1645.

MUNICIPAL OFFICER—FEES IN ORDINANCE CASES MUST BE PAID INTO MUNICIPAL TREASURY—COUNCIL MAY PROVIDE COMPENSATION TO TAKE PLACE OF FEES—MAY PROVIDE FIXED FEE NOT DEPENDENT ON OUTCOME OF TRIAL.

SYLLABUS:

1. *Section 4270, General Code, as amended by the 87th General Assembly, requires the mayor of a municipality, whether a city or village, to pay all fees collected by him in ordinance cases and due him as such mayor, or to a marshal, chief of police or other officer of the municipality, into the treasury of the municipality on the first Monday of each month.*

2. *Where the council of a village had, previous to the effective date of House Bill No. 99, passed by the 87th General Assembly, provided by ordinance that the mayor and marshal might retain as a part of their compensation the fees collected in ordinance cases, such council may enact legislation providing means of compensation for such mayor and marshal to take the place of the compensation by way of fees, which was caused to fail by reason of the amendment of Section 4270, General Code, as passed by the 87th General Assembly, and the benefit of such legislation may inure to the benefit of a mayor and marshal then in office, for the remaining portion of their terms.*

3. *Legislation providing for compensation for village mayors and marshals may lawfully take the form of providing a fixed fee for the trial of each case involving the violation of an ordinance, the said fee to be in no wise dependent on the outcome of the trial or the collection of the costs thereof.*

COLUMBUS, OHIO, February 1, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your communication which reads as follows:

> "House Bill 99, Ohio Laws, 112, was passed by the legislature on April 25th, 1927, and became effective on July 25th, 1927. Said House Bill amends Section 4270 of the General Code, and when read in connection with opinion of the Attorney General No. 2140, dated January 12th, 1925, with respect to the disposition of fees of the mayor and marshal, provides that such fees in ordinance cases are payable into the village treasury.
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> Said Section 4270 before amendment provided that in villages council by ordinance could authorize the mayor and marshal to retain their legal fees in addition to their salaries. In many villages council did so provide and fixed the salaries in small amounts, which salaries were payable from the general fund.
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> Section 4219, General Code, provides in part that the council in a village shall fix the compensation of all officers and employes, which amount shall not be increased nor diminished during the term for which any officer, clerk or employe may have been elected or appointed.
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> Question 1. In those instances where the ordinances of the village provide that the mayor and marshal receive fixed salaries from the general funds and in addition their legal fees, do the provisions of amended

Section 4270 now require such mayors and marshals to deposit their fees in ordinance cases in the village treasury?

Question 2. If fees in ordinance cases must now be deposited in the village treasury, may the mayor and marshal legally draw an increased salary at this date and during the term for which they were elected if council by ordinance provides therefor?

Question 3. May council by ordinance legally provide that the mayor and marshal each receive as compensation a fixed amount from the village treasury for each case tried for the violation of an ordinance?"

Previous to the enactment of House Bill No. 99 by the 87th General Assembly, Section 4270, General Code, read as follows:

"All fines and forfeitures in ordinance cases and all fees collected by the mayor, or which in any manner comes into the 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, authorize 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." (Italics the writer's.)

By the terms of House Bill No. 99, Section 4270, General Code, was amended by the deletion of the clause italicized in the above quotation.

The statute clearly states that the mayors of all municipalities shall in ordinance cases pay over to the municipal treasury all fees collected by them. As it formerly read, the section provided that ordinances might be passed by a village council authorizing the mayor of such village in ordinance cases to retain the fees collected by him as compensation for his services for which the fees had been earned. Inasmuch as when the statute was amended the provision with reference to permitting a village council, by ordinance, to authorize its mayor to retain such fees was stricken out, the clear import of the amendment is to render inoperative any ordinance theretofore enacted providing for the compensation of the mayor by way of fees earned in ordinance cases.

In villages where a part or all of the compensation of the mayor was dependent on the fees collected by him, which he was directed by ordinance to retain, the effect of the amendment is to decrease or entirely wipe out the compensation which the said mayor would receive, by causing such portion of his compensation dependent on fees to fail.

Constitutional provision has been made and laws have been enacted in the furtherance of public policy prohibiting any change in the compensation of public officers during their term of office. Article 2, Section 20, of the Constitution of Ohio 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."

Section 4219, General Code, relating to villages, reads as follows:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

It will be noted that language of like import with that of the constitutional provision above quoted is not incorporated in Section 4219, General Code, the former providing that no change in compensation shall affect the salary of an officer during his existing term, while the latter provides that the compensation of all officers, clerks and employes in a village government shall not be increased or diminished during the term for which such officer, clerk or employe may have been elected or appointed.

