

PROBATE—JUVENILE JUDGE—COMBINED SALARIES, ALLOWANCES AND COMPENSATION—TERM OF OFFICE BEGAN PRIOR TO EFFECTIVE DATES OF AMENDMENTS—H. B. 288, H. B. 332, 99 G. A.—SECTIONS 2251, 2252, G. C., AMENDED—LIMITATION PROVIDED BY SECTION 1639-7a G. C. NOT AFFECTED.

SYLLABUS:

House Bill No. 288 and House Bill No. 332 of the 99th General Assembly, amending Sections 2251 and 2252, General Code, do not affect the limitation provided by Section 1639-7a, General Code, upon the combined salaries, allowances and compensation of a probate-juvenile judge whose term of office began prior to the effective dates of said amendments.

Columbus, Ohio, October 29, 1951

The Honorable J. L. MacDonald, Prosecuting Attorney
Columbiana County, Lisbon, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The incumbent common pleas judge of Columbiana County, Ohio, who commenced his present term of office on January 1, 1947, receives, in accordance with the provisions of Section 2251 (122 Ohio Laws 444) and 2252 (122 Ohio Laws 444) of the General Code, a total salary of \$6,456.80 per annum.

“The Probate-Juvenile Judge of Columbiana County, Ohio, now receives a salary of \$7,456.80 per annum. The amount received in accordance with the terms of Sections 2992 and 5348-10a of the General Code is \$6,835.00. Pursuant to the provisions of Section 1639-7a of the General Code (122 v. 390; 123 v. H. 2, Eff. 2-5-49), he receives \$621.80 of the \$1,500.00 provided therein for the salary of juvenile judge.

“Section 2251 G. C. has been amended by Amended Substitute House Bill No. 288 (Effective 9-18-51) and Section 2252 G. C. has been amended by Amended Substitute House Bill No. 332 (Effective 9-14-51). These amendments will effect an increase in the salary provided by law for common pleas judge of Columbiana County to \$11,435.20, although the incumbent common pleas judge cannot receive the increase in salary until the expiration of his term of office.

“The question presented for your opinion is: What effect, if any, will the amendment of Sections 2251 and 2252 G. C. have upon determining the portion of the 1,500.00 salary provided for by Section 1639-7a G. C. upon the effective dates of Amended Substitute House Bill No. 288 and Amended Substitute House Bill No. 332, passed by the 99th General Assembly?

“Is the amount of the \$1,500.00 provided for by Section 1639-7a G. C. to be measured by the amount of salary entitled to be received by the incumbent common pleas judge, or may the Probate-Juvenile Judge receive an increase, on the effective dates of the amendments, on the theory that the law will then provide for the common pleas judge in Columbiana County to receive a salary of \$11,435.20, even though the incumbent Judge is presently disqualified from receiving it?”

In order to set out clearly the answer to your question it is necessary first to analyze your request.

You have stated that the incumbent common pleas judge took office on January 1, 1947, and that he receives \$6,456.80 per year in accordance with the provisions of Sections 2251 and 2252, General Code, as enacted in 122 Ohio Laws. While this statement is literally true, it is somewhat confusing, and for reasons which will appear more fully later it should be explained.

The act set out in 122 Ohio Laws 444, became effective September 20, 1947. It provided that after the expiration of the terms of judges then holding office, the annual salary of the office should be increased one thousand dollars. The effect of this enactment—and constitutionally it could not have provided otherwise—was that judges who took office prior to September 20, 1947, as in your county, are still paid under the provisions of the law as it existed before its amendment.

