393.

CITY COUNCIL—COUNCIL OF CHARTER CITY MAY APPROPRIATE MONEY FOR COST OF MUNICIPAL EXHIBIT IN AN INDUSTRIAL EXHIBITION.

SYLLABUS:

The council of a charter city may appropriate money for the purpose of paying the cost of a municipal exhibit in an industrial exhibition to be held for the purpose of promoting the welfare and prosperity of the city.

COLUMBUS, OHIO, April 27, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication, which is as follows:

> "The city of Cincinnati adopted an amendment to its charter at the November, 1926, election, which reads:
>
> 'All legislative powers of the city shall be vested subject to the terms of this charter and of the constitution of the state of Ohio, in the council. The laws of the state of Ohio not inconsistent with this charter, except those declared inoperative by ordinance of the council, shall have the force and effect of ordinances of the city of Cincinnati; but in event of conflict between any such law and any municipal ordinance or resolution the provisions of the ordinance or resolution shall prevail and control.'
>
> Civic organizations and merchants are fostering an exhibition to be known as 'Know Cincinnati'; various industries and institutions have been requested to exhibit their products, progress, etc., and the city desires to make an appropriation of $1,500.00 for the purpose of paying for its exhibit.
>
> In the case of State ex rel Thomas vs. Semple, Director of Finance of the city of Cleveland, No. 18879, decided by the Supreme Court, May 5, 1925, it was held that the city was without power to expend its funds to assist in creating and maintaining an organization with offices and officers entirely separate from those of the city, i. e., the city was denied the right to pay dues to the conference of Ohio municipalities. In view of this decision may the city of Cincinnati expend the amount of $1.500.00 for the purpose of maintaining an exhibit at the proposed exposition."

The city of Cincinnati has adopted a charter under the authority of Section 7 of Article XVIII of the Constitution of Ohio, which is as follows:

> "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

The powers of local self government granted by this section are not, however, without limitation. The section has been construed together with other sections of the Constitution which have been held to restrict and qualify somewhat the general grant of power therein contained.

Section 3 of Article XVIII is in the following language:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This section has been construed to limit municipalities in the enactment of local police, sanitary and other similar regulations by requiring that they shall not be in conflict with general laws. In other words, if the legislature has spoken generally on a matter of this character, the local regulation cannot be inconsistent. This is true irrespective of whether or not a charter has been adopted under authority of Section 7 of Article XVIII.

There are two other sections of the Constitution which have been construed as restrictive of the power of local self government. The first is Section 6 of Article XIII, which is as follows:

> "The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

The other is Section 13 of Article XVIII, where practically the same restriction is made in the following language:

> "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books, and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

These latter sections clearly grant authority to the legislature to restrict cities, both charter and those organized under general law, in the exercise of the power of taxation, assessment, borrowing money, contracting debts and loaning credit. Since the enactment of Article XVIII of the Constitution, the powers of municipalities are derived from the people through the Constitution and not through the legislature.

> Fitzgerald vs. Cleveland, 88 O. S. 338.
> State ex rel. vs. Railway Company, 97 O. S. 283.
> State ex rel vs. Otis, 98 O. S. 87.

The test whether a municipality which has adopted a charter is acting beyond the scope of its authority must be found in the Constitution and not in the acts of the legislature, unless the power sought to be exercised comes within the exceptions indicated in the sections quoted above, as to which the people, through the Constitution, have stated that the authority of the legislature shall be paramount.

It is clear that the appropriation sought to be made by the council of the city of Cincinnati is not a police, sanitary or other similar regulation, and therefore this portion of the limitation of municipal authority may be disregarded.

By the terms of Section 6 of Article XIII and Section 13 of Article XVIII, which are quoted above, I think it would be entirely within the power of the legislature to prohibit the incurring of any obligation of the character here involved. A search of the statutes reveals, however, that there has been no attempt so to do. It therefore follows that the appropriation in question may be made if (1) the proposed expenditure is for a public or governmental purpose and (2) if the council of the city of Cincinnati is authorized under its charter to make such appropriation. That is to say, since the legislature has not acted, a municipality may, if its governing body is properly authorized by charter, appropriate money for any legitimate public purpose.

