1149.

MOTOR VEHICLE—WHEN MAYOR HAS AUTHORITY TO PROHIBIT PERSON FROM DRIVING—COUNCIL CAN PASS ORDINANCE INCORPORATING CRABBE LAW AND FIX FINE AT AN AMOUNT OVER $500.

SYLLABUS:

1. *When a person pleads guilty or is found guilty of violating a city ordinance punishing "reckless or careless" driving, a mayor cannot invoke the provisions of section* 12607-1, *General Code, to prohibit such person from operating or driving a motor vehicle.*

2. *A council of a village or city can pass an ordinance incorporating the Crabbe law and fix the fine therein at an amount over* $500, *regardless of the provision of section* 3628, *General Code, prohibiting fines of over that amount.*

COLUMBUS, OHIO, January 26, 1924.

HON. PHIL. A. HENDERSON, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—In your communication of January 7th, 1924, you request my advice as follows:

> "When a person pleads guilty or is found guilty of violating a city ordinance punishing reckless driving, can the mayor hearing the case prohibit such person from operating or driving a motor vehicle under section 12607-1, G. C., of Ohio?
>
> "The council of this city has incorporated the Crabbe law into an ordinance. Under this ordinance, a person can be fined as high as $1,000 for the first offense. Section 3628 of the General Code limits the amount of a fine which may be imposed by council to $500. Please advise me if under this city ordinance a fine of $1,000 may be imposed."

Section 12607-1, General Code, reads as follows:

> "Whenever a person is found guilty under the laws of this state, of operating a motor cycle or motor vehicle contrary to the speed laws, or of failing to stop the motor cycle or motor vehicle in case of accident to persons or property due to the operation of such motor cycle or motor vehicle, and to give information required by law, or of operating a motor cycle or motor vehicle while intoxicated, the trial court may, in addition to or independent of all other penalties provided by law, prohibit such person from operating or driving a motor cycle or motor vehicle for a period not exceeding six months, or if such person be the owner of a motor cycle or motor vehicle the court may suspend the certificate of registration of the owner of the motor cycle or motor vehicle for such period as it may determine, not exceeding, however, the period for which such motor cycle or motor vehicle is registered. Upon finding a person guilty a second time of any of the offenses above referred to, the court may, under the same conditions and terms as above set forth, prohibit such person from operating or driving a motor cycle or motor vehicle for a period not exceeding two years or if such person be the owner of a motor cycle or motor vehicle the court may revoke the certificate of registration of the owner of such motor cycle or motor vehicle, and after such revocation the owner shall not be entitled to reg-

ister a motor cycle or motor vehicle for a period of not to exceed two years, as may be fixed by the trial court. After a certificate of registration has been suspended, unless notice of appeal be given, the trial court shall cause the offenders to deliver to the court the registration number plates, and the court or the clerk thereof shall retain possession of such registration number plates during the period of suspension, and shall immediately notify the secretary of state of the action of the court, and the secretary of state shall not issue another registration number to the offender during the period of suspension. If a certificate of registration be revoked, unless notice of appeal be given the court shall direct the offender to deliver the registration number plates into the possession of the court or the clerk thereof, and the same shall forthwith be forwarded, together with a notice of such revocation, to the secretary of state, who shall forthwith cancel the registration of such motor cycle or motor vehicle and shall not issue another certificate of registration to the offender during the period of revocation. Any owner who makes application to have a motor cycle or motor vehicle registered during the period of time for which certificate of registration has been suspended or revoked, shall be fined not more than one hundred dollars or imprisoned not more than six months, or both. Whoever operates any motor cycle or motor vehicle whatever at any time during the period in which a certificate of registration is suspended or revoked as the result of his or her offense, or during a period for which the person has been prohibited from operating a motor cycle or motor vehicle under the provisions of this act, shall be fined not more than fifty dollars or imprisoned in the county jail or workhouse not more than ninety days or both."

This is not a part of the penalty, but is simply a power given the court which might possibly have been given the secretary of state as well.

You will note that this section covers only laws known as "speed laws," "failure to stop in case of accident" and of "operating a motor cycle or motor vehicle while intoxicated," and does not cover careless or reckless driving law.

It is my opinion, therefore, that in cases of violation of so-called "reckless or careless driving" laws, a court cannot invoke the provisions of section 12607-1.

Your second question presents some difficulty, in view of section 3628, General Code, which reads as follows:

> "To make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months."

Since the passage of this section in 1902 and its amendment to its present language in 99 Ohio Laws, p. 9, the constitution of the state has been changed, and now contains article 18, section 3, adopted September 3, 1912, which reads as follows:

> "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 not necessary in this opinion to discuss the right of a mayor, police judge or municipal court judge to fine violators of law, as this question is well settled.

In *Heppel* vs. *The City of Columbus,* 106 Ohio St., 107, the syllabus is as follows:

"By virtue of authority conferred upon municipalities by section 3, article XVIII of the Ohio Constitution, to adopt and enforce within their limits such local police regulations as are not in conflict with general laws, municipalities may enact and enforce ordinances, the provisions of which are not inconsistent with the general laws of the state, prohibiting the manufacture, possession or sale of intoxicating liquor for beverage purposes and the keeping of a place therein where intoxicating liquors are manufactured, sold, furnished, etc., for beverage purposes."

The Court also says, on p. 110:

"It is true that no such authority has been specifically conferred upon the municipalities of the state, but broad and comprehensive power has been delegated to municipalities by the provisions of section 3, article XVIII of the State Constitution, to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws, and a *statute which would deny or abridge that right so conferred by the Constitution of the State would be invalid.* (City of Fremont vs. Keating, 96 Ohio St. 468.) The ordinance here in question is a police regulation, which is not only not in conflict but is in entire harmony with the laws of the state. Welch vs. City of Cleveland, 97 Ohio St. 311; and City of East Liverpool vs. Dawson, 101 Ohio St. 527."

Schaffer vs. City; Court of Appeals of Columbiana County, 101 Ohio St. 527, Law Bull. XXI-150.

96 Ohio St. 468:

"This statute is a police regulation, and, under the section of the constitution above referred to, the municipality has the right to adopt and enforce within its limits police regulations in regard to the same subject-matter, not in conflict with this statute.

"Notwithstanding this right conferred upon municipalities by the constitution of Ohio, section 6307, General Code, specially provides that local authorities shall not regulate the speed of motor vehicles by ordinance, by-law or resolution. It is sufficient to say that the general assembly of Ohio cannot deprive a municipality of its constitutional rights. This section is clearly in violation of section 3 of article XVIII of the Constitution of Ohio, and void." * * *

"It is claimed, however, that this ordinance is in conflict with the general law on the same subject-matter, for the reason that it prescribes a different punishment than that prescribed by the statute of the state.

"This question is not important in the disposition of this case."

In 19 O. C. C. (N. S.), 58, the syllabus is as follows:

"A municipality under power granted by section 1536-1, sub-section 5, Revised Statutes, to regulate ale, beer, porterhouses and shops and the sale of intoxicating liquors as a beverage, may enact a valid ordinance pro-

hibiting the sale of intoxicating liquor on Sunday and making the penalty therefor not exceeding $500 and not less than $100, for a first offense, though the state law on the same subject makes the penalty not exceeding $100 and not less than $25 for the first offense."

Also, on page 60 the court uses the following language:

"After discussing this claim, the court say:

'And it is no ground of objection to the validity of prohibitory ordinances, thus authorized, that the general laws of the state do not extend the prohibition to all parts of the state. Morality and good order, the public convenience and welfare, may require many regulations in crowded cities and towns which the more sparsely settled portions of the country would find unnecessary.'

"So, too, it may well be that in municipalities where there is a congested population more severe penalties are necessary and proper to secure an observance of the law, than are necessary where the population is sparse and the sales comparatively few. What might be a very severe penalty in the way of a fine to one whose sales are limited to $2 or $3 a day might be very light for one whose sales are many times that amount per day, and when the legislature gave to municipalities the power 'to regulate ale, beer, porter houses and shops and the sale of intoxicating liquor as a beverage,' it was presumed that it was done for the purpose of enabling municipalities to make such regulations, and provide such punishment for the violation of such regulations as the municipality might think best. In short, that the municipality might need some legislation different from that needed for the regulation of those places outside of municipalities.

"We reach the conclusion, therefore, that the ordinance is valid."

This case is affirmed in 81 Ohio St. 539.

Silea vs. Canton, 23 N. P. (N. S.) 166.

In 8 Ohio Nisi Prius (N. S.) 153, the Court says, on page 157:

"(Penalty for violation of ordinance.) To make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both; provided, that such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months."

"This paragraph is contained in the general enumeration of powers granted to municipal corporations, and *cannot control specific powers granted to such municipal corporations.*"

In Alliance vs. Joyce, 49 Ohio St. 7, the Court says on page 17:

"Such general power vested in the municipality to prohibit places where intoxicating liquors are sold at retail, is, in itself, sufficient to authorize the adoption of an ordinance adequate to the object proposed. As an ordinance without a penalty would be nugatory, *municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those who violate them.* Fisher vs. Harrisburg, 2 Grant (Pa.) cas. 291; Barter vs. Commonwealth, 3 Pa. (Pen. 7 W.) 253; Trigally vs. Memphis, 6 Coldw. (Tenn.) 382.

"But such power does not rest in implication alone. By section 1861 of the Revised Statutes, it is provided as follows:

'By-laws and ordinances of municipal corporations may be enforced by the imposition of fines, forfeitures, and penalties, on any person offending against any such by-law or ordinance; and the fine, penalty or forfeiture may be prescribed in each particular by-law or ordinance, or by a general by-law or ordinance made for that purpose; and municipal corporations shall have power to provide, in like manner, for the prosecution, recovery, and collection of such fines, penalties and forfeitures.'

"Standing alone, this section imposes no limitation upon a municipal corporation's passing an ordinance making the fine for an offense discretionary within fixed reasonable limits, whereby the tribunal might be enabled to adjust the fines to the circumstances of the particular case. And the section, taken by itself, would be no barrier to the passage of an ordinance like that of the city of Alliance, imposing a fine, upon conviction, of not less than fifty dollars, nor more than two hundred dollars for the first offense."

In Opinions of the Attorney-General for 1919, Vol. 2, p. 1540, the opinion says:

"Section 3628 G. C., which relates to the powers of municipalities, provides as follows:

'To make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months.'

"Article XVIII, section 3, of the amended Constitution of Ohio provides as follows:

'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.'

"The supreme court of Ohio, in the case of City of Fremont vs. Keating, 98 O. S. 468, clearly holds that under said constitutional provision municipalities may 'adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.' Said opinion makes no distinction as to the application of such rules as between chartered and non-chartered municipalities."

"Therefore, in view of the foregoing, I am of the opinion that non-chartered as well as chartered municipalities may enact proper ordinances regulating the carrying of conceaied weapons."

In the cases of Village of Struthers vs. George Sokol and City of Youngstown vs. John Sandela, 140 N. E. Rep. P. 519, September 4, 1923, the syllabus reads as follows:

"1. Municipalities in Ohio are authorized to adopt local police, sanitary and other similar regulations by virtue of section 3, article XVIII of the Ohio Constitution, and *derive no authority from, and are subject to no limitations of,* the general assembly, except that such ordinances shall not be in conflict with general laws.

"2. In determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.

"3. A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance."

In this opinion the court said, in referring to the case of Fremont vs. Keating, 96 Ohio St. 468:

"It was pointed out in that case that a different penalty was prescribed by the ordinance than that prescribed by the statutes of the state, and that fact was held to be unimportant and not to create a conflict between the statute and the ordinance."

And further along in that opinion the court said:

"It is the spirit and the pronouncement of the decisions in all the foregoing cases that by virtue of section 3 of article XVIII of the Ohio Constitution as amended in 1912, municipalities of the state have police power directly conferred by the people in all matters of local self-government and that upon all of the subjects covered in those cases municipal legislation was a valid exercise of the local police power. The question presented in the instant case has been more nearly met in the recent case of *Hepple vs. Columbus,* decided by this court December 12, 1922, not yet reported. The syllabus of that case is as follows:

'By virtue of authority conferred upon municipalities by section 3, article XVIII of the Ohio Constitution to adopt and enforce within their limits such local police regulations as are not in conflict with general laws, municipalities may enact and enforce ordinances the provisions of which are not inconsistent with the general laws of the state prohibiting the manufacture, possession or sale of intoxicating liquor for beverage purposes and the keeping of a place therein where intoxicating liquors are manufactured, sold, furnished, etc., for beverage purposes.'

"It will be seen, therefore, that unless there is some conflict between the ordinance and the state law which would invalidate the ordinance, this court has repeatedly answered the present inquiry."

The court also takes up the word "conflict" and says in relation thereto:

"No real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa. There can be no conflict unless one authority grants a permit or license to do an act which is forbidden or prohibited by the other."

Before the adoption of article XVIII, section 3, cities and villages undoubtedly derived their authority to enforce ordinances by fines from section 3628, General Code; but it is my opinion, in view of such constitutional section and the decisions herein referred to, that section 3628 no longer governs as to size of fines and that

the prohibitory part of said section 3 of article XVIII refers to the subject-matter of ordinances and not to the penalty.

Your second question must, therefore, be answered in the affirmative.

Respectfully,
C. C. CRABBE,
Attorney General

1150.

CONTRACT—VILLAGE COUNCIL MAY LEGALLY EMPLOY SOLICITOR FOR TERM OF TWO YEARS.

SYLLABUS:

A village council may legally employ a solicitor for the term of two years if said contract begins during the period of the present incumbents. The fact that said contract is not to be completed until after the personnel of council changes does not invalidate such contract.

COLUMBUS, OHIO, January 26, 1924.

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

GENTLEMEN:—You request my written opinion as follows:

> "Section 4220 of the General Code provides that:
>
> "When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."
>
> Section 4241 of the General Code provides that:
>
> "The council shall not enter into any contract which is not to go into full operation during the term for which all the members of such council are elected."
>
> On January 2nd, 1923, council of the village of Milford, Hamilton and Clermont counties, passed a resolution employing Messrs. Murphy & Joseph as legal counsel for the village for a period of two years ending December 31, 1924.
>
> Question: Since the term of all the members of council in office at the date when this contract was entered into expired on December 31, 1923, would such contract be binding upon the present council for the full period of its term?"

As suggested in your communication, section 4220 G. C. fully authorizes the council of the village to employ legal counsel for the term of two years when it deems it necessary. It is further true that section 4241 G. C. inhibits the council from entering into any contract, which is not to go into full operation during the term for which all of the members of such council are elected.

The only question presented, of course, is, as to when a contract is in full operation within the meaning of said statute. It is believed to be apparent that a contract going into operation is to be distinguished from the completion of a contract. This must be the situation or else it would be beyond the power of council to enter into any contract which was to be completed or any part of which is to be executed after the personnel of the council has changed. It is evident that it was