You next state the Probate-Juvenile Judge now receives \$7,456.80 per year under the provisions of Sections 2992, 5348-10a and 1639-7a, General Code. Section 2992 provides for a salary for the probate judge of each county based upon the population of the county. Section 5348-10a provides compensation for services performed in inheritance tax cases. To these two sources of compensation the General Assembly in 1947 added a third, to be applicable in those counties in which the probate judge also acts as juvenile judge. As originally enacted in 122 Ohio Laws, 390, Section 1639-7a provided as follows:

“In all counties where the state is not paying a salary direct to the judge exercising the powers and jurisdiction conferred in this chapter the state shall pay into the county treasury of the county, wherein such judge was elected, the sum of fifteen hundred dollars annually. The juvenile judge in such counties shall receive as his annual compensation fifteen hundred dollars. Provided that the combined salaries, allowances and compensation, of the probate judge and juvenile judge of said county shall not exceed the total salary provided by law for a common pleas judge in said county. Any unused portion of said fund shall remain in the county treasury to be used in the maintenance and operation of the juvenile court.”

This act became effective September 15, 1947.

The enactment of Section 1639-7a and the amendment of Sections 2251 and 2252, General Code, referred to above, gave rise to Opinion No. 2159, Opinions of the Attorney General for 1947, p. 451, rendered to your predecessor on August 20, 1947. Under the facts as presented to the then Attorney General, the common pleas judge who had taken office on January 1, 1947, received a salary of \$6,150.00. The incumbent Probate Judge, who had taken office on February 9, 1945, received \$6,675.00 pursuant to the provisions of Sections 2992 and 5348-10a, General Code. The question presented was whether, after September 20, 1947, the Probate Judge could receive enough of the \$1,500.00 provided by Section 1639-7a to bring his salary up to \$7,150.00, that latter amount being what a common pleas judge then assuming office would have received in the county in question.

The then Attorney General held that the salary increase could not be paid to the incumbent Probate Judge for two reasons. The first of those reasons was that for the Probate Juvenile Judge to receive any of the \$1,500.00 would violate the provisions of Article II, Section 20 of the Constitution forbidding the change of an officer's salary during his existing term. This reasoning was rejected in the case of *Derhammer v. Board of County Commissioners*, 53 Ohio Law Abstract 110, 38 O. O. 439, and the reasoning of the *Derhammer* case was subsequently adopted by my predecessor in Opinion No. 304, Opinions of the Attorney General for 1949, p. 75.

The second reason given by the then Attorney General in the 1947 Opinion for holding that the increase was not payable to the Probate-Juvenile Judge, was that he was already receiving a larger salary than

that of the common pleas judge. On this point the then Attorney General said at p. 456:

“Accordingly, it is obvious that not even the probate judge who will take office on the expiration of the present term, to wit, February 9, 1949, may hope to realize any benefit from the proposed allowance of a juvenile judge’s salary, because unless other legislation is had, the maximum salary which he can receive will still be the present salary of the common pleas judge, which as I have already pointed out, is less than that allowed by the present law to the probate judge.”

Clearly the then Attorney General was of the opinion that the relation between the salaries of the two judges was tied to the identity of the individuals holding the two offices.

Following this opinion by the Attorney General the General Assembly again considered the problem. In an act set out in 123 Ohio Laws 3, Section 1639-7a was amended to define further the limitation placed upon the Probate-Juvenile Judge’s salary. The act added the following new language after the provision limiting the salary to that of a common pleas judge in the same county.

“* * * Said limitation, however, shall be restricted only by the formula established by law for the total salary of a common pleas judge in said county whose term of office has begun, or will begin, subsequent to September 18, 1947. * * *”

This act was passed as an emergency measure and became effective February 5, 1949. Those Probate-Juvenile Judges who took office on February 9, 1949, benefited from its provisions because their terms of office began after the legislature had created the new formula, and because none of the factors of the formula was subjected to legislative change during their existing terms. By reason of this act the Probate-Juvenile Judge of your county whose term began February 9, 1949, received \$7,150.00, the amount which a common pleas judge taking office in the county after September 20, 1947, would have received.

This situation remained unchanged until April 1, 1950—the date of the federal census. That census must have shown that the population of your county had increased, and that as a result of the increase in population the common pleas judge became entitled to an increase in his salary under the terms of Section 2252, General Code. That section, both before and since its recent amendment provided in part as follows:

“In addition to the salary allowed by Section 2251, each judge of the court of common pleas shall receive an annual compensation equal to * * * cents per capita for the first * * * thousand of the population of the county in which he resided when elected or appointed, *as ascertained by the latest federal census.*
* * *”
(Emphasis supplied.)

