that the children and heirs at law of Mary J. Thurston, above named, own and hold the fee simple title to said property free and clear of all encumbrances except the inchoate dower interests of their respective spouses, and the undetermined taxes on this property for the year 1933. These taxes are now a lien upon this property but inasmuch as this lien for taxes is a lien of the state, the same will become merged in the fee simple title by which the state will own and hold these lands upon acceptance of the deed tendered by the above named owners and holders of this land, and the state will then hold this property free and clear of all encumbrances whatsoever.

Upon examination of the warranty deed tendered by the above named children and heirs at law of Mary J. Thurston who as tenants in common are now the owners and holders of the title to this property, I find that the deed has been properly executed and acknowledged by said persons as owners of this property and by their respective spouses who, by joining in the granting clause of the deed as well as by the express release, have relinquished their respective dower interests in this property.

I am accordingly approving said abstract of title and warranty deed. An examination of contract encumbrance record No. 13, submitted as a part of the files relating to the purchase of this property, shows that the same has been properly executed and that there are sufficient unencumbered balances in the proper appropriation account to pay the purchase price of this property, which purchase price is the sum of eight hundred dollars. I further find that the money necessary to pay the purchase price of this property has been released by the board of control as required by the provisions of the appropriation act.

I am herewith returning to you said abstract of title, warranty deed, encumbrance record No. 13 and other files relating to the purchase of this property, with my approval; and upon this approval I recommend that a voucher be issued covering the purchase price of the property.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1569.

MARION MUNICIPAL COURT—MAY ISSUE WARRANTS TO MARION COUNTY SHERIFF WHERE LAWS OF STATE ALLEGEDLY VIOLATED—PAYMENT OF SHERIFF'S FEES THEREFOR.

SYLLABUS:

1. *The Municipal Court of Marion may issue warrants directed to the sheriff of Marion County where the offense charged it is a violation of the laws of the state. The sheriff serving such processes is entitled to the statutory fees for such services which are to be paid into the county treasury. Opinion No.* 859, *rendered May* 22, 1933, *discussed and distinguished.*

2. *Wholly salaried minor court officers by virtue of section* 3017, *General Code, are entitled to receive in state cases from the county treasury the actual necessary expenses incurred by them in executing warrants to arrest, orders of commitment or other processes. When such expenses are collected from the defendant or from the state, they should be paid into the county treasury.*

COLUMBUS, OHIO, September 16, 1933.

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

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

> "Under date of May 22nd, 1933, you rendered to this department opinion No. 859 in which it was held that the Sheriff of Marion County had no authority to serve processes from the Municipal Court of the City of Marion in criminal cases. The opinion appears to be based wholly upon the provisions of law creating a municipal court.
>
> Our attention has been called to the provisions of Sections 13432-1 and 13432-9 of the General Code, which are parts of the criminal code, effective July 21, 1929.
>
> QUESTION 1: Will the provisions of these two sections make any change in your opinion No. 859, above referred to?
>
> QUESTION 2: When a sheriff serves writs issued from the municipal court of the City of Marion in State cases, and his fees, under Section 2845 of the General Code, are taxed and collected from the defendant, or in case of conviction and sentence to the penitentiary are paid by the State, should such fee, when collected by the clerk of the municipal court be paid into the county treasury or into the city treasury; and when such fees are collected by the clerk of court from the State, should they be paid into the county treasury or into the city treasury?
>
> QUESTION 3: Section 3017 of the General Code provides for the county paying the expenses of a wholly salaried minor court officer in serving warrants of arrest or summons, and such officer is entitled to charge fees under Section 3347, which includes the expenses of the officer in transporting and subsisting the prisoner. When such expenses are collected from the defendant or from the State, should they be paid into the county treasury or into the city treasury?"

You refer to my Opinion No. 859, rendered May 22, 1933. I held in that opinion as disclosed by the syllabus:

> "The sheriff of Marion County may serve the processes of the Marion Municipal Court only in civil cases and then only where such service is made in Marion County but outside the limits of the city and township of Marion. The sheriff serving such processes is entitled to the statutory fees for such services which are to be paid into the county treasury."

While that opinion is not exactly clear upon the question, it was not intended to discuss the question of the service of warrants in state cases. The opinion merely construed the Marion Municipal Court Act as providing that for violations of the city ordinances of Marion, the bailiff of that court was the proper party to serve warrants.

Section 13432-1 and 13432-9 of the General Code, referred to in your letter, read as follows:

Sec. 13432-1.

"A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, herein designated as 'peace officers,' shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained."

Sec. 13432-9.

"When an affidavit charging a person with the commission of an offense is filed with a judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused; if the offense charged is a violation of the laws of the state, such warrant may be directed to and executed by any officer named in Section 1 of this chapter, but if the offense charged is a violation of the ordinance or regulation of a municipal corporation, such process shall be directed to and executed by the officers of such corporation."

