

of Highways and The Galena Shale Tile & Brick Company. This agreement grants to The Galena Shale Tile & Brick Company the right to construct an underpass across what is commonly known as the Columbus-Wooster Road in Delaware County, Ohio.

Accompanying said agreement is a bond in the sum of three thousand (\$3,000.00) dollars, signed by the American Surety Company of New York, as surety, to the effect that The Galena Shale Tile & Brick Company will carry out all of the terms and provisions of the contract.

Finding said contract in proper legal form, I hereby approve the same.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1847.

COMMON PLEAS JUDGES—WHEN ENTITLED TO INCREASED COMPENSATION PROVIDED FOR BY SECTION 2252, GENERAL CODE, AS AMENDED IN 112 OHIO LAWS—PROCEDURE IN BRINGING CONSTITUTIONALITY OF SECTION 2252 BEFORE SUPREME COURT OF OHIO.

*SYLLABUS:*

1. *The only way in which the question of the constitutionality of Section 2253, General Code, as amended, 112 O. L. 345, providing for the additional per diem compensation of common pleas judges when holding court in counties other than that of their residence, for the purpose of aiding in the disposition of the business of such counties, can be brought before the Supreme Court so as to permit the majority of the members of the court to control the decision of the court on the question of the constitutionality of said section is by a proceeding in error in the Supreme Court to the decision and judgment of a Court of Appeals, declaring the law unconstitutional and void in its application to judges elected or appointed and qualified before said section, as amended, went into effect.*

2. *Section 2252, General Code, as amended, 112 O. L. 345, which provides for the annual compensation of common pleas judges, to be paid out of the treasury of the county for which such common pleas judges are elected or appointed, applies only to common pleas judges elected or appointed and qualified after the effective date of said section of the General Code, as amended. Common pleas judges elected or appointed and qualified prior to the effective date of said Section 2252, General Code, as amended, who are now in office, will continue to receive the salary provided for them by the provisions of Section 2252, General Code, prior to its amendment.*

COLUMBUS, OHIO, March 14, 1928.

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

GENTLEMEN:—This is to acknowledge receipt of your recent communication, which reads as follows:

"In the recent three to four decision of the Supreme Court, it was held that common pleas judges were entitled to receive \$20.00 per day while holding court in other counties than the one for which they were elected as provided by Section 2253, General Code, as amended, 112 O. L. 345, regardless of

the fact that such judges were holding their office at the time the law became effective.

*Question 1.* Is there any method by which this could be brought to the Supreme Court in such a way as to permit the majority of the court to control?

*Question 2.* In view of this decision may common pleas judges who were in office at the time this law became effective receive the additional compensation provided in Section 2252 of the General Code? If not, are they entitled to draw the compensation provided for in this section prior to its amendment?"

Section 2253, General Code, prior to its amendment by the 87th General Assembly, 112 O. L. 345, provided that, in addition to his annual salary and expenses otherwise provided for, a common pleas judge holding court by assignment of the Chief Justice in a county other than that of his residence, to aid in the disposition of the business of such county, should receive a compensation of ten dollars per day in addition to his actual and necessary expenses, to be paid out of the treasury of the county to which he is assigned. Said Section 2253, General Code, as amended, now provides that such common pleas judge shall receive a compensation of twenty dollars per day for such services in addition to his actual and necessary expenses, to be paid out of the treasury of the county to which he is assigned.

In the case of *State ex rel Jones vs. Zangerle*, 117 O. S. 507, decided by the Supreme Court December 21, 1927, said court by a vote of three judges only, held that the per diem compensation provided for by this section is not such compensation as is within the contemplation and meaning of Section 14 of Article IV of the Constitution of Ohio, which provides that "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." Reaching this conclusion, the Supreme Court held that Section 2253, General Code, as amended, was not unconstitutional in its application to common pleas judges elected or appointed and qualified before the effective date of said section, as amended; and that such common pleas judges, as well as those thereafter elected or appointed and qualified, were entitled to receive the increased per diem compensation therein provided, for services rendered under said amended section after the same went into effect.

Although, as above noted, the decision in the case of *State of Ohio ex rel Jones vs. Zangerle, Auditor*, supra, was concurred in by only three judges of said court, it was there held that effect was required to be given to said decision as the decision of the court by reason of the provision of Section 2 of Article IV of the state constitution, which provides that "no law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." By way of answer to your first question, it may be said that, under the above quoted provision of Section 2 of Article IV of the state constitution, the only way in which the question of the constitutionality of Section 2253, General Code, as amended, in its application to judges holding office prior to the effective date of said section, as amended, can be brought before the Supreme Court so as to permit the majority of the members of the court to control the decision of the court on the question of the constitutionality of said section, would be by a proceeding in error in the Supreme Court to the decision and judgment of a Court of Appeals, declaring the law unconstitutional and void in its application to judges elected or appointed and qualified before said section, as amended, went into effect.

