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1. MUNICIPAL JUDGE—URBANA—ADDITIONAL JUDICIAL DUTIES—IMPOSED UNDER AM. S. B. 14, 99 G. A., SECTIONS 1581, THROUGH 1617 G. C.—JUDGE NOT REMOVED FROM SCOPE OF ARTICLE II, SECTION 20, CONSTITUTION OF OHIO—CHANGE IN COMPENSATION SHALL NOT AFFECT SALARY OF ANY OFFICER DURING EXISTING TERM.

2. TERM INCUMBENT JUDGE, URBANA, EXPIRES DECEMBER 21, 1953—EXISTING TERM SHALL CONTINUE FOR PERIOD CREATED—OFFICE NOT ABOLISHED.

SYLLABUS:

1. The fact that, by the terms of Amended Senate Bill No. 14, Sections 1581 to 1617, inclusive, General Code, additional judicial duties will be imposed upon the incumbent municipal judge of Urbana on and after January 1, 1952 does not have the effect of removing him from the scope of Section 20, Article II of the Constitution, providing that any change in compensation of an officer shall not affect the salary of any officer during his existing term.

2. The General Assembly, by providing in Amended Senate Bill No. 14 that the existing terms of municipal judges shall not be diminished but shall continue for the period for which they were created, did not intend to and did not abolish the office of the incumbent municipal judge of Urbana and thus the General Assembly intended to and did recognize that the limitations as to change of compensation contained in Section 20, Article II of the Constitution would forbid any increase in compensation of such judge during his existing term, which term does not expire until December 31, 1953.

Columbus, Ohio, September 19, 1951

Hon. Richard P. Faulkner, Prosecuting Attorney
Champaign County, Urbana, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "Under the new Municipal Court Act the statutes creating the original Municipal Court of Urbana, Ohio, were repealed and the new Act provides that the present Municipal Judge will be the Municipal Judge under the new Act until the period for which he was originally elected expires.
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> "Under the former Act the salary as Municipal Judge was $1500.00 while the minimum salary established by the new Municipal Court Act is $2000.00. The question arises then whether or not the salary of the Municipal Judge of Urbana beginning January 1, 1952, will be at the old rate established or is affected by the minimum under the new Act.
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> "Under the constitutional provision covering increase in salaries, of course, it states that no officer's salary shall be increased during his term of office unless the office is abolished. It would appear to me that by the repeal of the Act creating the original Municipal Court the old Municipal Court is thereby abolished and a new Municipal Court with new and additional functions is set up under the New Act as of January 1, 1952.
>
> "Will you kindly give me an opinion as to whether or not the Municipal Judge now in office is eligible for the increase called for by the New Municipal Court Act?"

The presently existing Municipal Court of Urbana was established pursuant to the provisions of Sections 1579-1627 to 1579-1660, inclusive, General Code, enacted by the 96th General Assembly and effective June 11, 1945, 121 Ohio Laws 155. These statutes provide for the election of a municipal judge in 1945 for a four year term commencing January 1, 1946. It thus appears that the incumbent judge was elected in 1949 for a four year term beginning January 1, 1950 and expiring December 31, 1953. The salary of such judge is provided by Section 1579-1630, General Code, which reads as follows:

> "Said municipal judge shall receive such compensation, payable out of the treasury of the city of Urbana not less than nine hundred dollars per annum, payable in monthly installments,

as the council of Urbana city may prescribe, and out of the treasury of Champaign county not less than one hundred dollars per annum, payable in monthly installments, as the county commissioners may prescribe."

It appears from your letter that the present salary of such judge is $1500.00 per annum, such being the total of the compensation prescribed by the council of Urbana and the county commissioners of Champaign County, acting pursuant to the provisions of Section 1579-1630, General Code. I, of course, assume that such actions of the council and the county commissioners were taken prior to January 1, 1950, since the Supreme Court of Ohio has heretofore held that such actions may not affect the salary of a municipal judge during his existing term. State, ex rel. Holmes v. Thatcher, 116 Ohio St., 113.