The Circuit Court of Hamilton County in 1901 in the case of *State ex rel. Perry* vs. *Board of Education,* 21 O. C. C. 785; 12 O. C. D. 333, having under consideration the provisions of Section 1717 of the Revised Statutes of Ohio, the provisions of which were similar to the provisions of Section 4219 of the General Code, held, as stated in the headnote:

"The term 'officer' as used in Sec. 20, Art. 2 of the Constitution, providing that the general assembly shall not affect the salary of any officer during his existing term, does not refer to such officers as members of a board of school examiners or to officers of a municipal corporation, such as mayor, marshal, clerk, treasurer, etc., but to those created and whose salaries are fixed by the general assembly.

* * * * * * * * * * *

Sections 1716 and 1717, Rev. Stat., providing that municipal councils shall prescribe what fees or compensation officers of municipal corporations shall receive, and which shall in no case be increased or diminished during term of office, amount to a legislative construction of Sec. 20, Art 2 of the Constitution, providing that '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,' indicating that officers referred to in the statutes are not those referred to in the constitutional provision; otherwise legislation would have been unnecessary."

The Supreme Court of Ohio, however, in the case of *State ex rel. Clarke* vs. *Cook,* 103 O. S. 465, in commenting on the fact that the statute authorizing county boards of education to fix the salary of county superintendents of schools does not use the language of the Constitution as contained in Article II, Section 20, said as follows:

"Now it is argued that the legislature not having put this language in the board of education statute it may be presumed that the legislature did not intend to deny the board of education the right to subsequently change any salary fixed by it.

It can not be seriously doubted, however, that what the constitution reads into every statute it is quite unnecessary that the legislature should expressly write into the statute. Upon the contrary, unless the language of the statute is clearly inconsistent therewith, the presence of such constitutional provision is as necessarily implied in the statute as if the same were expressly written into it."

While the language of the Supreme Court as quoted above seems to indicate that the holding in the Perry Case, supra, is not the law, yet the observations of the Supreme Court in the Cooke Case are merely dicta and the conclusions with reference to the issues involved in the Cooke Case are not based on the inhibition contained in Article II, Section 20 of the Constitution of Ohio, but on the lack of power on the part of the county board of education to unfix a salary after once having fixed it. The court expressly said:

"The express power to fix a salary does not grant by implication the power to unfix such salary, * * It clearly appearing that the board of education has exceeded its statutory grant of power it is unnecessary here to determine whether or not a statute would have been constitutional had the board acted within its statutory grant of power."

I am therefore of the opinion that the law as contained in the decision of State ex rel. Perry vs. Board of Education, supra, is the correct interpretation of Article II, Section 20, of the Constitution of Ohio in its application to municipal offices whatever may be the effect of the home rule provisions of the Constitution.

In all cases wherein questions arise such as we have under consideration here, it is difficult to determine in the present state of our law, to what extent general laws passed by the legislature may be over-ridden by local municipal legislation enacted in furtherance of local self-government and in the exercise of the powers conferred upon the municipalities by Article XVIII of the Constitution of Ohio.

In any event, whether home rule has any effect on the matter or not, or whether the dicta of the Supreme Court, in the Cooke case above referred to, have the effect of over-ruling the principles laid down in the Hamilton County Case, supra, the provisions of Article II, Section 20, could not apply to the question under discussion for the reason that the effect of the amendment of Section 4270, General Code, under no circumstances would change the salary of the mayor of a village, but only that part of his compensation which he received by way of fees; and in the case of *Thomson* vs. *Phillips*, 12 O. S. 617, the Supreme Court held that compensation by way of fees is not salary.

I do not deem it necessary to pass on the question of the effect of the home rule provisions of the Constitution on the right of villages, by way of charter provision or otherwise, to enact legislation increasing or diminishing the compensation of its officers, in spite of the provisions of Section 4219, supra, because of the conclusions reached in this opinion on other grounds.

Even if it were to be conceded that Sections 4219 and 4270, General Code, are general laws which may not be over-ridden by municipal enactments in the exercise of the municipality's powers of local self-government, and the provisions of the said Sections 4219 and 4270, General Code, are to be construed as being effective

in the same manner and to the same extent as before the adoption of Article XVIII of the Constitution of Ohio, the effect of rendering ineffective village ordinances authorizing mayors to retain fees collected, as does the amendment of Section 4270, supra, is to decrease the compensation of such officers. If action were attempted by council it would not be effective during the existing term of such mayor. However, council had no control over the action of the General Assembly and Section 4219, General Code, does not amount to an inhibition upon the General Assembly's action with respect to increasing or decreasing the compensation of village mayors during their term of office.

