4967

1. COMMON PLEAS JUDGE — TOOK OFFICE JANUARY 1, 1929 TO SERVE TERM EXTENDING TO JANUARY 1, 1935 — COUNTY SHOULD PAY COUNTY'S SHARE OF SALARY ON BASIS 1930 FEDERAL CENSUS — STATE EX REL. MACK, JUDGE V. GUCKENBERGER, 139 O.S. 273.

2. WHERE COMMON PLEAS JUDGE, OVER PERIOD OF YEARS, ISSUED HIS SALARY VOUCHERS, RECEIVED AND ACCEPTED WARRANTS, PAID UPON BASIS FEDERAL CENSUS, AT TIME INDUCTED INTO OFFICE, SUCH JUDGE MAY NOT NOW RECOVER BACK PAY DUE TO POPULATION INCREASE IN COUNTY WHERE HE RESIDES.

SYLLABUS:

I. Under the holding of the Supreme Court in the case of The State, ex rel. Mack, Judge, v. Guckenberger, Aud., 139 O. S. 273 (1942), a Common Pleas Judge, who took office on January 1, 1929, to serve a term extending to January 1, 1935, should have been paid by the county, in so far as the county's share of his salary is concerned, on the basis of the 1930 Federal census.

II. Where a judge of a Common Pleas Court over a period of years issued his vouchers for his salary, receives his warrants, accepts the same, and is paid upon the basis of the Federal census at the time he took office, he may not now recover back pay, due to an increase of population of the county where he resides as determined by a subsequent Federal census.

Columbus, Ohio, March 28, 1942.

Honorable Lester W. Donaldson, Prosecuting Attorney,
Painesville, Ohio.

Dear Sir:

I have your letter requesting my opinion, your communication reading as follows:

> "The present Judge of the Court of Common Pleas of Lake County, Ohio, started serving his first term as Judge of said Court on January 1, 1929, and being re-elected at successive elections since that time so that his first term extended from January 1, 1929, to January 1, 1935. His second term was from January 1, 1935, to January 1, 1941, and his present term is from January 1, 1941, to January 1, 1947.

We now discover that during his first term from January 1, 1929, to January 1, 1935, his salary was paid to him during his entire term upon the basis of the 1920 census, which census was 28,667. The 1930 census being 41,674.

During the second term of his office from January 1, 1935, to January 1, 1941, his salary was paid to him upon the basis of the 1930 census, said census as we have stated being 41,674 and the 1940 census being 50,020.

And during his third term which extends from January 1, 1941, to January 1, 1947, he has thus far been paid his salary on the basis of the 1940 census.

The questions which we submit to you are as follows:

First, during his first term of office, which extended from January 1, 1929, to January 1, 1935, should the Judge have been paid a salary from April 1, 1930, to January 1, 1935, upon the basis of the 1930 census, rather than the 1920 census?

Second, if so, then I am assuming that the Auditor of Lake County is authorized to issue a warrant to cover the unpaid portion of the salary which should have been paid for that period of time.

Third, during the second term of his office should the Judge have been paid a salary of that portion of his term which extended from April 1, 1940, to January 1, 1941, upon the basis of the 1940 census?

Fourth, if that is so, then I am assuming that the Auditor of this county is authorized to issue a warrant for the unpaid portion of the salary based upon the 1940 census during that period of time.

The questions involved here are in line with the questions involved in your Opinion No. 3982, dated July 11, 1941, but in that opinion you did not go back as far in time as our instant case and I am submitting this opinion to you to make doubly sure that we are correct in our interpretation of the law relative to the payment of salaries of Common Pleas Judges in so far as they are based upon the census of the county."

For convenience, the terms of the Common Pleas Judge of your county, as well as the Federal census upon which his salary was based and paid, is set forth in the following schedule:

Term	*Federal Census*
First — January 1, 1929, to January 1, 1935,	1920
Second — January 1, 1935, to January 1, 1941,	1930
Third — January 1, 1941, to present date.	1940

It will be observed that, during each term, the salary of the judge of your county was determined in accordance with the Federal census of the ten year period during which he first took office and that he was actually paid upon the basis of such Federal decennial census, notwithstanding the fact that during each decennial period and while he was serving in the office to which he was elected, the Federal census for 1930 and 1940 each disclosed a substantial increase in the population of Lake county.

Sections 2251 and 2252, General Code, which have to do with, and are contained in, Title VI, Part First, of the General Code of Ohio, relating to and fixing the salaries or "Compensation of State Officials," read in part as follows:

Section 2251:

> "The annual salaries of the chief justice of the supreme court and of the judges herein named payable from the state treasury shall be as follows: * * *
>
> Judges of the common pleas courts, each, three thousand dollars. * * * "

Section 2252:

> "In addition to the salary allowed by section 2251, each judge of the court of common please shall receive an annual compensation equal to three cents per capita for the first fifty thousand of the population of the county in which he resides when elected or appointed, as ascertained by the latest federal census of the United States, and four cents per capita for the population of such county in excess of fifty thousand and not in excess of one hundred thousand, and four and one-third cents per capita for the population of such county in excess of one hundred thousand and not in excess of one hundred and eighty thousand, and one-third cent per capita for the population of such county in excess of one hundred and eighty thousand. Such additional compensation shall not be more than nine thousand dollars, payable monthly from the treasury of such county upon the warrant of the county auditor."

