

sioners to the judges, clerk and prosecuting attorney of such court in state cases shall be retained by the clerk and be paid by him quarterly to the trustees of such law library association, but the sum so retained and paid by the clerk of said police court to the trustees of such law library association shall in no quarter be less than 15 per cent of the fines and penalties collected in that quarter without deducting the amount of the allowances of the county commissioners to said judges, clerk and prosecutor.

* * * The moneys so paid shall be expended in the purchase of law books and the maintenance of such association."

You will note that this section pertains only to the disposition of "fines and penalties assessed and collected" and in no wise concerns "costs" collected. The language used therein is plain and unambiguous.

Your attention is directed to a former opinion of this office addressed to you which appears in Vol. I, Opinions, Attorney General, 1921, at page 118, the syllabus of which reads:

"provisions of Section 3056 G. C. are applicable to fines assessed and collected by the municipal court of Toledo."

The recent amendment of Section 1579-314, supra, would in no wise affect the conclusions therein reached.

Answering your inquiry specifically, I am of the opinion that:

1. The provisions of Section 3056, General Code, are applicable to fines and penalties assessed and collected by the Municipal Court of Toledo.

2. The Lucas County Law Library Association is not entitled to any percentage of "costs" collected in state cases prosecuted in the Municipal Court of Toledo.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2042.

MUNICIPAL COURT OF NEWARK—COUNCIL NO AUTHORITY TO FIX
COMPENSATION OF ACTING JUDGE.

SYLLABUS:

Assuming the constitutionality of Section 1579-371, General Code, providing for the appointment of an acting judge of the municipal court, Newark, Ohio, by the mayor of said city, the council of the city of Newark, for want of statutory authority so to do, has no power to fix the compensation of such acting judge or appropriate money to pay the same.

COLUMBUS, OHIO, May 1, 1928.

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

GENTLEMEN:—This is to acknowledge receipt of your recent communication requesting my opinion on a question therein stated. Your communication is as follows:

"Section 1579-371 G. C. (Section 5 of the Newark Municipal Court Act) provides that the mayor of the City of Newark may appoint an acting judge of the municipal court during the absence or disability of the regular judge.

Neither this nor any other section of the act makes any provision for compensating an acting judge for services rendered in that capacity. The council of the City of Newark has fixed the compensation of the regular judge to be paid out of the city treasury at \$2,600.00 per annum. The sum of \$2,900.00 was appropriated for the judge's salary for the year 1928. The additional three hundred was included for the purpose of paying acting judges. Council has never fixed the compensation of acting judges but same has been paid from the city treasury on several occasions at the rate of \$7.50 per day.

QUESTION: Is an acting judge in the municipal court of Newark, Ohio, entitled to compensation when the amount thereof has not been fixed by ordinance of council?"

Section 1579-371, General Code, referred to in your communication, is a part of an Act passed April 8, 1919, (108 O. L. Part 1, Page 171) entitled, "An Act to establish a municipal court for the City of Newark, Licking County, Ohio, and fixing the jurisdiction thereof and providing for a judge thereof and other necessary officers, and defining their powers and duties." The provisions of said act have been carried into the General Code as Sections 1579-367 to Section 1579-415 inclusive.

Section 1579-367, General Code, provides:

"That there be and hereby is created a court of record for the City of Newark, and the township of Newark, in the county of Licking, State of Ohio, to be styled 'The Municipal Court of Newark, Ohio,' the jurisdiction thereof to be as herein and hereinafter fixed and determined."

Section 1579-368, General Code, provides that said municipal court shall be presided over by one judge, to be designated as "Municipal Judge," whose term of office shall be for a period of four years; and that the said judge shall receive such compensation, not more than eight hundred dollars per annum, payable monthly, as the county commissioners may prescribe, and out of the treasury of Newark Township, Licking County, Ohio, not more than two hundred dollars per annum payable monthly, as the township trustees may prescribe, and such further compensation, not less than two thousand dollars per annum, payable monthly out of the treasury of the City of Newark, Ohio, as the council of said city or other legislative authority may prescribe.