The question then arises whether or not, when a part or all of the compensation provided for a mayor by a village council fails, for the reason that the law authorizing the granting of such compensation has been repealed, the council, may without violating the inhibition contained in Section 4219, General Code, provide further compensation in lieu of that which has failed.

It has been held that, where no salary or compensation has been fixed for an office prior to an election or appointment to such office, legislation may be enacted providing for compensation after the beginning of the term of an officer and such legislation is valid and effective and inures to the benefit of the then incumbent of the office even though changing the amount of compensation for the officer is prohibited by constitutional or statutory provision.

Mechem on Public Offices, Section 858, says:

> "It is a common provision in the constitution and statutes of the states that the salary or compensation of a public officer shall not be increased or diminished during his term. The wisdom of this provision is obvious and the courts will not permit it to be evaded. * * * Where however the salary or compensation has not been fixed at all at the time of the election or appointment this provision does not prevent its being fixed after the term begins."

In *State ex rel. Attorney General* vs. *Kennon, et al.*, 7 O. S. 547, at page 559, the court held that where an office is created providing for no fees or salary for the incumbents, but not providing that thereafter compensation to them shall be prohibited or precluded and such is not made a condition of their acceptance, there is nothing to prevent them applying for compensation to their legislature and nothing to prevent that body from allowing it.

A question involving principles clearly applicable to the question here under consideration was considered by the Common Pleas Court of Franklin County in the case of *State ex rel. Taylor* vs. *Carlisle et al.*, 16 Oh. Dec. 263, the holding of which case is stated in the headnote as follows:

> "While an officer can not attack the constitutionality of a statute under which he has received compensation for his official acts yet where such statute has been held unconstitutional in another proceeding and such officer enjoined from receiving the salary provided thereunder he will be entitled to the compensation provided by an act passed to take the place of such unconstitutional statute and such amendatory act will not come within the constitutional inhibition forbidding the legislature to change the salary of an officer during his existing term."

This case was favorably commented upon by Judge Winch in the case of *Wise* vs. *Barberton*, 31 O. C. D., 373, at page 377, wherein he says:

"In order to increase or decrease a salary, there must be something to increase or decrease. The legislature can not have intended that salaries might not be provided where none had been provided before, for then there would be no way of compensating officers of newly created municipal corporations, and there would be difficulty in finding persons to fill such offices and perform the duties thereof.

This is the conclusion reached by Judge Evans, of the Franklin County Common Pleas Court, in a well-reasoned opinion citing authorities which abundantly sustain his views: *State* vs. *Carlisle,* 16 Dec. 263, (3 N. S. 544).

That case was never carried higher, and we concur in the views there expressed."

Upon consideration of the authorities hereinbefore referred to in their application to the circumstances contemplated by your inquiry, it appears that that part of the compensation, which a village council has provided for its mayor and which accrued to the said mayor by reason of the fees which he had been authorized to keep in ordinance cases is not salary, and therefore by the repeal of the statute authorizing council to provide for the mayor's keeping these fees, his salary is not changed. On the other hand, that part of his compensation, which accrues from the fees which he had been authorized to retain is caused to fail, and so far as that part of his compensation is concerned he is in the same position as though it had never been provided for him. It would, therefore, seem to follow that some other compensation might be provided by council to take the place of that which had been taken from him by reason of the repeal of the statute by virtue of which he had theretofore received it.

Council having fixed an amount to be paid the mayor as salary, with a view of its being enhanced by fees received, would not be inhibited by reason of the terms of Section 4219, supra, from providing additional compensation to replace the compensation denied him by reason of the failure of that part of his compensation from causes over which the council had no control.

Moreover, it seems to me that there is an additional reason why the conclusion above reached is the correct one. It will be observed that by its express terms Section 4219, supra, in so far as the question here presented is concerned, contains a limitation of the General Assembly upon the action of council. It is not a limitation upon any action by the legislature, and obviously could not be because it is fundamental that one legislature cannot bind another.

In the case here under consideration council did not diminish the compensation, which it had fixed for the mayor, nor is it now sought by council to increase the compensation so fixed. What has happened is, that by the amendment of Section 4270, General Code, the legislature has wiped out one of the methods heretofore authorized and employed by council in paying certain compensation in the way of fees for the services of the mayor in ordinance cases. What the council now seeks to do is not to increase the compensation which it fixed prior to the inception of the mayor's term, but to substitute a different method of paying the compensation which had been fixed, because of the action of the legislature in taking away the authority heretofore conferred upon council to permit the mayor to retain his fees in ordinance cases as a part of his compensation. That is to say, it is extremely doubtful, to say the least, if the case here presented comes within the inhibition contained in Section 4219, General Code, which in accordance with well settled public policy, seeks only to prohibit *the council of a village* from increasing or diminishing the compensation of an incumbent in office.