Your questions are apparently engendered by my Opinion No. 3982, rendered under date of July 11, 1941, to the prosecuting attorney of Wood County, to which you refer in your request, and by the recent decision in the case of State, ex rel., Mack, Judge, v. Guckenberger, Aud., 139 O.S. 273 (Feb. 11, 1942).

The first and third branches of the syllabus in the Mack case, supra, are as follows:

"1. By reason of Section 14, Article IV of the Constitution, a legislative act diminishing or increasing the compensation of common pleas judges on the basis of change of population of the county in which they are elected, has no application to a judge of the Common Pleas Court whose term of office commenced before the act became effective. * * *

3. A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during his term by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court 'shall not be diminished or increased during his term of office.' "

The syllabus in the Mack case, above quoted, and the law therein annunciated, require no comment. However, other questions are presented by your inquiry, which must be given consideration and which are more difficult to answer. These are whether or not the judge in question has by his own conduct placed himself in a position where he cannot recover back pay because of the doctrine of estoppel or waiver or laches.

As said in Ensel v. Levy & Bro., 46 O.S. 255, 259, 19 N.E. 597 (1889), the "general doctrine of estoppel is stated in varying forms. Blackstone says an estoppel arises 'where a man hath done some act, or executed some deed, which estops or precludes him from averring anything to the contrary.' Coke says it arises 'where a man is concluded, by his own act or acceptance, to say the truth.' " In the case of Sanborn v. Sanborn, 106 O.S. 641, 647, 140 N.E. 407, 1 Abs. 134 (1922), Chief Justice Marshall held that an "estoppel is defined as a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judical officers or by the act of the party himself." See also Scholl v. Scholl, et al., 123 O.S. 1, 173 N.E. 305 (1930).

"Waiver" on the other hand is defined in the case of The List & Son Company v. Chase, 80 O.S. 42, 49, 88 N.E. 120 (1909), as "a voluntary relinquishment of a known right." See also 40 O. Jur. 1233 and cases cited. In the last named authority it is said at pages 1234 to 1236, inclusive, with reference to the distinction between estoppel and waiver:

"The terms 'estoppel' and 'waiver' are often treated as

> interchangeable, and it has been said that waiver is only another name for estoppel. Undoubtedly, they are closely related, and this is particularly true as to implied waiver. Nevertheless, it is inaccurate to use them as convertible terms as they rest upon different bases. As stated above, a waiver is an intentional relinquishment, either expressly or constructively, of a known right. An estoppel arises when one is concerned in or does an act which in equity will preclude him from averring anything to the contrary, as where another has been innocently misled into some injurious change of position.
>
> * * * As a general rule, a person may waive all personal rights or privileges to which he is individually entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided the waiver does not constitute a violation of public policy. * * * "

At page 1238 of the same text it is also said:

> "According to the definition stated in a preceding section, to constitute a waiver, certain elements are essential. There must be an existing right, benefit, privilege, or advantage; a knowledge, actual *or constructive,* of its existence; and an intention to relinquish it. A waiver may be express or implied; it may be by acts or conduct, or by a failure to act amounting to an estoppel, or by the showing of an intention to waive the right. * * * "
>
> (Emphasis mine.)

In view of the discussion hereinafter contained and the conclusions reached, it would be futile to spend much time upon a discussion of "laches," its definition or the principles of application thereof. Suffice it to say, as stated in 19 Am. Jur. 340, "laches is negligence or omission seasonably to assert a right. The idea is embodied also in the words 'acquiescence,' 'election,' 'abandonment,' 'ratification,' and 'waiver.' "

In connection with the question of "estoppel," your attention is directed to Section 5637, General Code, providing in part as follows:

> "The county commissioners, at their June session, annually, may levy on each dollar of valuation of taxable property within their county, for the purpose of creating a judicial and a court fund, as follows: (Here follows a schedule based upon the amount of the taxable property in the county.) Such fund shall be expended for the payment of all expenses of the various courts of the county. In case such fund should become inadequate to meet the expenses of the courts, the general or county fund shall be drawn upon for the payment of such expenses."

See also Section 5625-9, General Code, providing in part as follows:

> "Each subdivision shall establish the following funds:* * *
>
> (d) A special fund for each special levy. * * * "

Section 5625-29, General Code, provides in part:

> "On or about the first day of each year, the taxing authority of each subdivision or other taxing unit shall pass an annual appropriation measure and thereafter during the year may pass such supplemental appropriation measures as it finds necessary, based on the revised tax budget and the official certificate of estimated resources or amendments thereof. * * * Appropriation measures shall be so classified as separately to set forth the amounts appropriated for each office, department, and division and within each the amount appropriated for personal services; * * * "

The amount of appropriations is limited by Section 5625-30, General Code, as follows:

> "The total amount of appropriations from each fund shall not exceed the total of the estimated revenue available for expenditure therefrom as certified by the budget commission or in case of appeal by the tax commission of Ohio. * * * "

Provisions for amending and supplementing the original appropriation, ordinance or measure are contained in Section 5625-32, General Code. Section 5625-33, General Code, provides:

> "No subdivision or taxing unit shall: * * *
>
> (b) Make any expenditure of money unless it has been appropriated as provided in this act. * * * "

One who fails to comply with the provisions of this section is subject to penalties prescribed in Section 5625-37, General Code.

