a municipality may not legally expend funds for the purpose of maintaining an organization composed of municipalities.

Respectfully,
C. C. CRABBE,
Attorney General.

2479.

OFFICE OF POLICE JUDGE IS AN ELECTIVE OFFICE—MUNICIPALITY HAS NO POWER TO CREATE SUCH OFFICE OR PROVIDE FOR THE APPOINTMENT OF A JUDGE.

SYLLABUS:

The office of police judge is an elective office and no power to create such office or provide for the appointment of a judge therefor can be exercised by any city in Ohio, being contrary to the provisions of the constitution of the state.

COLUMBUS, OHIO, May 12, 1925.

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

GENTLEMEN:—This will acknowledge receipt of your letter of May 5, 1925, reading as follows:

> "On April 28th, 1925, the supreme court of Ohio decided the case of state ex rel. Cherrington vs. Hutsinpiller, holding that Ohio municipalities have no power by charter or otherwise to create courts and appoint judges thereof.
>
> "Section 29 of the charter of the city of Xenia provides for the appointment of a police judge by the city commission.
>
> "Section 7 of said charter reads:
>
> " 'There is hereby created a commission of five members, having the qualifications hereinbefore provided for, who shall be elected at the first general election after the adoption of this charter, who shall exercise all the powers, rights and authority now vested in and exercised by the city of Xenia and its several officers, or which may hereafter be granted to said city. All the powers exercised, or which may be exercised hereafter by municipal corporations are hereby vested in said commission, subject to the provisions of the constitution of Ohio, and said commission may provide by ordinance how any power shall be exercised.'
>
> "Section 8 of the charter reads:
>
> " 'The commission shall designate by a majority vote one of their number to act as mayor of the city, who shall use the title of "mayor" in any case in which the execution of legal instruments of writing or other necessity arising from, and which, the general law of the state so requires, but this shall not be construed as conferring upon him the administrative or judicial functions of a mayor under the general laws of the state, and he shall not receive any compensation other than as a member of the commission.'
>
> "Question 1: In view of the above decision, may the appointed police judge of the city of Xenia continue to hear and decide cases for the violation of city ordinances?

"Question 2: Assuming that the answer to the above question is in the negative, may the city commission or a member thereof chosen mayor appoint an acting judge under the authority of section 4569, General Code?

"Question 3: In the case of Hilton vs. state, ex rel., Bell, 108 Ohio St. 233, it was decided that magistrates must be elected. In view of this decision, could a member of the commission hear and determine cases of violations of ordinances or statutes, or both?"

Section 29 of the charter of the city of Xenia reads as follows:

"The commission shall designate on its record by resolution or ordinance some suitable person to act as police judge with power to hear and determine all misdemeanor causes arising under the ordinances of said city, and under the laws of the state of Ohio, whose jurisdiction as a magistrate shall be the same as that now conferred and vested in mayors of municipalities under the laws of the state of Ohio. The commission shall fix the compensation of said police judge, and he shall hold office at its pleasure. The fees taxed and collected by said police judge shall be paid into the city treasury, and credited to the fund out of which the salary of said police judge shall be payable."

This is the only provision for a judicial officer for the city of Xenia, it operating under the commission form of government provided by the General Code.

In my opinion to you under date of September 19, 1923, (Opinions of the Attorney General for 1923, Vol. 1, page 619), in the case of the city of Westerville, under a similar charter provision, I held that the city of Westerville had no officer who could function as a magistrate or mayor.

There are a number of other attorney general's opinions along this same line and this question reached the supreme court in the case of the *state of Ohio, ex rel. F. E. Cherrington as prosecuting attorney of Gallia county, Ohio,* vs. *John G. Hutsinpillar,* and was decided April 28, 1925. This case was squarely on the question of the right of a municipality to create a judicial position for the city of Gallipolis, Ohio, a charter city, which had provided for the appointment of a municipal judge by its commission in the same manner as the charter of the city of Xenia provides for a police judge. The syllabus of this case is as follows:

"The municipalities of this state have no power, by charter or otherwise, to create courts and appoint judges thereof, such exercise of power being in violation of section 1 and section 10, article IV, of the constitution of Ohio."

The opinion in this case, delivered by Day, J., contains the following language:

"A court is an instrumentality and an incident to sovereignty and is the repository of its judicial power. It is the agency of the state by means of which justice is administered, and is that entity in the government to which the public administration of justice is delegated and committed.

"To determine whether the municipal court of the city of Gallipolis is thus authorized by the sovereign power of the state, we turn to the constitution itself. Section 1, article IV thereof, provides:

" 'The judicial power of the state is vested in the supreme court, court 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.'

"And section 10:

" 'All judges, other than those provided for in this constitution, shall be elected by the electors of the judicial district for which they may be created, but not for a longer term of office than five years.'

