The abstract submitted consists of two sections, the first of which was prepared and certified under date of June 11, 1887, by George J. Atkinson & Company, abstracters of Columbus, Ohio, and the second of which commencing with a deed from William H. Barbee, sheriff of Franklin County, Ohio, to William Cheek and Emerson Gould, filed for record May 7, 1887, shows the chain of title to September 20, 1927, and was prepared and certified by John K. Kennedy, abstracter of Columbus, Ohio, under date of September 20, 1927.

The abstract pertains to the following premises situate in the County of Franklin, State of Ohio and city of Columbus:

> Being lot No. thirty-three (33) of Woodruff's subdivision of the south half of the south half of lot No. 278 of Woodruff's addition, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 3, page 421, Recorder's office, Franklin County, Ohio.

Upon examination of said abstract, I am of the opinion that the same shows a good and merchantable title to said lot No. 33 in Laura V. Maple, subject to taxes for the year 1927, amount undetermined, which are a lien.

You have further submitted an encumbrance estimate bearing No. 3531 and properly certified by the Director of Finance as of November 7, 1927.

You have further submitted a warranty deed in which Laura V. Maple, widow, is the grantor, and the State of Ohio is the grantee, covering the above described premises. Said deed appears to be in proper form and properly executed and will, in my opinion, when delivered, convey a fee simple title in said premises to the State of Ohio.

I am returning the abstract of title, warranty deed and encumbrance estimate herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1287.

JUDGE OF COURT OF APPEALS—COMPENSATION UNDER SECTION 2253-3, GENERAL CODE.

SYLLABUS:

A judge of a court of appeals in office at the time of the effective date of Section 2253-3, General Code, as enacted by the 87th General Assembly, who is assigned by the chief justice to aid in disposing of business of some district other than that in which he is elected or appointed, should receive $20.00 *per day for each day of such assignment, to be paid from the treasury of the county to which he is assigned.*

COLUMBUS, OHIO, November 23, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion as follows:

"In Section 2253-3, as enacted in House Bill No. 61, passed by the recent General Assembly, it is provided that each judge of the court of appeals, who is assigned by the Chief Justice by virtue of Section 1528 of the General Code to aid in disposing of business in some district other than that in which he is elected or appointed, shall receive $20.00 per day for each day of such assignment to be paid from the treasury of such county to which he is so assigned and upon the warrant of the auditor of such county.

Question: May judges of the court of appeals in office at the time this act was passed receive this compensation during their present terms?"

Section 2253-3, General Code, 112 O. L. 346, reads in part as follows:

"In addition to the annual salary and expenses provided for in Sections 1529, 2251, and 2233-2 * * * each judge of the court of appeals who is assigned by the chief justice by virtue of Section 1528 of the General Code, to aid in disposing of business of some district other than that in which he is elected or appointed, shall receive twenty dollars per day for each day of such assignment, to be paid from the treasury of the county to which he is so assigned and upon the warrant of the auditor of such county."

Prior to the enactment of the foregoing statute, judges of courts of appeals did not receive any compensation other than their regular salary when assigned by the chief justice to aid in disposing of business of some district other than that in which they had been elected or appointed. The question now arises whether or not a judge of a court of appeals in office at the time of the enactment of Section 2253-3, General Code, by the 87th General Assembly, may benefit by the provisions of the statute in view of the constitutional inhibition contained in Section 20, Article II of the Constitution of Ohio which reads 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."

In the case of *Gobrecht* vs. *Cincinnati,* 51 O. S. 68 at page 72, Judge Spear after quoting the above section of the Constitution observed:

"The question, therefore, is, whether or not the pay of a member of the board is 'salary' within the meaning of the above section?

We think it is not. A general definition of salary includes compensation. General definitions, do not, however, cover all cases. Salary is compensation, but, under the section quoted, compensation is not, in every instance, salary. The point is emphasized by this court in the case of *Thompson* vs. *Phillips,* 12 Ohio St. 617, where it is said that '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 service rendered.' * * *"

It will be observed that Section 2253-3, General Code, does not have the effect of changing the salary of judges of courts of appeals, but merely provides for the

payment to them of twenty dollars per day under certain circumstances, which is to be in addition to their regular salary. The constitutional inhibition above referred to is to the effect that an officer's compensation shall not be changed during his term of office so as to affect his salary.