The 99th General Assembly enacted Amended Senate Bill No. 14 (Sections 1581 to 1617, inclusive, General Code), commonly known as the Municipal Court Act, effective June 13, 1951. Section 2 of such Act repeals, as of December 31, 1951, all of the statutes relative to the several municipal courts heretofore established and existing pursuant to separate municipal court acts, including Sections 1579-1627 to 1579-1660, General Code, relative to the Municipal Court of Urbana. This Act establishes a municipal court in each of fifty-four named municipal corporations, including Urbana, to be styled ".....Municipal Court" and defines the jurisdiction and procedure of such courts. It provides that the institution of such courts shall take place on January 1, 1952 and that the jurisdiction and procedure of municipal courts theretofore existing shall continue until such date.

Section 1588, General Code, a part of this Act, prescribes the time of election of each of the judges of the municipal courts. In the case of Urbana, it provides for such election in 1953. It is obvious that such date was selected because of the fact that the existing term of the present municipal judge expires in 1953. In the case of each municipal court, a comparison of the provisions of Section 1588, General Code, with the several existing municipal court acts reveals that the dates of election prescribed by said section were established to coincide with the dates of expiration of the existing terms of incumbent municipal judges.

Any possible doubt as to the legislative intent not to disturb existing terms is dispelled by specific language of the Act as contained in Sections

1588 and 1617, General Code. Section 1588, General Code, reads in part as follows:

> "The above named offices of judge, for the several respective named courts, are those offices of judge of the municipal courts existing by virtue of the sections of the General Code designated for repeal by this act, and each judge who has been elected to the office of judge under any of the sections repealed by this act *shall serve as such judge, under the terms of this act, for the full length of the term for which he was elected,* notwithstanding the prior repeal of the section under which his office and his term of office were created. A judge who was or is elected to fill an unexpired term under any of these sections shall serve as such judge, under the terms of this act, for the balance of such unexpired term notwithstanding the prior repeal of the section under which his office and term for the unexpired portion of which he was elected were created. Judges holding the offices of judge under any of these sections on the effective date of this act shall be the incumbent judges under this act and *shall hold their offices* until their successors are elected and qualified in the manner and at the times designated in this section. Notwithstanding any length of term specified in any of these sections, judges who shall be elected at the elections designated in this section shall be elected for a term of six years, each, and their successors shall be elected for terms of equal length, each six years thereafter." (Emphasis added.)

Section 1617, General Code, reads in part as follows:

> "The institution of all courts enumerated in section 1581 of the General Code shall take place on January 1, 1952, and the jurisdiction and procedure of the municipal courts theretofore existing shall continue until such date. * * *
>
> "The *existing terms* of the municipal judges or elected clerks shall not be diminished, but shall continue for the period for which they were created. * * *" (Emphasis added.)

The constitutional provision applicable to the salaries of muncipal judges referred to in your letter is Section 20 of Article II, which reads:

> "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."

Similar constitutional provisions as to the Supreme Court judges and Common Pleas Court judges are contained in Section 14 of Article IV,

as to the Governor, Lieutenant Governor, Secretary of State, Treasurer of State and Attorney General in Section 19 of Article III and as to members of the General Assembly in Section 31 of Article II. All of these constitutional provisions have been interpreted as prohibiting any increase of salary of an incumbent during his existing term where the action of the body changing such salary became effective during the existing term of such incumbent, whether such change in salary was the result of action by the General Assembly, the council or the county commissioners. Donahey v. State, ex rel. Marshall, 101 Ohio St., 473; State, ex rel. Metcalfe v. Donahey, 101 Ohio St., 490; Zangerle v. State, ex rel. Stanton, 105 Ohio St., 650; Zangerle v. State, ex rel. Walther, 115 Ohio St., 168; State, ex rel. Holmes v. Thatcher, 116 Ohio St., 113; State, ex rel. Mack v. Guckenberger, 139 Ohio St., 273; State, ex rel. Glander v. Ferguson, 148 Ohio St., 581; State, ex rel. Milburn v. Pethtel, 153 Ohio St., 1; Opinion No. 387, Opinions of the Attorney General for 1945, page 473.

The provisions of the new Municipal Court Act relative to the compensation of municipal court judges is contained in Section 1591, General Code, which so far as pertinent to our question, reads as follows:

> "In territories having a population of not more than twenty thousand, judges shall receive as compensation an amount not less than two thousand dollars per annum, as the legislative authority shall prescribe, * * *.
>
> "The compensation of municipal judges shall be paid in semi-monthly installments, three-fifths of said amount being payable from the city treasury and two fifths of such amount being payable from the treasury of the county in which such city is situated."

