

of the costs of prosecution in misdemeanor cases involving a violation of the prohibition laws of this state where the prosecution fails, since the decision in the Tumey case, *supra*. Thus, where the fees of a justice of the peace in such a case cannot be collected because of the acquittal of the accused, there can be no valid claim against the state in favor of such justice of the peace for such fees.

The legislature has provided that justices of the peace in certain misdemeanor cases shall be paid for their services where the defendant is acquitted or after conviction is unable to pay the costs of prosecution. See Sections 896-14, 897-3 and 1454, General Code. However, as previously stated herein, there is no statute imposing upon the state liability for the costs of prosecution in prohibition cases where the defendant is acquitted.

In view of that fact and inasmuch as costs cannot be required to be advanced or secured by a person authorized by law to prosecute cases before a justice of the peace, I am of the opinion that there is no way by which such magistrate can be paid for his services in misdemeanor cases involving a violation of the prohibition laws of this state where the prosecution instituted by such officer fails.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4862.

SALARY REDUCTION—DEPUTY CLERK BOARD OF ELECTIONS—
BASED ON ACTUAL SALARY—NOT SUBJECT TO REDUCTION
DURING HIS TERM OF OFFICE.

SYLLABUS:

1. *The reduction of salary provided for election officers under Amended House Bill No. 2 of the 89th General Assembly, third special session, is, so far as a deputy clerk of a county board of elections in a county of less than 150,000 population is concerned, to be computed on the basis of the salary fixed by the board of elections for such clerk under authority of section 4785-15, General Code, and not on the basis of the maximum salary set up in said section for such a deputy clerk.*

2. *The salary of a deputy clerk of a board of elections may not be reduced during his term of office.*

COLUMBUS, OHIO, January 6, 1933.

HON. RUSSELL M. WILHELM, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

“The following question has been presented to this office by the local Board of Elections, requesting an opinion from your office:

STATEMENT OF FACTS.

General Code, Section 4785-15 provides that the Deputy Clerk of

the Board of Elections in all other counties than those of more than 150,000 population, shall receive a salary not in excess of two hundred dollars (\$200.00) per month. The local Election Board has provided a salary of one hundred fifty dollars (\$150.00) per month for its Deputy Clerk. Marion County is less than 150,000.

Amended House Bill No. 2, passed by the General Assembly on September 30th, 1932, being an Act to provide for a reduction in salaries of County election officers, reads as follows in Section I of that Act:

'Section 1. During the period commencing January 1, 1933, and ending December 31, 1934, the salaries of all county election officers, which are fixed, limited or determined in whole or in part by sections 4785-15, 4785-18 and 4785-19 of the General Code shall be reduced according to the schedule fixed in section 2 of this act, the provisions of said sections of the General Code to the contrary notwithstanding.' while Section II states the amount of the reduction to be made.

QUESTION: The question raised by the local Board is whether or not the reduction provided in this Act applies to the salary now being paid, or to the minimum (maximum) set forth in General Code, Section 4785-15 under which the local Deputy Clerk is paid. It was my opinion that the reduction should be made on the salary now paid. Do you concur with me? Or, is it your opinion instead that the reduction reduces the minimum (maximum) set forth in the statutes.

This office is an appointive office, and the further question is raised by the local board as to whether or not the salary may be reduced during the term of the appointment."

Section 4785-15, General Code, to which you refer in your communication, reads as follows:

"The board may, when necessary, appoint a deputy clerk of the political party opposite to that of the clerk, and one or more assistant clerks and other employes, prescribe their duties and fix their compensation as provided herein. The deputy clerk and assistant clerks shall take the same oath for the faithful performance of their duties as is required of the clerk of the board, and they shall have the same power to administer oaths as is given to the clerk by this act. The salaries of such deputy and assistant clerks and other employes shall not exceed the following schedule of compensation: Deputy clerk, in counties containing a population of over 450,000, \$400.00 per month; in counties containing less than 450,000 but not less than 300,000, \$300.00 per month; in counties containing less than 300,000 but not less than 150,000, \$250.00 per month, and in counties containing less than 150,000 population not more than \$200.00 per month; assistant clerks, in counties of more than 150,000 population, not more than \$250.00 per month, and in all other counties not more than \$200.00 per month; in all counties such other employes as are deemed necessary shall receive such compensation, not in excess of \$150.00 per month, as the board may by resolution provide. The board may also employ additional assistants or employes when necessary for part time only at the prevailing rate of pay for such services."

Under the above section the compensation of a deputy clerk of a county board of elections, in counties of less than 150,000 population, and containing

a registration city, is fixed by the board with the single limitation that such compensation when fixed shall not exceed \$200.00 per month.