Specific provisions for the expenditure of funds for pay-rolls is set forth in Section 5625-38, General Code, as follows:

> "Each political subdivision shall have authority to make expenditure for the payment of current pay rolls upon the authority of a proper appropriation for such purpose provided that the positions of such employes and their compensation have

been determined prior thereto by resolution or ordinance or in the manner provided by law. * * *"

In the case of Jenkins, Aud., v. The State, ex rel. Jackson, County Agricultural Society, 40 O.A. 312 (1931), it was held as stated in the third branch of the syllabus that:

"In preparing an appropriation measure under Section 5625-29, General Code, the taxing authority is bound to provide first for all those expenditures made imperative by statute."

It should require no argument to demonstrate that an appropriation to pay the salary of the judge of the Court of Common Pleas is imperative and mandatory as to the pay, as is the salary or compensation of the attaches of the court. Such appropriations are, of course, based upon the estimate or certification of the Common Pleas judge, and when the judge of the court submits an estimate covering his own salary, it wouuld seem to follow that he is thereafter estopped from recovering a greater amount after the lapse of the particular fiscal year for the reason that the allowance and payment of an additional sum might and probably would disturb the current balance sheet of the county; work an injury to the officers and employes presently employed; and possibly add additional burdens on the taxpayers.

But it is unnecessary to rely upon the doctrine of estoppel in view of the holding of the Supreme Court in the case of The State, ex rel. Hess, v. City of Akron, et al., 132 O.S. 305 (1937). The syllabus of this case reads:

"1. The occupant of a public office may waive part of the established salary thereof.

2. Such a waiver is not contrary to public policy."

In the opinion Chief Justice Weygandt said as follows at pages 307 and 308:

"The most frequently employed definition of waiver is that it is the voluntary relinquishment of a known right. As a general rule, the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy.

> Applying these fundamentals to the conduct of this relator, what is the result? In addition to the circumstances already outlined, it is conceded that during this period the relator was paid in semi-monthly installments, and on each occasion he presented his voucher, received payments, and then receipted a payroll sheet which expressly recited either that this was the 'am't due' or that he 'received pay in full to date.' According to the agreed statement of facts this occurred a total of 56 successive times over the period of 2 years and 4 months. Furthermore, the relator makes no claim that he ever protested this procedure; nor does he contend that his rights were unknown by him. Thus it is apparent that his conduct was wholly inconsistent with any theory except the plainest and simplest sort of waiver. Indeed, it is difficult to suggest how this result could have been accomplished more effectively without actually using the word 'waiver' itself — a thing which of course the law does not require as to any variety of waiver.
>
> Is it contrary to public policy to hold that the occupant of a public office may waive part of his salary? The relator offers no authority or reason in support thereof. On the contrary, public policy would seem to require that the law be just as prompt to scrutinize the conduct of a public officer as that of a private citizen — especially when that conduct involves an uninterrupted sequence of 56 repeated and consistent acts during a period of more than two years."

While, as above said, waiver is the voluntary relinquishment of a known right, the knowledge of such right may be either actual or *constructive.* While it is sometimes said that "everyone is presumed to know the law," this is not only a statement that sets forth what may be termed as an *extremely violent* presumption, but one that is without foundation. The statement is thoroughly erroneous. If everyone knew the law, there would be no need for courts, jurists, judges, lawyers, textbook writers, law books, law schools or deans thereof or professors therein. The true maxim is that ignorance of law does not excuse (Ignorantia legus meminem excusat). If the judge in question had any question as to the proper amount of his salary from 1929 on, certainly the courts were open and the proper remedies available. Having failed to avail himself of the remedies afforded by the law, it seems to me that he cannot now complain notwithstanding the recent opinion of the Supreme Court in the Mack case.

In passing, I deem it proper to say that I am not unaware of the case of Allenbaugh v. City of Canton, 137 O.S. 128 (1940). This case, however, was decided upon an entirely different state of facts and, in my opinion, is not in point as is the Hess case, supra.

In view of the foregoing, and in answer to your questions, it is my opinion that:

I. Under the holding of the Supreme Court in the case of The State, ex rel. Mack, Judge, v. Guckenberger, Aud., 139 O.S. 273 (1942), a Common Pleas Judge, who took office on January 1, 1929, to serve a term extending to January 1, 1935, should have been paid by the county, in so far as the county's share of his salary is concerned, on the basis of the 1930 Federal census.

II. Where a judge of a Common Pleas Court over a period of years issued his vouchers for his salary, receives his warrants, accepts the same, and is paid upon the basis of the Federal census at the time he took office, he may not now recover back pay, due to an increase of population of the county where he resides as determined by a subsequent Federal census.

Respectfully,

THOMAS J. HERBERT
Attorney General.