In the case of State, ex rel. Mack, Judge v. Guckenberger, 139 Ohio St. 273, the Supreme Court had before it the question of whether the above statute, which by its terms affected a judge holding office at the time of a census, was unconstitutional when so applied. The court held as indicated by the third branch of the syllabus:

“3. A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during his term by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court “shall not be diminished or increased during his term of office.”

The basis of the court’s reasoning was that the formula under which the judge’s compensation was computed had been enacted into law before his term began. His salary, therefore, was not changed by legislative act during his term; and the majority of the court held that it was only change by the legislature which was forbidden by the constitution.

By reason of the increased population indicated by the 1950 census and the reasoning of the *Mack* case, the salary of the common pleas judge of your county was increased from \$6,150 to \$6,456.80. At the same time the amount paid to the Probate-Juvenile Judge under the provisions of Section 1639-7a was increased so that his total compensation from all sources equalled \$7,456.80. The reasoning under which this latter increase was allowed to the Probate-Juvenile Judge is fully spelled out in my Opinion No. 865 rendered to the Hon. Stanley N. Husted, Prosecuting Attorney of Clark County, under this same date.

Following the 1950 federal census one other change occurred in your county, prior to the passage of the acts which gave rise to your inquiry. I am informed that on or about May 31, 1951, a new Probate-Juvenile Judge was appointed to fill a vacancy which had occurred. This new judge received the same total salary, \$7,456.80, which his predecessor had re-

ceived. But the separate amounts which he received from various funds making up that total were changed. That change came about because of the following situations:

Section 2992, General Code, provides in part as follows:

“Each probate judge shall receive * * * dollars for each full * * * thousand of the population of the county, *as shown by the last federal census next preceding his election; * * **”.

(Emphasis supplied.)

Section 5348-10a, General Code, provides in part as follows:

“In lieu of fees for services performed by him in inheritance tax cases, each probate judge shall receive annually * * * per capita for each full * * * thousand population of the county * * * *as shown by the last federal census next preceding his election.* * * *”

(Emphasis supplied.)

The difference between this emphasized language and the language governing common pleas judges, Section 2252, *supra*, is apparent. Section 2252 refers to the *latest* federal census; the two statutes above refer to the *last* census preceding election. Under these statutes, therefore, the changes brought about by the 1950 census did not affect the salary of a probate judge where term had begun prior to April 1, 1950, as in the case of the former judge in your county.

Under the reasoning and holding of the Supreme Court in the case of *State, ex rel. Glander v. Ferguson*, 148 Ohio St. 581, the new juvenile-probate judge who took office May 31, 1951, is considered as beginning a new term. As a result, the changes brought about by the 1950 census affect the compensation which he receives under the provisions of Sections 2292 and 5348-10a. In fact that compensation was increased from \$6,675.00 received by his predecessor, to \$6,835.00 as set out in your request. Since the total amount which he could receive from all sources was set at \$7,456.80 at the time he took office, the amount which he receives under the provisions of Section 1639-7a is somewhat less than the amount received from that source by his predecessor.

We are thus brought to the exact question which you have raised: By the provisions of House Bill No. 288 of the 99th General Assembly, effective September 18, 1951, Section 2251, General Code, was amended; and by the provisions of House Bill No. 332, effective September 14, 1951, Section 2252, General Code, was amended. The amendment of Section

2251 continued the increased pay to common pleas judges given in 1947, which increase has not yet become effective in your county; and the amendment of Section 2252 increased the compensation paid under that section to common pleas judges. These statutory increases cannot affect the incumbent common pleas judge, but the judge who takes office January 1, 1953, will receive \$11,435.20 under the new formula. Your question is whether the incumbent probate-juvenile judge can receive the balance of the \$1,500.00 provided by Section 1639-7a, General Code, not now received by him, on the theory that a common pleas judge elected or appointed subsequent to September 18, 1951, would receive an increased amount.