In passing it is deemed proper to point out the distinction between this opinion and the conclusion reached in Opinion No. 968, rendered to your bureau under date of September 8, 1927, the syllabus of which reads as follows:

> "The increased compensation for common pleas judges as provided by House Bill No. 61, passed by the 87th General Assembly, cannot be paid to judges, who were in office August 10, 1927, for the remaining portion of their present terms."

The holding in Opinion No. 968 was based on the provisions of Section 14, Article IV of the Constitution of Ohio, which provides:

> "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 office of profit or trust under the authority of this state or of 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 that opinion it was said with reference to the above section that:

> "The language of the section of the constitution above quoted so clearly controls the question as to the right of the legislature to change the compensation of judges of common pleas courts as scarcely to call for interpretation, construction or comment."

It will be observed that by its terms the provisions of Section 14, Article IV, supra, are limited to judges of the supreme court and of the court of common pleas. While this is true because at the time of the adoption of such section there was no court of appeals, nevertheless it is my opinion that the constitutional limitation of the section in question covers only the judges expressly mentioned therein. This view was taken by the supreme court of Ohio in the case of *Fulton* vs. *Smith*, 99 O. S. 230, when the election of a probate judge to the office of secretary of state was attacked. The court in its opinion said:

> "The whole judicial article must be viewed and construed together, and, in the creation of the judicial structure in our system of jurisprudence, the constitutional convention and the people specifically selected two courts the judges of which should not be voted for except for a judicial office.
>
> Under rules which are familiar and sanctioned by experience, it must be presumed that when the makers of the constitution took up and considered the subject and specified the two courts as to which the prohibition should apply they intended that as to the judges of other courts no such prohibition should be made.
>
> We, therefore, hold that the provisions of Section 4826, General Code, in so far as they apply to the judges of any of the courts created by the

constitution other than the common pleas court and the supreme court, are invalid."

In reaching this conclusion, I am not unmindful of the decision of the Supreme Court in the case of *The State, ex rel. Lueders, Probate Judge,* vs. *Beaman, Auditor,* 106 O. S. 650. In the Beaman case there was involved the question of the right of a probate judge, in office at the time of the enactment of Section 5348-10a, General Code, to draw the fees in inheritance tax cases prescribed in said section.

Section 5348-10a, General Code, provided that probate judges should be allowed certain fees in inheritance tax proceedings and which fees they were to retain personally, as compensation for the performance by them of the duties imposed on them by the inheritance tax law. The question involved was whether or not judges who were in office at the time of the effective date of the statute were entitled to the benefit of the fees provided for by the statute.

The court held that such probate judges were not entitled to these fees. The opinion is a per curiam opinion participated in by five judges and is short. In the opinion no distinction is made between "salary" and "compensation." Nothing whatever is said on the subject. Three of the judges held that:

> "Such compensation cannot be allowed probate judges in office when the act providing for payment of such compensation was passed, whether or not additional duties were then assigned to them,"

and two of the judges held

> "that as the duties of probate judges were not increased or new duties assigned to them contemporaneously with the passage of the act providing for such increased compensation probate judges in office at the time of the enactment of such statute are not entitled to the benefit of its provisions."

All of these five judges joined in denying the writ of mandamus asked for, and stated that they were all of the opinion that the provisions of Section 20, Article II, of the Constitution of Ohio, applied to the office of probate judge where the Constitution itself does not fix the term of office or compensation therefor, citing as authority for this latter statement the case of *State, ex rel. Metcalf* vs. *Donahey,* 101 O. S. 490.

In my opinion, the Beaman case cannot be considered as overruling the case of *Gobrecht* vs. *Cincinnati,* supra, decided by the supreme court in 1894, in the opinion of which, written by Judge Spear, are set forth well established principles of law, which had previously been laid down by many courts and concurred in by all text writers and later decisions, especially since the case is not mentioned in the opinion, nor its principles discussed.

The principles of the Gobrecht case are to my mind directly in point with the question herein considered and I have reached my conclusion in the belief that the case was not overruled by the Beaman case, supra, and that the Beaman case was decided on other lines.

I am therefore of the opinion that a judge of a court of appeals in office at the time of the effective date of Section 2253-3, General Code, who is assigned by the chief justice to aid in disposing of business of some district other than that in which he is elected or appointed, should receive twenty dollars per day for each day of such assignment, to be paid from the treasury of the county to which he is assigned.

Respectfully,
EDWARD C. TURNER,
Attorney General.