

trustees and officers of your society that the exercise of said reservation would not interfere in any manner with the purpose for which said property was obtained. This is a question to be determined in the first instance by your society; and although, under the terms of the act of the legislature above referred to, said site is required to be approved by the governor and the attorney general before it is accepted, I do not feel that your determination with respect to the acceptance of the above described property as a site for said monument under the terms and conditions set out in said deed, should be disturbed by me in the absence of facts showing that the site obtained by you is not a proper one for the purpose, or that the reservation contained in the deed will defeat the purpose for which the land was conveyed to your society.

Entertaining these views and finding that said deed has been properly executed and acknowledged by the grantors in the manner required by law, said deed is hereby approved.

In order that there may be a compliance with the provisions of Section 2 of the act of the General Assembly above referred to, the property here in question should be conveyed by your society to the state of Ohio as soon as the monument to be erected upon this property has been completed.

I am herewith returning said deed with my approval endorsed thereon.

Respectfully,

GILBERT BETTMAN,
Attorney General,

2856.

CENSUS—SALARIES—COUNTY OFFICERS ELECTED ON NOVEMBER 4,
1931, RECEIVE COMPENSATION BASED ON 1930 CENSUS.

SYLLABUS:

The salaries of those county officers whose compensation is based on population and who were elected on November 4, 1930, will be based on the 1930 federal census.

COLUMBUS, OHIO, January 23, 1931.

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

GENTLEMEN:—This acknowledges receipt of your letter of recent date which reads:

“Referring to the opinion of Hon. Timothy S. Hogan, rendered February 4, 1911, (1911-1912 Report, Volume 2, page 1035) reversing opinion of Hon. U. G. Denman, (1910-1911 Report, page 449) and to your opinion No. 2779 of July 31, 1930, the question arises whether county officers' salaries under the provisions of Sections 2990 et seq., of the General Code, which provide that such salaries shall be based upon the population of the county as shown by the last Federal Census next preceding their election are to be based upon the census of 1920 or the census of 1930, when such officers were elected at the November election, 1930.

Will you kindly render this department your written opinion upon this question?

It would seem that the official census was not published until after the election in November, 1930.”

The sole question to be decided in this opinion is whether the 1930 census was published before November 4, 1930. In view of the direct conflict of opinions of my predecessors, Messrs. Denman and Hogan, mentioned in your communication, I am at liberty to approach this question unaffected by these precedents.

As I understand the Denman opinion, it was held that the 1910 census as given out on the 23rd day of November, 1910, by the Director of the Census in the form of a newspaper statement, was to be regarded by county officers from that day on as a federal census, and county officers elected at the November election prior to that date (November 23, 1910) were not entitled to have their salaries based on the new population figures.

On the other hand, it was held by Mr. Hogan that county auditors should regard April 15, 1910, as the date of publication, inasmuch as the federal census act governing the 1910 census provided in Section 20 that, "the enumeration of the population required by Section 1 of this act, shall be taken as of the fifteenth day of April, 1910 * * *". It was further held that the county officials elected in November, 1910, were consequently entitled to be paid on the basis of the 1910 census.

It is not to be disputed that both of the foregoing opinions are correct in this respect, that there is no section in the Ohio General Code designating the date on which a county official should recognize a census as published. Section 3498, General Code, refers to municipalities only. Therefore, it would seem that if there is nothing in the census acts passed by Congress every ten years fixing a date of publication, the general rules of law will apply and determine the question. While the various census acts have differed somewhat in their provisions from time to time, at no time has a fixed or definite date of publication ever been set forth. The census acts do, however, state that the enumeration shall be taken as of a certain date, and that day in 1910 was April 15.

In the most recent census act approved June 28, 1929, it is provided in the first clause of Section 6:

"That the census of the population and of agriculture required by Section 1 of this Act shall be taken as of the 1st day of April * * *"

Now, the Hogan opinion holds, as disclosed by the fourth paragraph of the syllabus, that:

"The act providing for the federal census stipulated that reckonings should be made as of April 15, 1910, and therefore, the entire census and every step therein must be held to be a proceeding as of that date."

If this opinion is to be accepted, then the census of 1930 should be regarded by the county auditors as of the date of April 1, 1930. However, this is not the correct view. The then Attorney General did not discuss any cases to uphold his conclusion. At the time, however, there had been decided a case directly *contra* to his view. I refer to the case of *Lewis v. Lackawanna County*, 200 Pa. 590, decided October 11, 1901. In that case it was disclosed that the 1900 census was taken as of June 1, 1900, and it was contended that the fact of population must be taken to be established as of that date, without regard to when the result was made known. With this conclusion the court disagreed, as stated at page 596 with reference thereto:

"* * This will not help the difficulty. There is no retrospective force in the census act; nor was any such effect intended. A date certain was necessary to insure correctness, uniformity, the avoidance of duplication, etc., and this is all that was intended. But the argument only puts the in-

convenience a little further off without lessening it. The census was prescribed by the constitution as a basis for the apportionment of representatives in congress and required only an enumeration of the population, distinguishing free persons from all others, and excluding Indians not taxed. But congress in the interests of legislation, science and general information has included in the census many other statistics. Suppose the census of 1900 had been directed to report the population of the states by counties each year as of June 1, 1891, to June 1, 1900, we should have had the same difficulty already suggested. The fact would appear officially that for eight years Lackawanna had been acting as of a class to which it had ceased to belong though the official ascertainment of the fact was not until now. It is of general knowledge that the results of the census have not been promptly reached, that of 1880, not having been officially announced until 1883 and that of 1890, not until 1895. On the argument of appellee everything dependent on the census would be kept in a state of suspension, or in danger of being turned topsy turvy, for an indefinite period. The only escape from such intolerable inconvenience and confusion is by adherence to the logical principles of the law that the fact becomes applicable only from its legal ascertainment."

The above case was approved in 1922 in the case of *Commonwealth v. Walter*, 274 Pa. 553, at page 556, with the following comment:

"* * The suggestion that the change in population is to be treated as of January 1, 1920, when the census was to be taken, is without force, in view of the contrary ruling of this court in *Lewis v. Lackawanna County*, *supra*."

In view of the above court expressions, I am of the view that the fourth paragraph of the syllabus of Mr. Hogan's opinion is incorrect and should be overruled.

Since, as I have heretofore stated, there is nothing in Ohio laws nor the census act stipulating how the date of publication should be arrived at, it is necessary to follow the general rule for ascertainment as laid down by the courts. The latest decision that I have been able to find on this matter is the case of *Holcomb, et al. v. Spikes*, 232 S. W. Rep. 891, decided by the Court of Civil Appeals of Texas on June 6, 1921. The issue involved in that case was whether or not at the November 2nd election in 1920, Lubbock County, Texas, had a population of ten thousand as determined by the next preceding census of the United States. It was necessary in order to decide the case to determine on what date there was a pronouncement of the 1920 census. The evidence showed that on the 30th day of September, 1920, the Census Director wrote a letter to the Lubbock County Attorney as follows:

"In compliance with your request of September 24th I take pleasure in inclosing herewith an official certificate of the population of Lubbock county, Texas, as shown by a preliminary count, subject to correction, of the returns of the fourteenth census, taken as of January 1, 1920."

The Census Director enclosed a newspaper bulletin in this letter, which bulletin read as follows:

"Released for immediate use, Department of Commerce, Bureau of the Census, Washington. Fourteenth Census, preliminary announcement of population, subject to correction. Lubbock county, Texas.

| | | |
|--------|-------|------|
| 1920 | 1910 | 1900 |
| 11,096 | 3,624 | 293" |

The court held, as disclosed by the fifth paragraph of the syllabus, that:

"The fact that the Director of the Census issued a certificate stating the population of the county as shown by the census bulletin issued by him to be subject to correction, though in fact it was not thereafter corrected, does not make the bulletin incomplete as the promulgation of the census of that county or prevent official notice being taken of the population as therein stated."

It would seem that the above case supports Mr. Denman's view, since he held that the date of the release of the newspaper bulletin by the Census Director in 1910 was the date of publication to be followed by county officials.

The court in the Holcomb case, *supra*, in a well reasoned opinion, ended with the following statement:

"The bulletin does not indicate that it was incomplete or negligently done, but rather indicates it may be subject to correction. It does not carry the idea that it was incomplete, but that it was complete. We think, when the bulletin was given to the public, officials who were required to act with reference thereto, may take official notice that the enumeration had been made and was then in the archives of that office, subject to the inspection of the public in which the population of Lubbock county had been determined. The fact that it may be corrected does not indicate that the census was not complete and then a public document under the law."

In view of the fact that the latest court decision available supports Mr. Denman's view, I am of the opinion that his ruling should be followed.

I have been informed by the present Director of the Census at Washington that he released the 1930 census figures by Ohio counties in a newspaper bulletin on August 22, 1930. Therefore, this is the date which county officials should take cognizance of as the date of publication of the 1930 census.

Opinion No. 2179 of this office, dated July 31, 1930, did not in any manner take up the question that is presented in this opinion. You have called my attention to this opinion in your communication, but I am unable to find anything in that opinion inconsistent with the view which I have expressed herein.

In specific answer to your question, I am of the opinion that the salaries of those county officers whose compensation is based on population and who were elected on November 4, 1930, will be based on the 1930 federal census.

Respectfully,
GILBERT BETTMAN,
Attorney General,

2857.

CENSUS—COUNTY OFFICIALS WHOSE SALARIES ARE DETERMINED BY
POPULATION—WHAT CENSUS GOVERNS.

SYLLABUS:

Determination of what census governs the salaries of various Monroe County officials.