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JUSTICE OF PEACE—SALARY BY FORMULA—AMOUNT DEPENDS IN SUBSTANTIAL PART UPON FEES AND COSTS COLLECTED FROM JUDGMENT DEBTORS OR IN SUBSTANTIAL PART UPON FIXED DOLLAR ALLOWANCE FOR EACH CASE DOCKETED AND NUMBERED—NOT AUTHORIZED BY LAW—SECTIONS 1907.32, 1907.47 RC.

SYLLABUS:

The fixing of the salary of a justice of the peace, under the provisions of Section 1907.47, Revised Code, by a formula whereby the amount thereof depends in substantial part upon the fees and costs collected from judgment debtors, as provided in Section 1907.32, Revised Code, or in substantial part upon a fixed dollar allowance for each case docketed and numbered, is not authorized by law.

Columbus, Ohio, May 9, 1956

Hon. Harold D. Spears, Prosecuting Attorney
Lawrence County, Ironton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I have been asked by the Auditor of Lawrence County for an opinion as to the legality of payments to Justices of the Peace in this County under a plan recently proposed by the County Commissioners of this County for the compensation of such Justices by reason of Section 1907.47, Revised Code.

"The Commissioners proposed that each qualified Justice of the Peace in Lawrence County receive a 'salary' of ninety per cent of the costs and fees that such Justice transmits to the General Fund of the County but that in no event shall a Justice receive less than \$10.00 per month nor more than \$125.00 per month. It is proposed that the other ten per cent of such collections be used for the purchase of supplies, forms and equipment.

"In view of the apparent lack of direction afforded by the statute as to the formula or basis to be employed in the matter of fixing an annual salary for Justices of the Peace under the new act, and by reason of the widespread and varied efforts now being made throughout the State to devise adequate means to comply with said law, it is felt that a further clarification of this problem would be beneficial and we would, therefore, appreciate and do, therefore, respectfully request that you advise whether in your opinion a system such as the one hereinbefore described, purporting to compensate Justices of the Peace by returning a percentage of the fees and costs transmitted by such Justice to the general fund of a county and placing a minimum and maximum monthly rate of compensation is permissible under the provisions of the new Justice of the Peace Act, 1907.01 et seq., Revised Code, requiring that Justices of the Peace receive a 'fixed annual salary.'

"Your opinion is requested also on the legality of payment of a salary to justices consisting of a fixed dollar amount per annum, to include an allowance for supplies, forms and equipment not otherwise provided by law, plus an additional fixed amount of \$5.00 for each case docketed and numbered on the records of the justice concerned."

A question virtually identical with that you have first raised has since been presented in an inquiry by the Hon. John H. Barber, Prosecuting

Attorney of Fulton County, and both such questions may be disposed of in a single opinion.

Section 1907.47, Revised Code, as enacted effective September 30, 1955, reads as follows:

“The justices of the peace shall receive a *fixed annual salary* and such salary shall be determined by the board of county commissioners of the county in which such office of the justice of the peace is situated, and may include a fixed annual allowance for supplies, forms, and equipment.” (Emphasis added.)

In the enactment of the salary provision in Section 1907.47, Revised Code, the legislature was quite evidently attempting to cure a defect in the Ohio judicial system which was noted by the Supreme Court of the United States nearly thirty years ago in *Tumey v. Ohio*, 273 U. S., 510; 73 L. Ed., 749, 1927. The headnotes (L. Ed.) in that decision read in part as follows:

“1. Officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided.

“2. An accused is unconstitutionally deprived of due process of law if his liberty and property are subjected to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him.

“3. One accused of violating the liquor law is unconstitutionally deprived of due process of law by being subjected to trial before a mayor the sole source of whose costs will be the fine imposed upon accused, unless the costs are so small that they may properly be ignored as within the maxim ‘de minimis non curat lex.’

“4. The possibility of a mayor receiving \$12 as costs for conviction of one accused of violating the liquor law, and whose emoluments from such source amount to about \$100 per month, in addition to his salary, is not an interest so minute, remote, trifling, or insignificant that his sitting as judge in the case will not deprive accused of due process of law.

“* * *

“11. An accused has a right to an impartial judge regardless of the evidence against him, and may halt the trial by objections seasonably raised because of the disqualification of the judge.”

Section 1907.32, Revised Code, relative to fees to be collected in the courts of justices of the peace in criminal cases, was amended, effective

January 1, 1956, by the same enactment (Amended Senate Bill No. 319, 101st General Assembly) in which the "salary provision" here in question was adopted. This section provides in part:

Section 1907.32

"For their services in criminal proceedings, justices of the peace shall tax as costs and *collect from the judgment debtor* the following fees: * * *"
(Emphasis added.)

It is clear from the language emphasized above that if there be no "judgment debtor" in a criminal case in a justice of the peace court, no fees or costs of any kind can be collected under authority of this section. I am not aware of any other statutory provisions purporting to provide for the collection of fees or costs in such cases, and so conclude that no such collections may be made in criminal cases where judgment is rendered for the defendant.

In this situation it is obvious that where a justice expects to receive, as "salary," ninety per cent of the fees and costs collected in cases disposed of in his court, such justice has a "direct and substantial pecuniary interest" in reaching a conclusion against the defendant within the meaning of the rule in the *Tumey* case. Accordingly, because it was the evident legislative intent, in making the provision for a "fixed annual salary" for justices, to avoid such a pecuniary interest, I am impelled to the conclusion that the arrangement described in your inquiry is not authorized by law.

The term "fixed salary" is defined in *Black's Law Dictionary* as follows:

"One which is definitely ascertained and prescribed as to amount and time of payment, and does not depend upon the receipt of fees or other contingent emoluments; not necessarily a salary which cannot be changed by competent authority."

The term "fixed," as used in connection with "salary" or "compensation," is ordinarily used "in contradistinction to the fee system." See *17 Words and Phrases*, 115 et seq., and cases there cited.

The term "salary" is commonly defined as a "fixed periodic payment for services, dependent on time, and not on the amount of services rendered." *38 Words and Phrases*, 48. This definition was approved in my Opinion No. 978, *Opinions of the Attorney General for 1951*, p. 825, in which the distinction between "salary" and "compensation" was noted.

In view of the evident legislative purpose, noted above, in changing the scheme of compensation of justices of the peace I am impelled to the conclusion that the term "fixed annual salary" as used in Section 1907.47, Revised Code, is used "in contradistinction to the fee system"; and I regard an allowance of a specified sum for each case docketed and numbered as definitely amounting to a "fee system."

In specific answer to these inquiries, therefore, it is my opinion that the fixing of the salary of a justice of the peace, under the provisions of Section 1907.47, Revised Code, by a formula whereby the amount thereof depends in substantial part upon the fees and costs collected from judgment debtors, as provided in Section 1907.32, Revised Code, or in substantial part upon a fixed dollar allowance for each case docketed and numbered, is not authorized by law.

Respectfully,

C. WILLIAM O'NEILL

Attorney General