Section 1579-371, General Code, provides as follows:

"In case the judge of the municipal court shall be incapacitated from sitting in any case, or by reason of absence or illness be unable to attend sessions of said court, the mayor of the City of Newark, Ohio, may appoint some attorney having the qualifications required by this act. Such appointee shall serve until the return of the regular incumbent of the office and shall have the jurisdiction and powers conferred upon the judge of the municipal court herein, and be styled 'Acting Judge' of the municipal court, and as such sign all process and records during the time he shall serve and perform all other acts pertaining to the office. All courts shall take judicial notice of the actions and powers of such persons.

Provided, however, that nothing contained in this act nor any other laws of Ohio, shall prevent the acting municipal judge from practicing as an attorney and counselor at law, in any other court in said state, or in any matter of business in said municipal court in which he is not engaged as

attorney or counselor, in such cases in which he is engaged as attorney or counselor, he shall be disqualified to perform any judicial functions."

The act above noted, establishing the municipal court of Newark, Ohio, was passed pursuant to the authority of Section 1 of Article IV of the State Constitution, which provides:

"The judicial power of the state is vested in a Supreme Court, Courts 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."

Section 15 of the same Article provides that:

"Laws may be passed * * * to establish other courts, whenever two-thirds of the members elected to each house shall concur therein."

The municipal court of Newark, Ohio, provided for by this act, is a part of the judicial organization of the state, and its establishment was a matter concerning which the City of Newark had no authority to act so far as its home rule powers under the Constitution were or are concerned. *State ex rel. vs. Yeatman*, 89 O. S. 44, 47; *State ex rel. vs. Hutsinpillar*, 112 O. S. 468.

The first question suggested in the consideration of that presented in your communication is with respect to the constitutionality of Section 1579-371, General Code, above quoted. This question arises by reason of the provisions of Sections 10 and 13 of Article IV of the state Constitution, which declare that all judges, other than those provided for in the Constitution, shall be elected by the electors of the judicial district for which they are created; and that in the case of a vacancy in the office of the judge such vacancy shall be filled by appointment by the Governor.

In the case of *Ex Parte Strang*, 21 O. S. 610, the question was presented with respect to the constitutionality of Section 174 of the Municipal Court Act of May 7, 1869, (70 O. L. 248), now Section 4569, General Code, providing that the mayor of a city, in the absence or disability of the Police Judge, is authorized to select a reputable member of the bar of such city to hold the Police Court, who, it was provided, should have for the time being the jurisdiction and powers conferred upon judges of Police Courts. In this case the court held:

"That assuming (but without deciding the question) the power of appointment thus conferred upon a mayor to be unauthorized by the Constitution, yet the person acting under such appointment, would be a judge *de facto*."

The case of *Ex Parte Strang*, *supra*, was an action in habeas corpus brought by one Strang, who had been committed to the workhouse in the City of Cincinnati in default of the payment of a fine imposed by an acting Police Judge appointed by the mayor of said city under the provisions of said Section 174 of the Municipal Court Act of 1869. Touching the merits of the case thus presented the Supreme Court further held:

1. The acts of an officer *de facto*, when questioned collaterally, are as binding as those of an officer *de jure*.

2. To constitute an officer *de facto* of a legally existing office it is not necessary that he should derive his appointment from one competent to

invest him with a good title to the office. It is sufficient if he derives his appointment from one having colorable authority to appoint; and an act of the General Assembly, though not warranted by the Constitution, will give such authority."

In the case of *Hillon, Police Justice, vs. The State ex rel. Bell*, 108 O. S. 233, it was held that the provisions of Section 4544, General Code, (98 O. L. 159), conferring power upon the council of a municipality to appoint a Police Justice, were unconstitutional and void. In the opinion of the Court in this case it was said:

"Not only does the express language of the judicial article of the Constitution, but its entire spirit, breathe antagonism to an appointed judiciary. Section 13, Article IV, provides the only method by which appointments can be made to this branch of the state government, and that is to vacancies only, and so insistent against the length of term of judicial office is that provision of the Constitution that it permits the appointment, not for the unexpired term of a predecessor, but only until the first annual election occurring more than 30 days after the vacancy. It is clear that the Legislature of the state cannot create a court and appoint its members, except under Section 22 (21) of the judicial article, which provides for the appointment by the Governor of a Supreme Court Commission. What the Legislature has not power to do by way of appointment to the judiciary, it may not delegate to one of its governmental agencies, as it has attempted to do in this case."