In the view that I take of the matter, your question resolves itself into a determination of whether or not an appropriation, for the purpose of paying for the exhibit of

the city of Cincinnati in the proposed exposition, is for a public purpose. As I understand the facts from your letter, the exposition is industrial in character and designed to stimulate interest in local industries with the ultimate purpose of promoting the welfare and prosperity of the city. While the exposition is in one sense private in character, yet its purposes appear to be public and I do not understand that the appropriation is to be given as a gratuitous donation to the organization, but that the city is itself proposing to have an exhibit, the cost of which is to be paid from the appropriation.

The answer to the question would be simple were it not for the decision of the Supreme Court in the case of State ex rel. Thomas vs. Semple, 112 O. S. 559, to which you refer in your letter. This case was an original action in mandamus, brought by the clerk of the council of the city of Cleveland against the Director of Finance. The case involved the authority of the city council to appropriate funds of the municipality for the support and maintenance of a so-called "conference of Ohio municipalities". This organization was proposed to be formed by several of the larger municipalities of this state with a view of securing better co-operative effort as to matters of common interest. A separate organization was to be maintained from contributions from the various municipalities. In rendering the opinion, the court said:

> "It does not follow from the broad power of local self-government, conferred by Article XVIII of the constitution of the state, that a municipal council may expend public funds indiscriminately and for any purpose it may desire. The misapplication or misuse of public funds may still be enjoined, and certainly a proposed expenditure, which would amount to such misapplication or misuse, even though directed by a resolution of council, would not be required by writ of mandamus. Without considering the validity of such a provision, it must be conceded that there is no express provision of the charter of the City of Cleveland relative to the distribution from the treasury of the city to a fund made up of contributions of various municipalities for purposes enumerated in the constitution of the conference of Ohio municipalities.' "

I think the obvious inference from this language is that the court regarded the proposed expenditure there to be a misuse of public funds. In other words, the conclusion was reached that an appropriation to assist in creating and maintaining a separate organization would scarcely be for a public purpose. While it is true that the court also makes the observation that there was no express provision of the charter of the city of Cleveland authorizing such an expenditure, it is my belief that the decision is based primarily on the fact that the expenditure was not for a proper public purpose.

Whether or not the court meant to lay down a general rule broad enough to cover a case such as you now present, is not without doubt, but I am of the opinion that that decision should be confined strictly to the particular facts. This is especially so in view of the uniformity with which appropriations of public funds, for the purpose of assisting in exhibitions and expositions of various kinds, have been sustained. Thus in this state we find the case of Cleveland vs. Coughlin, 16 O. N. P. (N. S.) 468. The head note to that case is as follows:

> "The appropriation made by the council of the city of Cleveland toward the expense of celebrating the centennial anniversary of Perry's Victory on Lake Erie, was an appropriation for a public purpose and was authorized by the charter of that city."

I believe the general rule is correctly stated by the court in the opinion on page 474, as follows:

"That the expenditure of public moneys for this kind of a celebration is a public purpose; that state legislature may make such expenditures upon the part of the state; that the legislature may delegate to municipalities the power to make such expenditures of public funds, are propositions which have been decided over and over again. The leading cases, or practically all of them, are cited in the brief filed by the defendants, and I shall make no effort to review them at this time or make any lengthy quotations."

As pointed out in this opinion, there is ample authority in other jurisdictions sustaining such expenditures.

Daggett vs. Colgan, 14 L. R. A. 474; 92 Cal. 53.
Norman vs. Board of Mgrs., 18 L. R. A. 356; 93 Ky. 537.
State ex rel vs. Cornell, 39 L. R. A. 513; 53 Nebr. 556.

The first two of these cases dealt with appropriations to pay expenses of exhibits at the Chicago World's Fair and the last dealt with the Trans-Mississippi and International Exposition at Omaha. It is also well known that the state of Ohio has on many occasions made appropriations for various expositions, none of which seems to have been questioned in the courts.