These two sections were enacted in 1929 as part of the new criminal code (113 O. L. 123). To a certain extent, they are apparently in conflict with section 1579-775, General Code, of the Marion Municipal Court Act. This section reads in part as follows:

"All summons, writs and process in the municipal court shall be served and returned by the bailiff, or by publication, in the same manner as is now, or may hereafter be, provided by law for the service and return of summons, writs and process in the court of common pleas. Where the manner of service is not so provided for, service and return may be made in the same manner provided by law for the service and return of summons, writs and process issued by police court or a justice of the peace."

This office in an opinion found in Opinions of the Attorney General for 1928, Vol. I, page 821, held as disclosed by the syllabus:

"The Municipal Court of Newark (Sections 1579-367 to 1579-415, both inclusive, of the General Code) is without authority to issue warrants directed to the sheriff of Licking County, Ohio. Such warrants should be directed to the bailiff or to any police officer of the City of Newark, Ohio."

In Opinions of the Attorney General for 1925, page 550, it was held as disclosed by the syllabus:

"The Municipal Court of Portsmouth may not legally issue warrants directed to the sheriff of the county or constable of a township. Such warrants should be issued to the bailiff or a deputy bailiff provided for said court."

These two opinions were based upon the provisions of the Newark and Portsmouth Municipal Court Acts. These two acts contain provisions similar to section 1579-775, supra, of the Marion Court Act.

Sections 13432-1 and 13432-9 do not purport to repeal section 1579-775 supra. Repeals by implication are not favored by the law, and wherever possible, a court will try to harmonize the statutes. As stated in the case of *State, ex rel.,* vs. *Building Commission,* 123 O. S. 70, at page 74, "the rule is familiar and elementary that repeals by implication are not favored and that the legislature in passing a statute did not intend to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two are irreconcilable."

An interesting case dealing with inconsistent provisions between the municipal court act and the criminal code is the case of *Holub* vs. *State of Ohio,* reported in the August 7, 1933, issue of the Ohio Bar, 127 O. S. 34. Section 1579-519 of the Akron Municipal Court Act provides that all criminal cases "shall be tried to the court unless a trial by jury is demanded by a party," etc. Section 13442-4, General Code, which was enacted after section 1579-519 reads:

> "In all criminal cases pending in courts of records in this state, the defendant shall have the right to waive a trial by jury, and may, if he so elect, be tried by the court without a jury. Such waiver and election by a defendant, shall be in writing, signed by the defendant and filed in said cause and made a part of the record thereof."

If no written waiver of a jury or election to be tried by the court was filed, the defendant contended that the municipal court had no jurisdiction to try him, and that it was incumbent upon the court to have his case sent to a jury. The Supreme Court refused to uphold this contention and held as disclosed by the second branch of the syllabus of that case:

> "2. The provisions of section 13442-4, General Code, relating to the waiver of jury trials in criminal cases do not repeal or supersede the provision found in the Akron Municipal Court Act (section 1579-519, General Code), requiring a trial to the court, unless a trial by jury be demanded."

In the opinion Jones, J., said:

> "The Akron Municipal Court Act was not expressly repealed when the new criminal code was later adopted; and we can discover no legislative intention to repeal it."

It is possible to harmonize section 13432-9, supra, with the Marion Municipal Court Act by holding that this section merely extends to the sheriff's authority to serve warrants in state cases.

It is therefore my opinion, in specific answer to your first question, that the Municipal Court of Marion may issue warrants directed to the sheriff of Marion County where the offense charged is a violation of the laws of the State.

In reference to your second question, relative to whether the fees shall be paid into the county or into the city treasury, I call your attention to a former opinion, No. 859, rendered May 22, 1933. In that opinion, I stated the rule as follows:

"Whether or not the county should receive the fees in the event the sheriff has served such processes, depends upon the authority of the sheriff to serve them."

Section 2845, General Code, reads in part as follows:

"For the services hereinafter specified when rendered, the sheriff shall charge the following fees, and no more, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those legally liable therefor: * * * When any of the foregoing services are rendered by an officer or employe, whose salary or per diem compensation is paid by the county, the legal fees provided for such service in this section shall be taxed in the costs in the case and when collected shall be paid into the general fund of the county."

Section 1579-798, General Code, relating to the duties of the clerk of the Municipal Court of Marion, reads in part as follows:

"He shall collect all fines, costs and penalties. He shall be the receiver of all moneys payable into his office and on request shall pay them to persons entitled thereto. On the first business day of each calendar month he shall pay to the treasurer of the city of Marion to the credit of the municipal court fund, all moneys collected by his office for official services; and to the credit of the general fund, all fines collected for violation of city ordinances.

He shall on the first day of each month in each year, pay to the county treasurer all fines collected for the violation of state laws."

From a reading of the above section of the Marion Municipal Court Act, there is nothing which would prevent the clerk of the Municipal Court of Marion from paying these fees into the county treasury. Hence, the question of whether the fees are collected by the clerk of the Municipal Court of Marion or by the clerk of courts of the county is immaterial.

It is therefore my opinion, in specific answer to your second question, that the sheriff serving such processes is entitled to the statutory fees for such services which are to be paid into the county treasury.

Your third question pertains to the expenses of wholly salaried minor court officers. Section 3017, General Code, referred to in your letter reads as follows:

"In all state cases any wholly salaried minor court officer charged with the execution of a warrant to arrest or order of commitment shall receive from the county treasury the actual necessary expense of executing such writs upon specifically itemized bills, verified by his oath, and certified to by the proper magistrate, court or clerk thereof, and in like manner such expense shall be paid from the municipal treasury when incurred in ordinance cases."

It has been pointed out in numerous opinions of this office that the allowance for actual necessary expenses provided for by section 3017, General Code, supra, is not a fee for official service as that term is commonly used but a reimbursement to such officers for *actual necessary expenses.* I assume from your question that you refer to state cases and not ordinance cases, since you

refer to that part of section 3017 which provides for the county paying such expenses. Section 3017 does not provide the place where these expenses shall be paid when the same are collected from the defendant or from the state. Likewise, I find no other section of the Code covering this particular situation. However, it would appear that these expenses, when recovered, should be paid into the public treasury from which they were advanced. The legislature has in various statutes indicated such a conclusion. Section 3014, General Code, reads in part as follows:

"* * * Each witness attending before a justice of the peace, police judge or magistrate, or mayor, under subpoena, in criminal cases, shall be allowed the fees provided for witnesses in the court of common pleas, and in state cases said fees shall be paid out of the county treasury, and in ordinance cases out of the municipal treasury, upon the certificate of the judge or magistrate, and the same taxed in the bill of costs.

When the fees herein enumerated have been collected from the judgment debtor, they shall be paid to the public treasury from which said fees were advanced."

Section 3016, General Code, reads in part as follows:

"In felonies, when the defendant is convicted, the fees of the various magistrates and their officers, the witness fees and interpreter's fees shall be inserted in the judgment of conviction and when collected the same shall be disbursed by the clerk of courts to the persons entitled thereto; * * *."

Section 3035, General Code, reads as follows:

"On the first Monday of December each year, each clerk of the court of common pleas shall transmit to the auditor of state a certified report of all costs collected in the county by the prosecuting attorney or otherwise, and which the state is required by law to advance, in criminal causes, wherein the persons convicted have been sentenced and transported to the penitentiary."

Section 13451-18, General Code, reads as follows:

"In all sentences in criminal cases, including violations of ordinances, the judge or magistrate shall include therein, and render a judgment against the defendant for the costs of prosecution, and if a jury has been called to the trial of the case, a jury fee of $..... shall be included in the costs, which, when collected, shall be paid to the public treasury from which the jurors were paid."

11 O. Jur. 156 states the rule as follows:

"* * * It is made the duty of the clerk, when he has received such cost money from the sheriff, or otherwise, to pay the same, on request, to the persons entitled thereto. All such costs as may have been previously paid out of the county treasury are to be returned thereto, as well as all unclaimed costs, which may be afterwards obtained from the county treasury by the persons entitled thereto, upon proper application."

To the same effect, see Opinions of the Attorney General for 1922, Vol. I, page 421.

The above authorities indicate that these expenses should be paid into the public treasury from which the same were advanced.

It is therefore my opinion, in specific answer to your questions, that:

1. The Municipal Court of Marion may issue warrants directed to the sheriff of Marion County where the offense charged is a violation of the laws of the state. The sheriff serving such processes is entitled to the statutory fees for such services which are to be paid into the county treasury. Opinion No. 859, rendered May 22, 1933, discussed and distinguished.

2. Wholly salaried minor court officers by virtue of section 3017, General Code, are entitled to receive in state cases from the county treasury the actual necessary expenses incurred by them in executing warrants to arrest, orders of commitment or other processes. When such expenses are collected from the defendant or from the state, they should be paid into the county treasury.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1570.

TUITION—OBLIGATION OF BOARD OF EDUCATION TO PAY TUITION OF RESIDENT STUDENTS ATTENDING HIGH SCHOOL IN ANOTHER DISTRICT—DUTY OF LATTER TO ADMIT STUDENTS.

SYLLABUS:

1. *The obligation of a school district to receive into its schools high school pupils from other districts, where circumstances are such that a duty fixed by law rests on the board of education of the pupil's residence to pay the tuition of those pupils as provided by Sections 7747 and 7748, General Code, is not dependent on the issuance of a certificate by the clerk of the board of education of the pupil's residence, under Section 5625-33, General Code, to the effect that money has been appropriated and is in the treasury or in the course of collection, unencumbered, with which to pay the child's tuition.*

2. *The obligation of a board of education of a school district wherein a high school is not maintained, to pay the tuition of resident high school pupils who attend high school in other districts, as fixed by Section 7747 and 7748, General Code, is an obligation fixed by law, and is not contractual in its nature.*

3. *Foreign tuition cannot be paid without an appropriation. It cannot be said that an unpaid balance due for foreign tuition at the beginning of a fiscal year automatically constitutes an encumbrance upon the funds of the school district against which the claim exists.*

COLUMBUS, OHIO, September 16, 1933.

HON. GEORGE L. LAFFERTY, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "Referring to your Opinion No. 421 dated March 30, 1933, in the first paragraph of the syllabus you state that:
>
> 'Where, by reason of the assignment made in pursuance of Section 7764, General Code, or otherwise, a school pupil is entitled to admission to high school, and is entitled under the law to attend that high school