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SALARY—SHERIFF, CLERK OF COURTS, PROBATE JUDGE, JUDGES COURTS COMMON PLEAS, COUNTY TREASURER, RECORDER, COMMISSIONERS, ENGINEER—APRIL 1, 1940, DATE TO DETERMINE RESULT SIXTEENTH FEDERAL DECENNIAL CENSUS, BASIS TO COMPUTE SUCH SALARIES—CORONERS, ELECTED NOVEMBER 5, 1940, PAID UNDER SECTION 2866-1 G.C.—STATUS CERTAIN OFFICIALS ELECTED 1938, HOW PAID—ADDITIONAL COMPENSATION JUDGES, COURTS COMMON PLEAS ELECTED 1936, 1938—HOW COMPENSATION COMPUTED.

SYLLABUS:

1. *The date of the legal ascertainment of the result of the sixteenth federal decennial census (1940), so far as the population of counties in Ohio is concerned upon the basis of which salaries of county officials are determined, was April 1, 1940.*

2. *The salaries of sheriffs, clerks of courts, probate judges, county treasurers, county recorders, county commissioners, prosecuting attorneys and county engineers who were elected on November 5, 1940, should be based on the 1940 federal census.*

3. *Coroners who were elected on November 5, 1940, should be paid the compensation provided for in section 2866-1, General Code, in accordance with the 1940 federal census.*

4. *The annual compensation of county auditors and county commissioners elected in the year 1938, is, for their entire term of office, based upon the population of their respective counties, as shown by the 1930 census.*

5. *Additional compensation provided for judges of courts of common pleas who were elected in 1936 and 1938 by section 2252, General Code, should be computed for each year of their terms which begin after April 1, 1940 on the basis of the 1940 federal census.*

Columbus, Ohio, July 11, 1941.

Hon. Floyd A. Collier, Prosecuting Attorney,
Bowling Green, Ohio.

Dear Sir:

You have submitted for my consideration and opinion, the following inquiry:

“There seems to be some question among the various county officials of the various counties of the state as to whether county officials who were elected at the November Election, 1940, shall receive their salaries as based on the 1930 Federal Census or the 1940 Federal Census.

At the Prosecutors' Meeting held in Canton some time ago, most of the Prosecutors thought that they were entitled to the increase due to the increase in population. However, these Prosecutors were practically all from the smaller counties, the larger counties not being affected to any great extent by the change in population.

The Federal census, as you know, was taken sometime last spring, and certified by the county and state officials to Washington long before election. However, the official certification by the Federal authorities, I am informed, only took place around December 2nd of 1940. I may be wrong on that fact. If so, I wish you would look that matter up and see when it actually did take place.

The question, therefore, is, do the newly elected Sheriff, Clerk, Probate Judge, Treasurer, two Commissioners, Prosecuting Attorney, and Recorder get their salaries as based on the 1930 census or the 1940 census?

The sections affecting these officers are as follows:

Sheriff — 2994; Clerk — 2993; Probate Judge — 2992; Treasurer — 2991; two Commissioners — 3001; Prosecuting Attorney — 3003; Recorder — 2995. You will note those sections all contain the following words: ‘As shown by the last Federal Census next preceding his election.’

Does the Engineer collect his portion of the county salary under Section 7181, based on the 1930 or the 1940 census? You will note that that section contains the words, ‘as shown by the Federal Census next preceding his election.’

Is the maximum of the Coroner's salary as fixed by Section 2866-1, governed by the 1930 or the 1940 census. You will note that that section contains the words, 'according to the last Federal Census.' The words, 'preceding his election' are absent from that section.

One Commissioner, salary governed by Section 3001, and the Auditor's salary governed by Section 2990, were elected in 1938. Would their salaries be based on the 1930 census or the 1940 census?

Would the salary of the Common Pleas Judge elected in 1936 or 1938, be governed by the 1930 or the 1940 census? You will note that Section 2252, governing their salaries as paid by the county contains the words, 'as ascertained by the last Federal Census of the United States,' and nothing is said about the date of his election."