It will be noted that Section 1591, General Code, does not specifically provide that the compensation therein prescribed shall be paid to incumbent judges who, by other provisions of the act, continue in office until the end of their existing terms. Neither does it specifically provide that such judges shall not receive the benefits of any increased compensation provided therein. However, it must be presumed that if the provisions of Section 20, Article II of the Constitution would forbid such increase, the General Assembly acted with full knowledge of this fact and did not intend any increase in compensation to affect the salaries of incumbent municipal judges. In this connection, it might be pointed out that in the Ohio legislative history, the General Assembly, in providing for increased

salaries, has uniformly followed the practice of simply amending the pertinent salary fixing statute without specifically providing therein that any such increase shall be applicable only to those officers assuming office after the effective date of such change. This same parctice was followed by the 99th General Assembly in increasing salaries of the various state elective officers, county elective officers and judges of other courts. Quite obviously, each of such statutes was enacted with the applicable constitutional provision in mind and it was not the legislative intent that such increases in compensation or salary be applicable to increase the compensation or salary of an incumbent during his existing term of office.

I, therefore, am not confronted with the question of determining the constitutionality of a statute enacted by the General Assembly, which would be beyond my power as an executive officer, but only with the question of determining whether the General Assembly, having in mind its constitutional limitation, intended to increase the compensation of incumbent municipal judges during their existing terms of office.

As previously noted the fact that municipal judges fall within the scope of Section 20, Article II of the Constitution has already been established by the case of State, ex rel. Holmes v. Thatcher, 116 Ohio St., 113. In your letter, however, you suggest the possibility that such constitutional provision might not be applicable to the situation here under consideration because (1) new and additional duties are imposed upon the incumbent judge over and beyond those within the scope of his duties upon his assumption of his existing term of office on January 1, 1950, and (2) the old office of judge of the Municipal Court of Urbana is abolished as of January 1, 1952 and the new office of judge of the Urbana Municipal Court is instituted as of such date. I shall consider these two questions in that order.

It is true that the jurisdiction of the Urbana Municipal Court will be greater than that of the Municipal Court of Urbana. For example, the jurisdiction in civil cases will be up to $2,000 for the Urbana Municipal Court, as contrasted with $1,000 for the Municipal Court of Urbana. In the natural course of events, the incumbent municipal judge, after January 1, 1952, will determine more cases and devote more hours to the performance of his duties. This also would be true in case the General Assembly had increased the jurisdiction of the Municipal Court of Urbana and the compensation of the judge of such court by amending Sections 1579-1627 to 1579-1660, inclusive, General Code, instead of by enacting

a single Municipal Court Act. In such case could it successfully be contended that the compensation of the incumbent municipal judge would be inreased during his existing term? I am of the opinion that no such contention could be successfully advanced.

Section 20, Article II of the Constitution does not state that no change of compensation shall affect the salary of any officer during his existing term unless the duties of his office be increased or decreased. Instead, it states that such change shall not affect the salary of any officer during his existing term unless the office be abolished. The question of whether the existing office is abolished is a separate question which I shall hereafter consider. As to the point here under consideration, however, the specific and unequivocal language of the Constitution does not permit an increase or decrease in compensation of any officer during his existing term because the duties of his office were increased or decreased.

The contention that an increase or decrease in the duties of an office would warrant an increase or decrease in the compensation therefor during an existing term has been rejected by the Supreme Court. I quote from the per curiam opinion in Donahey v. State, ex rel. Marshall, 101 Ohio St., 473, at pages 476 and 477:

> "* * * It is a familiar rule that when a public officer takes office he undertakes to perform all of its duties, although some of them may be called into activity for the first time by legislation passed after he enters upon his term. As said by Bradbury, J., in Strawn v. Commissioners of Columbiana County, 47 Ohio St., 404, at page 408: 'The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance, for the legislature may deem the duties imposed to be fully compensated by the privileges and other emoluments belonging to the office.' That case is commented on with approval by Judge Spear in Jones, Auditor v. Commissioners of Lucas County, 57 Ohio St., 189, 209, which is likewise approved in Clark v. Board of County Commissioners of Lucas County, 58 Ohio St., 107, 109. To the same effect is State, ex rel. Enos, v. Stone, 92 Ohio St., 63.
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> "In Twiggs v. Wingfield, 147 Ga., 790, it is said: 'A public officer takes his office *cum onere*, and so long as he retains it he undertakes to perform its duties for the compensation fixed, whether such duties be increased or diminished.' See also State, ex rel. Noble, v. Mitchel, 220 N. Y., 86; State, ex rel. Bryant, v. Donahey, Auditor, 96 Ohio St., 247, and Board of County Commissioners of Creek County v. Bruce, 51 Okla., 541, 152 Pac. Rep., 125."