In connection with the above, however, it should be pointed out that the principles of law here enunciated have application only where council bona fidely seeks to provide compensation to take the place of that done away with by reason of the action of the legislature in amending Section 4270; and it is probably unnecessary to point out that any attempt to provide an increase in the salary of an incumbent in office, under the guise of restoring compensation of which the mayor had been deprived by reason of the action of the legislature, would come squarely within the inhibition of Section 4219, supra.

With reference to your third inquiry, consideration should be given to the question as to whether or not, in view of the holding of the Supreme Court of the United States in the case of *Tumey* vs. *State,* 273 U. S. 510, 50 A. L. R. 1243, a mayor is in all cases disqualified to act in misdemeanor cases where the fines imposed in such cases are to be paid into the village treasury, even though his costs are not dependent on conviction.

This question was considered by the Supreme Court of Ohio in the case of *Dugan* vs. *State,* 117 O. S. 236, reported in the Ohio Law Bulletin and Reporter for January 30, 1928. The Supreme Court held that the second of the conditions referred to in the opinion in the Tumey Case, viz., that the mayor was disqualified because he had in mind the financial needs of the city "was intended to apply to those courts which were shown to be commercialized, and should not be made to apply to a mayor compensated by a fixed annual salary, and receiving no part of the assessed costs, who is conducting a court in the trial of misdemeanors committed within the confines of his own city or village."

In the opinion it was said as follows:

> "The mayor of Xenia is a salaried officer, and does not participate in the costs collected in misdemeanor cases. All such costs are paid into the funds of the city of Xenia. It does not appear in this record that the court of the mayor of city of Xenia has any of the features referred to in the opinion of the United States Supreme Court in the Tumey case, whereby the cause of justice was commercialized, and it further appears that the offense for which Dugan was tried was committed within the limits of the city of Xenia. The amount of fines collected annually on convictions before the mayor of Xenia in liquor cases does not appear. It is insisted that, even though the mayor was a salaried officer, this case comes within the second of the conditions referred to by the Supreme Court in the Tumey case, viz., that the mayor had in mind the financial needs of the city. Upon this point the Court of Appeals, in affirming the conviction, said:
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> 'This reference, however, was in our judgment incidental, and did not of itself amount to a disqualification of the mayor, but was a circumstance which accentuated the personal interest of the mayor under the scheme provided by the so-called Crabbe Act. To hold that the mayor of a city is disqualified merely because fines are paid into the city treasury would break down the legitimate functions of the noncommercialized courts of the state. To so construe the decision of Judge Taft would affect the jurisdiction, not only of mayors operating upon a fixed salary, but municipal court judges, and might even extend to the common pleas and probate judges where the fines are paid into the county treasury. We are clear that this interpretation is not justified by the decision of the Supreme Court of the United States in the Tumey case.'"

Specifically answering your questions I am of the opinion:

1. That Section 4270, General Code, as amended by the 87th General Assembly, requires the mayor of a municipality, whether a city or a village, to pay all fees collected by him in ordinance cases and due him as such mayor, or to a marshal, chief of police or other officer of the municipality, into the treasury of the municipality on the first Monday of each month.

2. Where the council of a village had, previous to the effective date of House Bill No. 99, passed by the 87th General Assembly, provided by ordinance that the mayor and marshal might retain as a part of their compensation the fees collected in ordinance cases, such council may enact legislation providing further means of compensation for such mayor and marshal to take the place of the compensation by way of fees which was caused to fail by reason of the amendment of Section 4270, General Code, as passed by the 87th General Assembly, and the benefit of such legislation may inure to the benefit of a mayor and marshal then in office for the remaining portion of their terms.

3. Legislation providing for compensation for village mayors and marshals may lawfully take the form of providing a fixed fee for the trial of each case involving the violation of an ordinance, the said fee to be in no wise dependent on the outcome of the trial or the collection of the costs thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1646.

CEMETERIES—INTEREST BEARING BONDS OR STOCKS—SECTION 4169, GENERAL CODE, CONSTRUED.

SYLLABUS:

The term, "interest bearing bonds or stocks", as used in Section 4169, General Code, relating to the investment of the permanent funds of public graveyards or burial grounds located in cities, does not include certificates of deposit issued by building and loan associations authorized to do business in Ohio.

COLUMBUS, OHIO, February 1, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion as follows:

> "Section 4169, G. C., relates to the investment of certain cemetery funds and reads:
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> 'The director shall turn over to the council property on hand or held by him as a permanent fund, for such purposes under his control, or such money as may thereafter come to him for such purpose, rendering a full statement thereof, by whom, when, and for what purpose paid. The council shall acknowledge receipt thereof in writing to the director signed