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MUNICIPAL COURT—SUBSTITUTE JUDGE—WHERE APPOINTED TO ACT AS JUDGE, COMPENSATION PAID SHOULD NOT BE DEDUCTED FROM COMPENSATION OF REGULAR JUDGE—SECTION 1579-858 G. C.

SYLLABUS:

Where a substitute judge is appointed to act as judge of the Municipal Court of Ashtabula pursuant to the provisions of Section 1579-858, General Code, the compensation paid to him should not be deducted from the compensation of the regular judge of such court.

Columbus, Ohio, December 19, 1940.

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

Gentlemen:

In your recent request for my opinion you ask whether the compensation of a substitute judge of the Municipal Court of Ashtabula, appointed pursuant to the provisions of Section 1579-858, General Code, should be deducted from the salary of the regular judge. With your communication you enclosed a letter from the Solicitor of the City of Ashtabula from which it appears that the present judge of the Municipal Court was appointed by the Governor to fill a vacancy occasioned by the resignation of his predecessor. Such appointee of the Governor was actively engaged in the practice of law prior to his appointment and was counsel in a great many cases pending in the Municipal Court of Ashtabula and for such reason is incapacitated from sitting as judge in those cases. By reason of this situation, it is suggested by the Solicitor that it will be necessary frequently to appoint a substitute judge of the court.

Section 1579-815, General Code, provides as follows:

“Said municipal judge shall receive such compensation, payable out of the treasury of Ashtabula county not less than fifteen hundred (\$1,500.00) dollars per annum, payable in quarterly installments, as the county commissioners may prescribe and out of the treasury of Ashtabula township, not less than five hundred dollars (\$500.00) per annum, payable in quarterly installments, as the

township trustees may prescribe, and such further compensation, not less than two thousand (\$2,000.00) dollars per annum, payable in monthly installments out of the treasury of the city of Ashtabula, as the council thereof may prescribe."

Your communication raises the question as to whether the compensation payable to the municipal judge pursuant to this section should have deducted therefrom the compensation paid to a substitute judge appointed under the provisions of Section 1579-858, General Code, which reads as follows:

"Whenever the incumbent of any office created by this act shall be temporarily absent or incapacitated from acting, the judge shall appoint a substitute who shall have all the qualifications required of the incumbent of the office. Such appointee shall serve until the return of the regular incumbent or until his incapacity ceases. In case said judge shall be incapacitated from sitting in any case, or by reason of absence or inability be unable to attend sessions of said court, the president of the council of the city may appoint some attorney having qualifications required by this act, to act in his stead until said judge is able to resume his position, provided that the compensation of any such appointee shall be the same as that of the incumbent of the office for the time of such temporary appointment, *and provided further that the judge and each officer and employee of said court shall be entitled to an annual vacation of two weeks without deduction in compensation.*"

(Emphasis mine.)

You will note that this section provides that where the municipal judge is incapacitated from sitting in any case or by reason of absence or inability is unable to attend sessions of the court, the President of Council of Ashtabula may appoint an attorney having the qualifications required by the Act to act as municipal judge during the regular judge's incapacity, absence or inability to attend, and that such appointee shall be paid at the same rate as the incumbent during the period of such temporary appointment. It is further provided that the judge and each officer and employe of the court shall be entitled to an annual vacation of two weeks without deduction in compensation.

A judge of a court of record is a public officer. In 32 O. Jur., 890, Section 29, it is said in part:

"There can be no question that a judge of a court of record is a public officer because the nature of his duties makes him one of the agencies for administering one of the three great powers of government, apportioned by the Constitution between the three administrative departments of the state—the legislative, the executive, and the judicial."

An officer is entitled to his salary as an incident to the office and not necessarily because he performs the functions thereof. Thus, in 22 R. C. L., 529, it is said that "the right of an officer to his fees, emoluments, or salary is not impaired by his occasional or protracted absence from his post, or even by his neglect of duty, or failure to perform substantial services." Likewise, the rule is stated in 32 O. Jur., 1017, Section 156:

"As a general rule, the right of an officer to his fees, emoluments, or salary is not impaired by his occasional or protracted absence from his post, or even by his neglect of duty or failure to perform substantial service. The same is true of an absence granted on account of illness; in the absence of a statutory provision directing a reduction from the salary, no such deduction will be made."

The rule is also well stated in 46 C. J., 1014, as follows:

"The person rightfully holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. * * * The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office; hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office. * * *"

It is therefore clear that no deduction should be made from the compensation paid to the regular municipal judge on account of any compensation paid to his substitute unless some provision of law plainly requires such deduction. It is likewise clear that Section 1579-858, General Code, supra, does not expressly provide that the compensation paid to the substitute judge shall be deducted from the compensation of the regular municipal judge, nor do I believe that the language of such section with respect to vacation, which I have emphasized, requires any such conclusion by implication.

I have heretofore pointed out that the rule of the common law is that the compensation of an officer is an incident of his office and the person holding such office is entitled thereto, even though he fails to perform the duties of the office. Statutes should not be regarded as changing a well established rule of the common law unless the language used therein clearly requires such conclusion. Thus, in *State, ex rel. Morris v. Sullivan*, 81 O. S., 79, at pages 95 and 96, it was said by Crew, C. J.:

“* * * The statute must be read and construed in the light of the common law in force at the time of its enactment, and the legislature will not be presumed or held to have intended the repeal or modification of a well settled rule of the common law then in force, unless the language employed by it clearly imports such intention.”

Also I find the rule stated in 59 C. J., 1040, as follows:

“* * * Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated, either by express terms or by necessary implication from the language used. * * *”

When these rules of construction are applied, it is clear that Section 1579-858, General Code, *supra*, does not require that the compensation paid to a substitute judge of the Municipal Court of Ashtabula shall be deducted from the compensation of the regular judge. An examination of these statutes does not disclose any other provisions which bear upon the question.

I am therefore of the opinion that where a substitute judge is appointed to act as judge of the Municipal Court of Ashtabula pursuant to the provisions of Section 1579-858, General Code, the compensation paid to him should not be deducted from the compensation of the regular judge of such court.

Respectfully,

THOMAS J. HERBERT,
Attorney General.