I have no difficulty in reaching the conclusion that an exhibition such as you describe in your letter, whose purpose evidently is primarily for the furtherance and advancement of the welfare of the city of Cincinnati, is of such a public character as to bring any appropriation made therefor within the definition of the term "public purpose". If, therefore, the purpose be conceded to be public, the only remaining question is whether or not the council of the city of Cincinnati is authorized, by charter, to make such an appropriation. Stating it differently, if this purpose be one which could properly be exercised by the legislature, can the council of Cincinnati, under its charter authority, also accomplish the same purpose?

From the discussion of the Home Rule Amendments heretofore given, it is apparent that a charter may properly reserve to municipalities all rights of local self-government, excepting only that local police, sanitary and other similar regulations shall not conflict with the general laws and with the further qualifications embraced within the provisions of section 6 of Article XIII of the Constitution, above quoted.

Referring to the section of the charter adopted at the November, 1926, election by the city of Cincinnati, we find that it attempts in substance to vest all legislative powers of the city in the council. This is done subject only to the terms of this charter and of the constitution of the state of Ohio. While you have not quoted the charter in full, I assume that it is silent as to any restriction which would prevent the appropriation in question. The constitutional limitations have been heretofore discussed and shown inapplicable. The provision of the charter further makes the laws of the state of Ohio not inconsistent with the charter of the same force and effect as the ordinances of the city. No provision of the General Code can be cited prohibiting the appropriation in question.

Finally, the charter specifically states that in the event of conflict of an ordinance and any general law, the provisions of the ordinance shall control. Since there is no conflict between any statute of the state of Ohio and the proposed ordinance, any discussion on this subject is unnecessary.

While the language of the court in the case of Thomas vs. Semple, which I have quoted above, might be construed as indicating the necessity of specific charter authority for an appropriation of this character, I do not feel that it was the intention of the court to so hold. Such a conclusion appears to be clearly inconsistent with the spirit of the Home Rule provision of the Constitution. It would logically result in the necessity of seeking specific authority either in general law or in the charter in

every instance, and the inevitable conclusion would be that the people of a municipality are powerless to grant by charter general authority to the council to exercise on their behalf the powers of local self-government expressly reserved by the Home Rule provisions.

I am of the opinion that the broad power conferred by the charter provision which you quote, is amply sufficient to vest in the council of the city of Cincinnati the authority to enact all ordinances and resolutions which properly pertain to the subject of local self-government and that, in the exercise of that power, it may, unless restricted by some provision of the charter not before me, properly make an appropriation to defray the cost of an exhibit in an exhibition whose primary purpose is the furtherance of the welfare and prosperity of the city, since such an appropriation, under the authorities, would obviously be for a public purpose.

Respectfully,
EDWARD C. TURNER,
Attorney General.

394.

COSTS IN FELONY CASES—WHEN PAID TO EXAMINING MAGISTRATE.

SYLLABUS:

When a convict who has been convicted of a felony is sentenced otherwise than to imprisonment in a reformatory or the penitentiary, or to death, there is no provision of law whereby the examining magistrate who had bound over the defendant may be paid his costs or an allowance in lieu thereof, from public funds.

COLUMBUS, OHIO, April 27, 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 a case where an affidavit is filed before a justice of the peace charging the violation of Section 13008, General Code, and such person is bound over to the grand jury, indicted, pleads guilty and is sentenced by the court to a term in a work house, is this a felony wherein the state failed to convict or a misdemeanor in which the defendant proves insolvent so that the costs of the justice of the peace and constable may be included in the allowance made by the county commissioners in lieu of fees under Section 3019, General Code?"

Section 13008, General Code, reads as follows:

> "Whoever, being the father, or when charged by law with the maintenance thereof, the mother of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, fails, neglects or refuses to provide such child or such woman with the necessary or proper home, care, food and clothing, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

Section 12372, General Code, provides: