacent to the boundaries of such political subdivision, to make application for a lease for the same. In the event an application is made, provision is found for an appraisal of the property covered by the application, and, by Section 9, the right is given to the owner of any existing leasehold which "has been improved by the construction of railway tracks thereon, or by the erection of substantial buildings thereon, other than buildings erected for use of gasoline and oil filling stations," to make application for permission to surrender his present leasehold and take a new lease thereon under the terms of the act. The express statement is found, however, that no renewals of leases of canal property which has not been improved, as hereinbefore stated, prior to January 1, 1925, shall be made.

The privilege given to secure new leases, as found in Section 9, is only extended as to that land which has been applied for by municipalities or other legal subdivisions. While your letter does not state, I understand the fact to be that the village of Miamisburg has made an application to lease the canal lands within its boundaries. It would follow that the lease in question could, as of right, be renewed had the lessee made any improvement in the manner specified by Section 9, provided, of course, that any violation of the terms of the lease hereinabove discussed had not forfeited all rights under the lease. In view of the fact, however, that no improvement of any character whatsoever has been attempted by The Cincinnati & Dayton Traction Company, or its predecessor in title, The Ohio Electric Railway Company, I know of nothing which will entitle the company to a renewal under the terms of the act.

I may point out that Section 18 of the act authorizes you to lease any portion of the abandoned canal lands within a municipality that is not included in an application by such municipality and in which no lease is granted. In fact this property is not covered by the application of the village of Miamisburg, or, if the village definitely abandons its application and does not lease the lands for which I understand it has applied, then you would have the authority to lease the property under consideration in accordance with the terms of the act. On the other hand, if the property is included within the application of the village and the village proceeds and secures a lease upon the property in question, then, by the terms of Section 10 of the act, you are authorized to assign the lease to the village, after appraisal thereof, and the village is thereafter entitled to the revenues accruing therefrom. Upon termination of the present lease, all authority of the state with respect to a renewal would cease and negotiations would have to be had with the municipality, which, by the terms of Section 14 of the act, is given specific authority to sub-lease.

Upon the foregoing considerations, I am of the opinion that a lease of a portion of the Miami and Erie canal lands, lying within the limits of a village and as to which property such village has made application to lease, cannot be surrendered and a new lease executed under the provisions of House Bill No. 162 of the 86th General Assembly (111 O. L. 208), where the property covered by the lease was not, prior to January 1, 1925, improved by the construction of railway tracks thereon, or by the erection of substantial buildings thereon, other than buildings erected for use of gasoline or oil filling stations.

Respectfully,
EDWARD C. TURNER,
Attorney General.