The question of the right of a common pleas judge, in office before the effective date of said Section 2253, General Code, to receive the increased per diem compensation therein provided for may be presented in the first instance in a number of different ways. Such question may be presented by an action by the prosecuting attorney of the county to which such common pleas judge may be assigned, under Section 2921, General Code, to restrain the payment of such increased compensation or to recover the same if it has been paid. Like actions may be filed by a taxpayer of the county, under Section 2922, General Code, if the prosecuting attorney, upon written request to bring such action, fails to do so. Again, the question may be presented by an action by the prosecuting attorney, under Section 286 of the General Code, to recover on a finding made by the Bureau of Inspection and Supervision of Public Offices against such common pleas judge for the amount of increased compensation received by him under said Section 2253, General Code, as amended.

Of course, such question might be made by an action in mandamus filed by such common pleas judge in the Common Pleas Court, or in the Court of Appeals of the county to which he is assigned, for the purpose of enforcing the payment to him of the increased compensation provided for by this section in case the payment of the same is refused. Whatever the form of action may be in which such question is presented, if a Court of Appeals having jurisdiction of the case should hold against the right of such common pleas judge to the increased compensation provided for by Section 2253, General Code, as amended, on the ground that as to such common pleas judge the provisions of said section are unconstitutional, a case presented to the Supreme Court on error to the decision and judgment of the Court of Appeals would be one in which the decision of the court on the question of the constitutionality of said Section 2253, General Code, would be controlled by a majority of the members of that court. In a case so presented, a majority of the members of the Supreme Court might hold that under the rule of *stare decisis* the court is bound by the previous decision of the court on the question, without regard to the views of such majority members of the court on the question of the constitutionality of such section. In any event, however, a case thus presented to the Supreme Court would be one in which the decision of the court would be within the control of the majority of the members of the court.

With respect to your second question, it will be noted that Section 2252, General Code, as amended by said act of the General Assembly, 112 O. L. 345, provides for the annual compensation by way of salary of common pleas judges, which is to be paid out of the treasury of the county for which such common pleas judges are elected or appointed; and said Section 2252, General Code, as amended, effects an increase in such annual compensation of common pleas judges over that provided for by said section prior to its amendment. Under Section 14 of Article IV and Section 20 of Article II of the State Constitution, the amendatory provisions of Section 2252, General Code, and the increased compensation and salary for common pleas judges thereby provided for, can apply only to common pleas judges elected or appointed and qualified after the effective date of said section, as amended. Common pleas judges elected or appointed and qualified prior to the effective date of said Section 2252, General Code, as amended, who are now in office, will continue to receive the salary provided for them by the provisions of Section 2252, General Code, prior to its amendment by the act above referred to. *Zangerle, Auditor, vs. State ex rel Walther*, 115 O. S. 168; *Baer vs. State ex rel Stanton*, 111 O. S. 327; *Zangerle, County Auditor, vs. State ex rel Stanton*, 105 O. S. 650; *State ex rel vs. Donahey*, 101 O. S. 490.

In this connection it may be stated that the decision of the Supreme Court in the case of *State ex rel Jones vs. Zangerle, Auditor*, supra, does not in any way affect the second question made in your communication, or the conclusion reached by me by way of answer to said question.

In conclusion, it should be stated that in pointing out the different ways in which the question first above discussed may be presented with the view of ultimately obtaining a majority decision of the Supreme Court with respect to the constitutionality of Section 2253, General Code, as amended, it is not thereby intended to hold that the prosecuting attorney of the county in which a common pleas judge is assigned may by action on a finding of the Bureau, or otherwise, recover from a common pleas judge monies paid to him out of the treasury of the county in pursuance of and in obedience to a writ of mandamus issued by any court having jurisdiction of the case. On the contrary, the decision of the court in such a case is conclusive against any action or proceeding to recover monies paid to any such common pleas judge out of the treasury of the county in pursuance of the writ of mandamus issued in such case. *Baer vs. State ex rel Stanton*, 111 O. S. 327.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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1848.

APPROVAL, BONDS OF THE VILLAGE OF CRIDERSVILLE, AUGLAIZE COUNTY, OHIO—\$27,012.54.

COLUMBUS, OHIO, March 14, 1928.

*Industrial Commission of Ohio, Columbus, Ohio.*

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1849.

APPROVAL, BONDS OF THE VILLAGE OF WHITEHOUSE, LUCAS COUNTY, OHIO—\$22,945.41.

COLUMBUS, OHIO, March 14, 1928.

*Industrial Commission of Ohio, Columbus, Ohio.*

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1850.

APPROVAL, NOTE OF BELPRE VILLAGE SCHOOL DISTRICT, WASHINGTON COUNTY—\$122,500.00.

COLUMBUS, OHIO, March 14, 1928.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*