Salaries of county officials in the several counties of the State of Ohio, are dependent upon the population of their respective counties. The basis for the determination of these salaries is fixed by statute, and in each instance that basis is made the population of the county. As you state, the salary of a county auditor is determined in the manner provided in Section 2990, General Code; that of a county treasurer is controlled by Section 2991, General Code; of a probate judge by Section 2992, General Code; of a clerk of courts by Section 2993, General Code; of a sheriff by Section 2994, General Code; of a recorder by Section 2995, General Code; of county commissioners by Section 3001, General Code; of a prosecuting attorney by Section 3003, General Code. Without further reference to these statutes it is sufficient for our present purpose to note that in each of these statutes the basis for the computation of these salaries is the population "as shown by the last federal census next preceding his election," except in Section 3003, General Code, wherein is fixed the basis for the determination of the salary of a prosecuting attorney on the basis of population, "as shown by the federal census next preceding his election." The fact that the language of the statute fixing the salary of a prosecuting attorney is slightly different from that contained in the other statutes, does not, in my opinion, have any significance. The phrase, "last federal census next preceding" could not possibly be interpreted to mean anything different from the phrase "federal census next preceding." This is especially true when there is no other language in the statute or in any cognate statute to show an intention of the Legislature to the contrary. In my opinion, each of the expressions means the federal census in existence at the time the official is elected. The same

observation may be made as to that portion of the salary of a county engineer which is dependent upon the population of the county, the basis for which is fixed by Section 7181, General Code, on population "as shown by the federal census next preceding his election."

Obviously, if each of the officers above named is to receive a salary based on the "federal census next preceding his election" or the "last federal census next preceding his election," the census which is to govern the salary of such officers during their entire terms is that which is in existence at the time of their election to office. Since the auditor and one county commissioner were elected in 1938, the fifteenth federal decennial census (1930) will govern their salaries throughout their terms. Whether the salaries of those officers above mentioned who were elected in 1940 are to be governed by the 1930 or the 1940 census depends, of course, upon the date when the 1940 census became effective. If such effective date was prior to their election, obviously their salaries would be governed thereby, if not, their salaries would, of course, be paid in accordance with the 1930 census. It therefore remains to be determined when the sixteenth federal decennial census (1940) became effective.

The federal statutes providing for the taking of the census which are pertinent hereto, are in part as follows:

Title 13, section 201, U.S.C.A.

"A census of population, agriculture, irrigation, drainage, distribution, unemployment and mines shall be taken by the Director of the Census in the year 1930 and every ten years thereafter."

Title 13, section 202, U.S.C.A.

"The period of three years beginning with the first day of January in the year 1930, and every tenth year thereafter, shall be known as the decennial census period and the reports upon the inquiries provided for in said section shall be completed within such period."

Title 13, section 206, U.S.C.A.

"The census of the population and of agriculture required by section 201 of this title shall be taken as of the first day of April, and it shall be the duty of each enumerator to commence the enumeration of his district on the day following unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work."

Title 13, section 213, U.S.C.A.

“ * * * that he (the Director of the Census) is further authorized to have printed by the Public Printer, in such editions as the Director may deem necessary, preliminary and other census bulletins * * * .” (Parenthetical matter the writer’s.)

From the foregoing, it will be noted that the census shall be taken as of April 1, and that the Director of the Census is given three years to complete his report but is authorized to make preliminary reports from time to time within said period. No specific provision is made for publishing final reports and, furthermore, the statute does not fix a definite date when the new census becomes effective. It therefore seems to me that the only logical conclusion is to determine the population of any given county as of the date fixed by law for its determination, without reference to the time at which the announcement thereof, either preliminary or final, official or unofficial, is made. The adoption of any other rule, it appears to me, would result in irregularity and non-uniformity. For example, the population in each of two counties in this state might show an increase as of April 1, 1940; the population of one might be officially determined on November 1 following, and the other on December 1 following. In such case, the officials of the former county would draw the increased salary during their terms of office, while those of the latter would draw salary on the basis of the 1930 census. This, of course, would result in inequality and injustice.

Furthermore, it must be borne in mind that the census is the enumeration of the population and not the announcement of the result of such enumeration.