It is my opinion that the Probate-Juvenile Judge cannot legally be paid the increase in question. I base this opinion squarely upon the reasoning of the Supreme Court in the Mack case, *supra*. In that case, as in the situation which is presented here, the formula under which the judge's compensation was computed had been established by the legislature before the judge's term began. The increased compensation in the Mack case was held to be constitutional for the reason that it came about, not by any further action by the General Assembly, but through the operation of the pre-existing formula and an increase in population. In the instant case, although we are concerned with a pre-existing formula, *one of the factors of that formula has been changed by the General Assembly during the term of the incumbent judge.*

The factor in the formula which has been changed in the compensation of common pleas judges. No one would argue that the present statutory change could affect an incumbent common pleas judge; and for the same reason no one would argue that a change in Sections 2992 or 5348-10a could affect an incumbent probate judge. Since the General Assembly cannot directly change the salary of an incumbent probate judge, it would be a sophistry for me to hold that it can change that salary indirectly by changing one of the factors by which it is computed.

That this was the basis of the reasoning in the Mack case, is clear from the language of the opinion set out in 139 Ohio St. at p. 279:

“The General Assembly, under grant of power conferred by Sections 1 and 20 of Article II of the Constitution, has the sole authority to fix the salaries and compensation of the judges of the common pleas court. No other officer or department of government has any authority or control over such salaries or compensation. The command in the Constitution, ‘shall not be diminished,

or increased,' is in the passive voice, denoting that the subject (in this case compensation) of which it is the predicate, is not to be acted upon. *Acted upon by whom and when? Clearly, by the Legislature and during the "term."* The only other possible construction is to hold that the Constitution prohibits the Legislature from acting on (increasing or decreasing) compensation prior to the term, if that action fixes a sum, or a standard or basis of computation whereby compensation may vary in amount during the term. Past experience in this state discredits such construction." (Emphasis supplied.)

And again at pp. 282-283 :

"* * * The inhibition, according to the language of the Constitution thus directed to the Legislature, is that it shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that basis, within the contemplation and understanding of both the judge and the people who elect him, is fixed, certain and unchangeable during his term. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits."

In the view which I take of the question here presented, it makes no difference whether a new common pleas judge were to be appointed after September 18, 1951, to fill an unexpired term, or one elected for a new term. The solution does not turn upon what the common pleas judge of your county actually is getting or could get if beginning a new term, but on the fact that the incumbent probate judge cannot be affected by legislative action during his existing term.

The following argument has been presented to me in support of the contention that the increase should be paid to incumbent Probate-Juvenile Judges: Section 1639-7a appropriates \$1,500.00 to each affected county to be used in paying the juvenile judge's salary and in the maintenance of the juvenile court. The exact distribution between the two functions is determined by a certain formula. Since the General Assembly has not undertaken to change the \$1,500.00 figure, and since the money will be paid to the county anyway, the General Assembly is not actually changing the salary when it changes the method of distributing the \$1,500.00 already provided by pre-existing law.

It is true that this factor was not present in the Mack case, and to that extent this case is different. However, it is my opinion that the difference is one of degree and not of law. The court in the Mack case was careful to point out, over the able dissent of two of its members, that the constitutional inhibition against changing salaries was directed *to the legislature*, not to the fiscal officer who paid the salary or to the judge who received it. Consequently, if the legislature varies the formula, even within previously established limits, it is violating the Constitution. It is true that the violation is not of so severe a degree when the legislature can only give or take away within a \$1,500.00 range, but the principle of law remains the same.

In view of the above it is therefore my opinion that House Bill No. 288 and House Bill No. 332 of the 99th General Assembly, amending Sections 2251 and 2252, General Code, do not affect the limitation provided by Section 1639-7a, General Code, upon the combined salaries, allowances and compensation of a probate-juvenile judge whose term of office began prior to the effective dates of said amendments.

Respectfully,

C. WILLIAM O'NEILL
Attorney General