Section 1 of Amended House Bill No. 2, passed by the legislature on September 30, 1932, at the third special session of the 89th General Assembly, and quoted by you in your communication, among other things, provides that the salary of a county election officer, which is fixed, limited or determined by section 4785-15, General Code, shall be reduced according to the schedule fixed in section 2 of the act. Said section 2 of such Amended House Bill No. 2 provides as follows:

“Such reductions shall be made in the following manner: There shall be a reduction of 5 per cent on each annual salary of \$1,000 or less, of the first thousand dollars of each annual salary of an amount greater than \$1,000; there shall be a reduction of 10 per cent of that portion of each annual salary in excess of \$1,000 up to and including \$2,000; there shall be a reduction of 12½ per cent of that portion of each annual salary in excess of \$2,000 up to and including \$3,000; there shall be a reduction of 15 per cent of that portion of each annual salary in excess of \$3,000 up to and including \$4,000; there shall be a reduction of 17½ per cent of that portion of each annual salary in excess of \$4,000 up to and including \$5,000; there shall be a reduction of 20 per cent of that portion of each annual salary in excess of \$5,000.”

Clearly, when the provisions of sections 1 and 2 of Amended House Bill No. 2 are read with those of section 4785-15, General Code, there is no doubt but that the legislature intended to make the reduction set forth in section 2 of Amended House Bill No. 2 apply to the compensation fixed by the board for the deputy clerk, rather than the maximum limit set out in said section 4785-15.

There is a general principle of statutory construction to the effect that if the terms of a statute are clear and unmistakable there is no authority for the courts to construe such statute. See *Mansfield vs. Brooks*, 110 O. S. 566; *State ex rel vs. Brown*, 121 O. S. 329; *Swetland vs. Miles*, 101 O. S. 501, and *Ohio S. & T. Co. vs. Schneider*, 25 O. App. 259. I feel that this principle is applicable here.

The question now arises as to whether or not the reduction in salary provided for by Amended House Bill No. 2 will apply to a deputy clerk now serving until the expiration of his present term of office. I am advised by the Secretary of State that the present deputy clerk was appointed on March 1, 1932. In view of the fact that section 4785-10 provides that a deputy clerk's term shall be two years, it is obvious that his term will not expire until March 1, 1934.

The answer to the foregoing question depends on whether or not a deputy clerk is an “officer” and receives “salary”, so as to fall within the inhibition of Article II, Section 20 of the Ohio Constitution. Said section is as follows:

“The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

Before taking up the first point, viz., whether or not a deputy clerk is an officer within the term as used in Section 20, Article II, supra, it is well to note

that the language of Amended House Bill No. 2 appears to apply to "all" county election officers. However, it is well established that when the legislature enacts a statute it has in mind all the constitutional provisions which are applicable to the subject matter thereof (see *State ex rel. vs. George*, 92 O. S. 344, 346), and further, a statute will be construed, if at all possible, so as to render it constitutional (see *Hopkins vs. Kissinger*, 31 O. App. 229).

Hence, the constitutional provision (Article II, Section 20, Ohio Constitution) must be read into Amended House Bill No. 2 in order to preserve the constitutionality of the law. That the legislature had the provision of Article II, Section 20, Ohio Constitution in mind when it passed Amended House Bill No. 2, is shown by a reference to Amended Senate Joint Resolution No. 3, passed at the third special session of the 89th General Assembly. This joint resolution is as follows:

"JOINT RESOLUTION

Relative to requesting voluntary acceptance of salary reductions by officials constitutionally immune.

WHEREAS, Under the provisions of S. B. No. 5 and Sub. H. B. No. 1 enacted by the third special session of the 89th General Assembly, the salaries of all elective officials whose terms begin after the effective date of these acts, are reduced by these said enactments; and

WHEREAS, A constitutional provision inhibits a mandatory reduction in the salaries of certain judges, county auditors, county commissioners and other officials and employes whose terms began before the effective date of the said bill; and

WHEREAS, Due to the present economic conditions and the demands of the people for reduction in all salaries of all officials;

BE IT RESOLVED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That all such judges, county auditors, county commissioners and all other officials and employes thus technically immune by way of constitutional or legislative provision are hereby requested to voluntarily accept the same rate of salary reductions as the General Assembly may set and apply to other elective officers and for the same period;

BE IT FURTHER RESOLVED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That said acceptance by any of the afore-said officers shall not be construed as a violation of what is commonly known as 'the corrupt practice act' or any other law of the state of Ohio."