"In considering and construing this exercise of power in the creation of a court and the selection of a judge to preside thereover, reference must be made to section 3, article XVIII, which provides:

" '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.'

"It is urged on behalf of the defendant that this authority of municipalities to exercise *'all powers of local self government'* carries with it a sovereign power in itself, and that the creation of a court is one of the incidents thereto, especially if construed with reference to matters pertaining to purely local affairs.

"The sovereign power in this state abides with the people of the state, and not with the subdivisions thereof, and the highest expression of this power is found in the constitution itself, being that body of rules, regulations and political canons in accordance with which the powers of sovereignty are to be habitually exercised.

"The right to exercise judicial authority as an incident to its sovereignty the state has, by section 1, article IV, vested in the courts therein named, and 'such other courts inferior to the courts of appeals as may from time to time be established by law.' Prior to the adoption of the amendments to the constitution of 1912, to wit, in the constitution of 1851, this section of the constitution read: 'Such other courts * * * as the general assembly may, from time to time, establish,' and such was likewise the substance of the language of the constitution of 1802.

"It is argued that the amendments to the constitution of 1912 thus took from the general assembly the exclusive power to establish courts inferior to the courts of appeals, and by implication granted to municipalities power to establish courts inferior to the courts of appeals, as they saw fit, as an incident to the power of local self government granted to municipalities under section 3, article XVIII.

"This is a construction with which we cannot agree, for it allows, by implication only, the municipalities of the state the freedom to exercise this incident of sovereignty, to wit, creation of courts. A power so extraordinary and vital should not rest upon any less foundation than express grant or clear and necessary implication, and we find neither in the constitution. The change in the phraseology from 'as the general assembly may, from time to time establish,' as provided in the constitution of 1851, to the expression 'be established by law,' as appears in the amendments of the constitution of 1912, is to be construed as conveying no change of meaning, to wit, that courts shall be created by the exercise of the sovereign power by the law-making body, to wit, the general assembly of the state.

" 'The duty of providing courts of justice is a governmental function of the state, and the authority to establish a court must emanate from the supreme power of the state, otherwise the court itself is an absolute nullity, and all its proceedings are utterly void. No person can, in the absence of authority at law, create a court and preside over the same as judge, nor can any judge hold a court which is unconstitutional in its organization. In the United States the state constitutions usually create certain courts and confer on them designated powers, and such courts proceed directly

from the sovereign will and constitute a coordinate and independent department of the government.'

—15 Corpus Juris, page 854.

"The judicial power of the state is distinct from the executive and the legislative, and as one of the highest elements of sovereign power can only be created in strict conformity to the manner indicated by the rules laid down in the expression given to sovereignty by the people themselves, to wit, the constitution. This judicial power has been cared for by the organic law, and is beyond the control of municipalities, which, after all, are only agents of the state for local governmental purposes. Section 1, article IV, is a special provision of the constitution that has to do with the creation of courts, and as such supersedes the general power of local self government, as granted in section 3, article XVIII.

"After all, no power of local self government in the municipality is interfered with by this denial of the power to create courts. All the executive, legislative, proprietary and general governmental powers incident to municipal government may still be exercised, and legal rights, arising under state law and municipal ordinance, be measured by local judges sitting in courts created under constitutional sanction, applicable alike to *all* municipalities of the state. The power of local self government under such a court can be as well exercised as under a court created by local charter. It is the law that is to be construed and interpreted, and it is the same in any court, but the court itself can only be created by the power authorized by the constitution. Local self government does not extend so far as to override plain constitutional limitations. Even the legislature cannot create a court by mere majority, but by section 15, article IV, a two-thirds vote is required, thus indicating the care to be exercised in creating a court.

"We are, therefore, of opinion that no power exists in the municipalities of this state by their own fiat, by charter or otherwise, to create a court or courts, and thus seek to exercise the judicial power in contravention of section 1, article IV, of the constitution.

"This conclusion requires us to over-rule the demurrer to the petition, but in view of the fact that counsel have argued and briefed at length the question of the right to appoint a judge, instead of electing one, we have reached the conclusion that under section 10, article IV, all judges of courts in this state 'shall be elected by the electors of the judicial district for which they may be created.' Except, therefore, for the purpose of filling vacancies, as provided by law, there is no legal or constitutional power by which a judge may be appointed in this state. See *Hilton* vs. *state,* ex rel., 108 Ohio St. 233-238."

As set out in the former opinions of this department and the law as laid down in the *Cherrington* vs. *Hutsinpillar* case, I am of the opinion that no judicial authority whatsoever can be exercised by the police judge appointed for the city of Xenia, and, there being no legal judge, there can be no vacancy in the office coming within the provisions of section 4569, General Code.

This applies in both state and ordinance cases, so that no further answers to your three questions are necessary.

Respectfully,
C. C. CRABBE,
Attorney General.