

3020.

FEDERAL CENSUS—OFFICIALLY CERTIFIED AUGUST 22, 1930—SUCH DATE GOVERNS IN DETERMINING SALARIES OF COUNTY OFFICIALS—APPELLATE JUDGE APPOINTED TO FILL VACANCY THEREAFTER, PAID ACCORDINGLY.

SYLLABUS:

1. *The 1930 federal census was officially certified and announced for the purpose of determining salaries payable from county treasuries on August 22, 1930.*

2. *A person appointed to fill a vacancy in the office of appellate judge after the official certification and announcement of the 1930 federal census is entitled to be paid on the basis of the population as shown by such census.*

COLUMBUS, OHIO, March 5, 1931.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

“The County Auditor of Licking County has asked me for an opinion on the following situation, and I am, in turn, requesting the benefit of your opinion, as a number of counties are affected thereby:

On December 3, 1930, the Governor appointed a Judge of the Court of Appeals of the Fifth Judicial District of Ohio, to fill a vacancy. That appointee qualified on December 6th, 1930.

Question: Should said appointee's salary be computed and paid on the basis of the 1920 census, or the 1930 census?”

In Opinion No. 2074, rendered July 9, 1930, it was stated in the second paragraph of the syllabus that:

“Should appointments be made at the present time to fill vacancies in the office of common pleas judge before the official certification and announcement of the 1930 census, such appointees are entitled to the annual compensation based on the 1930 census, provided they are not sworn in until after official certification and announcement of said census.”

In said opinion it was pointed out that the constitutional inhibition against the change of salary of a public officer during his existing term (see Art. II, Sec. 20, Ohio Constitution) refers to the incumbent of the office rather than the time of the incumbency of the office, and that therefore an appointee to fill a vacancy in a public office is not prohibited from receiving an increase merely because he was appointed to fill a vacancy in a term which began before the 1930 census was completed. The authorities were carefully reviewed on this point in that opinion, and it is therefore unnecessary to again discuss them here. While this ruling dealt with appointments to fill vacancies in the office of judge of a common pleas court, nevertheless, the same principle applies to persons appointed to fill vacancies in the office of appellate judge.

In Opinion No. 2856, rendered January 25, 1931, it was determined that there was a certification and announcement of the 1930 census for the purpose of fixing salaries payable from county treasuries on August 22, 1930. On that

date the Director of the Census at Washington released the population figures for Ohio by counties.

Said opinion further pointed out that section 3498, General Code, which provides that thirty days after the proclamation of population by the Secretary of State cities shall become villages or *vice versa*, has no application to counties. I am informed that the Secretary of State sent out on December 30, 1930, to all county auditors a copy of the 1930 census figures by counties. However, this has no legal effect in determining the date of the completion of the 1930 census so as to affect salaries payable from the county treasuries.

Since the appellate judge concerned in this opinion was appointed on December 3, 1930, and took office on December 6, 1930, which was some time after August 22, 1930, I am of the opinion that his salary should be based on the 1930 census figures of the counties in his appellate district.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3021.

COMMUTATION OF LIFE SENTENCE—FIXED BY GOVERNOR TO EXPIRE AT THE END OF TERM OF YEARS CERTAIN—PRISONER NOT ENTITLED TO FURTHER DIMINUTION FOR GOOD BEHAVIOR.

SYLLABUS:

Where the expiration of a sentence in the commutation of a life sentence is fixed by the governor to be "at the end of eleven years from beginning of sentence," the provisions of section 2163, General Code, are not applicable to the commuted sentence, and the prisoner is not entitled to any diminution for good behavior.

COLUMBUS, OHIO, March 5, 1931.

HON. JOHN MCSWEENEY, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, which reads as follows:

"Section 2163 G. C. (O. L. 88 v. 556) provides that a person confined in the penitentiary for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, shall be entitled to a certain diminution of his sentence.

We respectfully request your opinion as to whether or not a prisoner sentenced for life and whose sentence has been commuted is entitled to a further diminution of sentence under this section.

Specifically, one J. S. was on May 23, 1920, sentenced to the Ohio Penitentiary for life on a charge of Murder, First Degree—Mercy. On January 12, 1931, the Governor granted him a 'commutation at end of eleven years.' This prisoner's sentence will not expire under this commutation until May 22, 1931, provided there is no further diminution allowed him."

Your inquiry raises the question of whether or not time allowance for good