The first branch of the syllabus of Zangerle v. State, ex rel. Walther, 115 Ohio St., 168, reads as follows:

> "Under Section 14, Article IV of the Ohio Constitution, the compensation of common pleas judges can neither be increased nor diminished during their term, and if once fixed it cannot be denied; *nor does such compensation vary with the amount of service rendered by the occupant of the office.*"
>
> (Emphasis added.)

While there is authority both within and without Ohio for the proposition that additional compensation may be provided upon the imposition of duties not germane to or within the ordinary scope of the duties of the office, such proposition has no application here. Obviously the additional duties here imposed are all of a judicial nature within the ordinary scope of a municipal judge.

I conclude, therefore, that the fact that additional judicial duties will be imposed upon the incumbent municipal judge of Urbana to be exercised during his existing term of office does not have the effect of removing him from the limitations as to compensation prescribed by Section 20, Article II of the Constitution.

I turn now to a consideration of whether the office now occupied by the incumbent judge of Urbana is abolished as of January 1, 1952, within the meaning of the Constitution. Since there can be no existing term for an office that does not exist, it would follow that if the existing office is abolished as of such date, the "existing term" also is abolished and a new term is established to continue from January 1, 1952 to December 31, 1953. That the General Assembly did not intend to and did not abolish the existing office I believe to be quite apparent from the language of the Act itself. As previously noted, the Act provides in Section 1588, General Code, that the incumbent judges of the several municipal courts "shall serve as such judge, under the terms of this act, for the full length of the term for which he was elected, notwithstanding the prior repeal of the section under which his office and his term of office were created." The Act provides in Section 1617, General Code, that the "existing terms of the municipal judges or elected clerks shall not be diminished, but shall continue for the period for which they were created."

The fact that the General Assembly did not intend any increase in compensation of municipal judges provided by Section 1591, General

Code, to affect the salaries of incumbent judges appears to me to be obvious. The General Assembly has provided that the *existing terms* shall not be diminished, but that such existing terms shall continue for the period for which they were created. The Constitution provides that no change in compensation of an officer shall affect the salary of any officer during his *existing term* unless the office be abolished. An existing term necessarily relates to an existing office. An existing office can not be abolished without also abolishing an existing term. Conversely, an existing term can not be continued without at the same time continuing such office. Thus, by continuing existing terms, the General Assembly did not abolish, but, instead, continued existing offices. By employing the same phraseology as that contained in Section 20, Article II of the Constitution, namely "existing term", the General Assembly apparently had such section in mind and by apt language made plain its legislative intent that salaries of incumbent municipal judges should not be affected by this new Municipal Court Act.

The purpose of the language "unless the office be abolished" as contained in Section 20, Article II of the Constitution, is to make clear, I believe, the fact that such section shall not prohibit the abolishment of an office not provided for by the Constitution, with its attendant effect upon the salary of such officer by the abolishment of the salary of such officer. It does not mean that the General Assembly, by changing the name of such office and by increasing or decreasing the duties thereof, can increase or decrease the salary of such office.