Coming now to the question of whether or not a deputy clerk of a county board of elections is an "officer" within the meaning of that term as used in Section 20 of Article II of the Ohio Constitution, it may be stated that there have been many opinions by the Supreme Court which have attempted to define an officer. See *State vs. Hunt*, 84 O. S. 143, 149; *State ex rel. vs. Brennan*, 49 O. S. 33; *State ex rel. Attorney General vs. Jennings*, 57 O. S. 415; *State ex rel. Armstrong vs. Halliday*, 61 O. S. 171; *Palmer vs. Zeigler*, 76 O. S. 210; *State ex rel. Landis vs. Commissioners of Butler County, et al.*, 95 O. S. 157; *State ex rel. vs. Callen*, 110 O. S. 367, and *Wright vs. Clark*, 119 O. S. 462.

Possibly one of the most often cited of the above cases is that of *State ex rel. Landis vs. Board of County Commissioners of Butler County, et al.*, 95 O. S. 157. At page 159 of 95 O. S., it is said:

"The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary. * * * The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment. * * * It is no longer an open question in this state that to constitute a public office, * * * it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law.

In the case at hand, it is to be noted that the elements of durability of tenure, oath and emoluments are present, for section 4785-10, General Code, provides that the deputy clerk "shall continue in office for two years." Section 4785-15, provides that the deputy clerk "shall take the same oath for the faithful performance of" his "duties as is required of the clerk of the board." The oath of the clerk of the board is provided for by section 4785-14, General Code. Section 4785-15, General Code, quoted, *supra*, provides for emoluments for a deputy clerk.

It is true that the deputy clerk has few independent duties prescribed by the legislature. Most of his duties are prescribed by the board under authority set out in section 4785-15, General Code. Nevertheless, the few duties prescribed by the legislature are important. For instance, the deputy clerk is given the power to administer oaths (section 4785-15). Also, he is directed to countersign vouchers for the compensation of members and clerks of the board of elections in the absence of the clerk of the board (see G. C. 4785-18). Also section 4785-20, General Code, provides that, "Payments (of expenses of the board) shall be made upon vouchers of the board, certified to by its chairman or acting chairman and the clerk or *deputy clerk*, upon warrants of the auditor." While not controlling, it may be stated that the legislature saw fit to style a deputy clerk an officer by language in two statutes. Section 4785-10 and 4785-11, General Code, speak of a deputy clerk as an officer in several parts of the statutes.

Taking all these facts into consideration, I am of the opinion that the deputy clerk is an officer.

The second point to be taken up is whether or not the monthly compensation fixed by the board for the deputy clerk under section 4785-15 is salary within the provisions of Article II, Section 20, Ohio Constitution.

The Supreme Court in the case of *Thompson vs. Phillips*, 12 O. S. 617, defined the meaning of the word "salary" in the above noted constitutional section. The court stated at pages 617 and 618:

"It is manifest, from the change of expression in the two clauses of the section, that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time, and not on the amount of the services rendered."

The principle of this case was followed in the later case of *Gobrecht vs. Cincinnati*, 51 O. S. 68.

Applying this test to the case at hand, it would appear that the compensation fixed by the board under section 4785-15, General Code, is salary, for the board fixes the remuneration in monthly installments, payments depending on the time and not on the amount of service rendered.

Moreover, it is to be noted that the legislature speaks of the compensation provided for by sections 4785-15, 4785-18 and 4785-19 as "salary" throughout Amended House Bill No. 2.

In view of the above considerations, I am of the opinion that the salary of the present deputy clerk cannot be reduced in accordance with Amended House Bill No. 2 until March 1, 1934, when his present term expires.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4863.

PROSECUTING ATTORNEY—REQUIRED TO FILE ONLY ONE BOND
COVERING TOTAL SUM OF SALARY.

SYLLABUS:

When the prosecuting attorney, before undertaking the duties of his office, has given bond to the State of Ohio in a sum as fixed by the Common Pleas Court or the Probate Court, in excess of the amount of his official salary, with sureties approved by such court, conditioned that he will faithfully perform the duties enjoined upon him by law and pay over, according to law, all moneys by him received in his official capacity, it is not necessary for such prosecutor to file an additional bond in order to be entitled to the additional allowance provided in Section 3004, General Code.

COLUMBUS, OHIO, January 6, 1933.

HON. PAUL A. FLYNN, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I am in receipt of your request for opinion, as follows:

"The Prosecuting Attorney of each county, in order to qualify for his position, must give bond under section 2911, of the Ohio General Code, in a sum not less than \$1,000.00, for the faithful performance of his duty, and also a bond under section 3004, in a sum not less than his official salary, conditioned the same as the bond mentioned in section 2911. Heretofore it has been the practice in this County to give one bond, usually in the sum of \$3,000.00, covering the faithful performance of duty and the proper accounting of all funds collected.

My question is, whether or not one bond will satisfy both sections of the statute, or whether it is necessary to give two bonds. In explana-