In view of the provisions of Sections 10 and 13 of Article IX of the State Constitution and the language of the Supreme Court above noted construing the same, it is difficult to sustain the constitutionality of the provisions of Section 1579-371, General Code, authorizing the mayor of the City of Newark, Ohio, to appoint an acting judge for said municipal court in the absence or disability of the regularly elected judge of said court. Moreover, with respect to this question, it is to be noted that such acting judge is not an officer of the City of Newark, Ohio, nor is he an officer of a judicial district co-extensive with said city, but, when appointed, he is an officer of a judicial district, which comprises both the City of Newark and Newark Township, Licking County, Ohio.

However, assuming the constitutionality of Section 1579-371, General Code, for the purposes of this opinion, it is noted that the question submitted in your communication is whether an acting judge of the municipal court of Newark, Ohio, appointed under the provisions of said section, is entitled to compensation when the amount thereof has not been fixed by ordinance of the council of said city. Section 4214, General Code, authorizes and requires the council of a city to fix by ordinance or resolution the compensation of officers, clerks and employes in each department of the city government. However, as above noted, the acting judge of the municipal court of Newark, Ohio, when appointed, is not an officer or employe of the City of Newark but is an officer of the judicial district for which said municipal court is created; and obviously the provisions of Section 4214, General Code, can have no application in the consideration of the question here presented.

Section 1579-368, General Code, makes provision for the annual compensation of the regularly elected municipal judge of said court, and provides that as part of such compensation there shall be paid to him out of the treasury of the City of Newark, Ohio, not less than two thousand dollars per annum, as the council or other legislative authority of said city may prescribe. Pursuant to the requirement of this section the council of the City of Newark has fixed the compensation of said municipal judge to be paid out of the city treasury, which amount, conformable to the provisions

of Section 5625-33, General Code (112 O. L. 406), the council of said city is required to appropriate annually before the compensation so fixed can be paid out of the city treasury. However, no provision is made in the act providing for the establishment of the municipal court of Newark, Ohio, or otherwise, authorizing the council of the City of Newark, Ohio, to fix the compensation of the acting judge, or authorizing the payment to him of any compensation by the City of Newark or any other authority. The case of *Ex Parte Strang* is authority for the conclusion that the acting judge of said municipal court, when appointed, is at least a de facto officer. As such officer, the question of his right to receive compensation for services rendered by him as acting judge of said court is governed, in so far as the question here presented is concerned, by the same principles applicable with respect to the compensation of other public officers. As to this, it is well settled that unless the compensation of a public officer is provided for by law no compensation can be legally paid to such officer for services performed by him.

In the case of *Clark vs. Commissioner*, 58 O. S. 107, it is said:

"It is well settled that a public officer is not entitled to receive pay for services out of the public treasury, unless there is some statute authorizing the same. Services performed for the public, where no provision is made by statute for payment, are regarded as a gratuity, or as being compensated by the fees, privileges and emoluments accruing to such officer in the matters pertaining to his office. *Jones vs. Commissioners*, 57 Ohio St. 189. To warrant payment out of the public treasury, it must appear that such payment is authorized by statute. Section 5, Article 10 of the Constitution. *Debolt vs. Trustees*, 7 Ohio St. 237; *Anderson vs. Commissioners*, 25 Ohio St. 13; *Strawn vs. Commissioners*, 47 Ohio St. 404."

Aside from the instance here presented with respect to the act establishing the municipal court of Newark, Ohio, it is noted that in a number of the other municipal court acts, enacted by the Legislature from time to time, provisions are made for the appointment of acting municipal judges. In most of such cases, as well as in the case of an acting police judge, provision is made for the compensation of such acting judges.

It is thus apparent that the authority of the council of the City of Newark, Ohio, to fix and to provide for the payment of the compensation of the acting judge of the municipal court of that city cannot be sustained without reading into the statutes, providing for the establishment of said court and the appointment of such acting judge, provisions that the Legislature might have incorporated in said act, but which it failed to place therein.

Not only does your question, in the form in which it is stated, require a categorical answer in the negative, but the law applicable to the consideration of said question requires me to go further and to hold that the council of the City of Newark has no authority to fix the compensation of the acting judge of said municipal court or to provide for the payment of such compensation out of the treasury of said city.

Respectfully,

EDWARD C. TURNER,

Attorney General.