There is of course no statute in Ohio which fixes the time when the federal census becomes effective for the purpose of computing the salaries which by law are based on population as ascertained by a federal census, nor are there any court decisions in this state that discuss or refer to the question. In fact, the decisions of other states are not numerous and are not in all respects consistent. In the case of *Underwood v. Hickman*, 162 Tenn. 689, it was held:

“1. The effective date of the decennial census of 1930 provided for by act of Congress was the date as of which the enumeration was taken, i. e., April 1, notwithstanding evidence of the new population may not have been available for several months thereafter.

2. County officials whose county changed class under the act fixing the salaries of county officials as a result of a change in population are entitled to the salary of the new class into which their county moved as of April 1, 1930, because that was the date as of which the decennial census of 1930 provided for by act of Congress was taken."

See also *Etowah Light and Power Company v. Yanzey*, 197 Fed. 845, wherein it was held that, where a federal census was taken and under it an act became applicable to a particular county, such applicability could not be defeated by reason of the fact that the supervisor of the census had not sent a certificate of the population to the clerk of the county court; there being nothing in the act requiring such certificate as a condition of applicability.

The population of the various counties of Ohio, as shown by the 1940 federal census having been determined as of April 1, 1940, it clearly follows that sheriffs, clerks of courts, probate judges, county treasurers, county recorders, prosecuting attorneys and county commissioners who were elected on November 5, 1940, should each be paid during the terms served by them an annual salary based on the sixteenth federal decennial census taken in the year 1940.

For a like reason, a county engineer elected on November 5, 1940 should be paid a salary during his term based on the population of his county as ascertained by the 1940 census.

In arriving at the conclusion that the sixteenth federal decennial census was determined as of April 1, 1940, I am not unmindful of an opinion rendered by the then Attorney General on January 23, 1931, reported in the Opinions of the Attorney General for 1931, page 68, wherein it was held that, the date of the determination of the 1930 census figures, so far as they affect county officers, was the date when the preliminary population figures of Ohio by counties were first released in a press release by the Director of the Census at Washington. Said opinion was based entirely upon the holding of the Supreme Court of Pennsylvania, in the case of *Lewis v. Lackawanna County*, 200 Pa. 590, which decision of course is in conflict with the case of *Underwood v. Hickman*, supra.

After carefully reading the opinions in each of the above cases, I am inclined to consider the *Underwood* case as being the more well reasoned of the two.

I might also point out, in connection therewith, that the Supreme Court of Pennsylvania, in deciding the Lewis case, reversed a decision of the Superior Court of Pennsylvania in said case, which latter court held that the date of determination was that as of which the census was taken.

The answer to your question would be the same, however, in either event. In other words, if the date of the determination of the 1940 census was April 1, 1940, or the date on which the preliminary population figures of Ohio were first released by the Director of the Census, the salaries of the officers in question would not be affected in either case. A preliminary bulletin showing the population of the counties of Ohio as ascertained by the sixteenth federal decennial census was published and distributed by the Department of Commerce, Bureau of the Census at Washington, under date of September 23, 1940. This bulletin is designated "Preliminary Population Figures for the State of Ohio."

Each of the above dates was, of course, prior in time to the date of the general election held in 1940 and, therefore, if either one is accepted as the effective date of the 1940 federal census, the county officers in question would receive salaries during their terms of office based upon the 1940 census.

I come now to a consideration of section 2866-1, General Code, which provides for the compensation of coroner in counties of less than four hundred thousand population. Said section reads:

"In counties having a population, according to the last federal census, of less than four hundred thousand the total compensation paid to the coroner as fees, under all sections of the General Code, in no case shall exceed five thousand dollars per annum or be less than one hundred and fifty dollars per annum. If the fees in any one year are less than the minimum compensation allowed by law then such coroner shall be allowed the difference up to one hundred and fifty dollars to be paid by the county commissioners out of the emergency or contingent fund."