To further fortify my opinion, let us consider the necessary consequences of an interpretation that the offices of incumbent municipal judges are abolished as of January 1, 1952. Let us consider that as of such date new and completely independent judicial offices are established. In such event the General Assembly, in effect, would be *appointing* new judges for two and four year terms. Such an interpretation would mean that the General Assembly intended to appoint judges, although not authorized to do so by the Constitution. I quote from the opinion of Jones, J. in the case of Hilton v. State, ex rel. Bell, 108 Ohio St., 233, at page 238:

> "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 in-

> sistent 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. * * *"

I quote also from the opinion of Day, J. in the case of State, ex rel. Cherrington v. Hutsinpiller, 112 Ohio St., 468, at page 475:

> "This conclusion requires us to overrule the demurrer to the petition, but in view of the fact that counsel have argued and briefed at length the question of the right to appoint a judge, instead of electing one, we have reached the conclusion that under Section 10, Article IV, all judges of courts in this state 'shall be elected by the electors of the judicial district for which they may be created.' Except, therefore, for the purpose of filling vacancies, as provided by law, there is no legal or constitutional power by which a judge may be appointed in this state. See Hilton v. State, ex rel., 108 Ohio St., 233, 238, 140 N. E., 681."

A situation somewhat similar to the facts herein was involved in the case of State, ex rel. Fox v. Yeatman, 89 Ohio St. 44. The General Assembly had passed acts enlarging and extending the jurisdiction of the police courts of Cincinnati and Dayton and changing the names of such police courts to municipal courts. These were the first municipal court acts in Ohio. In each case the act provided that the incumbent police judge should be presiding judge of the municipal court during his term of office. The claim was made that the General Assembly, by such action, had exercised the power of appointment. The court, however, held that a new office was not created, but, instead, new duties were imposed on the existing office. By such holding the validity of the acts was upheld.

It thus would appear that if we were to consider that the new Municipal Court Act abolishes the offices of the incumbent municipal judges, the constitutional validity of the Act in continuing the existing judges in new judicial positions would be open to serious question and the incumbent judges might well be out of office as of January 1, 1952. That the General Assembly intended no such thing, however, is evident by the express language of Sections 1588 and 1617, General Code, heretofore quoted.

A case almost squarely in point on all of the issues herein involved

is State v. Board of Commissioners, 48 Wash. 461, 93 P. 920, the second branch of the syllabus of which reads as follows:

> "Laws 1907, p. 352, c. 160, changes the title of the county surveyor to county engineer; and, while such officers had theretofore received per diem compensation, section 5 provides for an annual salary in certain counties, which materially increases the compensation, but does not expressly state that it shall apply to existing officers. Held, the incumbents when the act was passed are not entitled to compensation thereunder, though the act increases the officers' duties, the new duties being within the proper scope of the office; it being assumed the Legislature intended to provide the new compensation subject to Const. art. 11, section 8, prohibiting an increase in county officers' salaries during their terms, and article 2, section 25, prohibiting an increase in any public officer's compensation during his term." (93 P. 920.)

By way of summarization, I believe that an examination of the new Municipal Court Act, when compared with the many separate municipal court acts heretofore passed, clearly shows that the purpose of the General Assembly was to establish, with certain enumerated exceptions contained therein, uniformity as to jurisdiction, procedure, term of office, numbers of judges and salaries in the various municipal courts of Ohio, the number of judges and salaries being made dependent upon population. Such uniformity could have been accomplished by amendment of the many separate municipal court acts or, more easily could be established by the enactment of a single act. The General Assembly chose the latter course of procedure. It did not intend to establish new courts in municipalities having such courts, but only to establish uniformity therein. The fact that the names of the courts were changed is of no consequence. Consistent with such intent, the General Assembly continued the present judges in office for the balance of their elective terms, subject to all the rights and restrictions incident to such continuance. One of the restrictions incident to such continuance is the limitation as to change of salary contained in Section 20, Article II of the Constitution.

In conclusion, and in specific answer to your questions, it is my opinion that:

1. The fact that, by the terms of Amended Senate Bill No. 14, Sections 1581 to 1617, inclusive, General Code, additional judicial duties will be imposed upon the incumbent municipal judge of Urbana on and after January 1, 1952 does not have the effect of removing him from the

scope of Section 20, Article II of the Constitution, providing that any change in compensation of an officer shall not affect the salary of any officer during his existing term.

2. The General Assembly, by providing in Amended Senate Bill No. 14 that the existing term of municipal judges shall not be diminished but shall continue for the period for which they were created, did not intend to and did not abolish the office of the incumbent municipal judge of Urbana and thus the General Assembly intended to and did recognize that the limitations as to change of compensation contained in Section 20, Article II of the Constitution would forbid any increase in compensation of such judge during his existing term, which term does not expire until December 31, 1953.

Respectfully,

C. WILLIAM O'NEILL
Attorney General