As stated in your communication, the language of the above section relating to the last federal census differs from that contained in those sections fixing the salaries of other county officers in that the words "preceding his election" are omitted therefrom. This, however, should cause no difficulty in ascertaining into which classification a county would fall for the purpose of determining the compensation to be paid a coroner

elected in 1940. As pointed out above, the date of the determination of the 1940 census was April 1 of that year. A coroner elected in the year 1940 assumed office on the first Monday of January, 1941, at which time the payment of his compensation commenced. The maximum compensation paid to a coroner as fees would therefore be determined by the population of the county according to the 1940 census.

Your next question concerns the salary of the common pleas judge. Additional compensation payable to the judges of the Court of Common Pleas from the several county treasuries is provided for by section 2252, General Code. It is therein stated that each judge of the Court of Common Pleas, in addition to the salary allowed by section 2251, General Code, shall receive an annual compensation based on "the population of the county in which he resided when elected or appointed, ascertained by the latest federal census of the United States."

In so far as the compensation of common pleas judges elected in the year 1940 is concerned, no serious question is presented. That part of their compensation provided for by section 2252, General Code, would, of course, be governed by the 1940 census.

The case of a judge elected in 1936 or 1938 does, however, raise a question of some concern. The question may be stated in this manner: Does an official's annual salary which is predicated on population as ascertained by a federal census change with the years of his term if that population changes during the term, or to state it another way, does an annual salary based on population once fixed for the first year of such officers's term continue the same for each year of the term, or should it be made to conform to fluctuations of population as shown by a federal census that occurs and becomes effective during the term? The question turns on the effect to be given to Article II, section 20 and Article IV, section 14, of the Constitution of Ohio. Said sections read as follows:

Article II, section 20.

"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."

Article IV, section 14.

“The Judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this State, or the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this state, given by the General Assembly, or the people, shall be void.”

In express terms, the above sections provide respectively that the General Assembly shall fix the compensation but no change therein shall affect the salary during the existing term, and that judges shall receive such compensation as may be provided by law, which shall not be diminished or increased during their term of office.

This language, in my opinion, does not mean the prohibition of a change in salary by reason of any other circumstances than some action of the General Assembly and should not be held to have reference to a change that may occur by reason of a change in the measuring standard fixed by the General Assembly after that standard is so fixed. It therefore does not, in my opinion, prohibit a change brought about by a change in population.

A search of the reported decisions of courts in this state reveals but one case touching the question under consideration herein, i.e., the case of *Bordenkircher v. Lingrel*, Auditor, 29 O.N.P. (N.S.), 559. It appeared therein that the 1930 census showed that Hardin County had decreased in population to such an extent as to decrease the salaries of the county auditor, probate judge, common pleas judge and clerk of courts, if their annual salaries for the remaining years of their respective terms were to be computed on the basis of the reduced population. Suit was instituted to enjoin the payment of the salaries of these officers for the remaining year of their terms on the basis of the 1920 census which was in effect at the time of their election. The court held that any such change of salaries was forbidden by Section 20 of Article II of the Constitution of Ohio. Little consideration seems to have been given to Section 14 of Article IV of the Constitution, although it was mentioned.

The *Bordenkircher* case was decided in 1932. No Ohio authority was cited by the court for the reason that none existed, nor was any consideration given to authorities outside the state.

In an opinion rendered by the then Attorney General on July 9, 1930 (Opinions of the Attorney General for 1930, page 1075), it was held that:

“The annual compensation of common pleas judges, under Section 2252, General Code, who were elected and took office prior to the taking of the 1930 census, should be based on the 1920 census.”

Said opinion, however, does not seem to consider the fact that the constitutional provisions in question might be construed as prohibiting a change in salary or compensation only when such change is brought about by legislative enactment.

In other states having similar constitutional provisions, the courts are not entirely in accord as to the applicability of the prohibition of changes in salaries during terms, where the change is brought about by reason of a change of population. The later cases, however, which are supported by what seems to be the substantial weight of authority hold that such a change is not contemplated by the prohibition contained in constitutional provisions similar to Article II, Section 20, or Article IV, Section 14 of the Constitution of Ohio.

In a well considered case decided by the Supreme Court of Indiana, in 1938, *Board of Commissioners v. Crowe*, 15 N.E., 2d, 1016, it was held:

“Where statute fixed salary of clerk of circuit court according to population of county, the increase of clerk’s salary, upon filing of census showing county’s population to have increased so as to entitle clerk to greater salary, was not an ‘increase of salary during term of office’ within constitutional prohibition thereagainst, since the salary was fixed by statute before clerk was elected to office, to be determined by population.”

The constitutional provision (Article XV, Section 2, of the Constitution of Indiana) upon which the above decision is predicated, reads as follows:

“When the duration of any office is not provided for by this constitution it may be declared by law and if so declared such office shall be held during the pleasure of the authority making the appointment. But the General Assembly shall not create any office, the tenure of which shall be longer than four years, nor shall the term of office or salary of any officer fixed by this Constitution or by law be increased during the term for which the officer was elected or appointed.”

The court in deciding the above case, cited and quoted from a companion case in Indiana, and from several cases in other states:

Crowe v. Board of Commissioners,
210 Ind. 404, 3 N.E. 2d, 76, 78;

State, ex rel, Harvey v. Linville,
318 Mo. 698, 300 S.W., 1066;

Board of Commissioners v. Williams,
38 Okla. 738, 135 P. 420;

Puterbaugh v. Wodham, et al. (1912)
162 Cal. 611, 123 P. 804;

Yuma C. v. Sturges,
15 Ariz., 538, 140 P. 504;

Board of Commissioners v. Mathews,
147 Okla. 296, 296 P. 481.

Upon consideration of the language used in Section 20, Article II, and also Section 14 of Article IV of the Constitution of Ohio, so far as a change of salary is concerned, I believe it should be considered as being an inhibition directed to the General Assembly and should not be construed as having application to a change in salary brought about automatically by a change in population and the operation of a law enacted prior to the election of an official whose salary may be thus affected. The first part of each of the sections of the Constitution under consideration unquestionably refers to legislative duty and power and the latter part from its association should be construed as a limitation on that power.

Section 2252, General Code, was in effect when common pleas judges were elected in the years 1936 and 1938. Under it their salaries, while not expressly stated in dollars and cents, were nevertheless fixed for their entire terms. The effect of the statute was to say to such judges: "Your salaries shall be determined upon the population of your respective counties as ascertained by the federal census of 1930, until there is another census taken, at which time your salary may be increased or diminished according to the population of your respective counties ascertained by such census."

It therefore appears to me that the salary of a judge dependent upon the population as ascertained from time to time would be provided by the law in force at the time of his election and any change therein resulting from a change in population would not be repugnant to the constitutional provisions above quoted.

Common pleas judges who were elected in 1936 and 1938, for six year terms, would of course have had their salaries for each year of their respective terms which began prior to the effective date of the 1940 census determined on the basis of the 1930 census. The salaries of such judges for each year of their term that began after said date should be computed on the basis of the 1940 census.

In view of the above observations, I am of the opinion that the first branch of the syllabus of the 1930 opinion, *supra*, is incorrect and should be overruled.

I am therefore of the opinion, in specific answer to your questions, that:

1. The date of the legal ascertainment of the result of the sixteenth federal decennial census (1940), so far as the population of counties in Ohio is concerned upon the basis of which salaries of county officials are determined, was April 1, 1940.

2. The salaries of sheriffs, clerks of courts, probate judges, county treasurers, county recorders, county commissioners, prosecuting attorneys and county engineers who were elected on November 5, 1940, should be based on the 1940 federal census.

3. Coroners who were elected on November 5, 1940, should be paid the compensation provided for in section 2866-1, General Code, in accordance with the 1940 federal census.

4. The annual compensation of county auditors and county commissioners elected in the year 1938, is, for their entire term of office, based upon the population of their respective counties, as shown by the 1930 census.

5. Additional compensation provided for judges of courts of common pleas who were elected in 1936 and 1938 by section 2252, General Code, should be computed for each year of their terms which begin after April 1, 1940 on the basis of the 1940 federal census.

Respectfully,

THOMAS J. HERBERT,

Attorney General.