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COMMON PLEAS COURT JUDGE—RECEIVED MONTHLY PAY FROM COUNTY VOUCHERS BASED ON 1930 FEDERAL CENSUS—TERM BEGAN PRIOR TO APRIL 1, 1940, CONTINUED THROUGH DECEMBER, 1941 — COUNTY PAID DIFFERENCE BETWEEN AMOUNT SO RECEIVED AND SALARY JUDGE WAS ENTITLED TO RECEIVE UNDER 1940 CENSUS—SECTION 2252 G. C.—COUNTY WITHOUT POWER TO RECOVER ADDITIONAL AMOUNT PAID JUDGE—BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—NOT AUTHORIZED TO MAKE FINDING FOR RECOVERY OF SUCH PAYMENT—SECTION 286 G. C.

SYLLABUS:

Where a judge of the common pleas court, serving a term which began prior to April 1, 1940, and continued through December, 1941, presented vouchers for and received monthly from the county a salary based upon the 1930 federal census, and thereafter was paid by the county the difference between the amount so received and the salary to which he was entitled under the 1940 census, as provided in section 2252, General Code, the county would be without power to recover from said judge the additional amount so paid to him, and the Bureau of Inspection and Supervision of Public Offices is not authorized, under the provisions of section 286, General Code, to make a finding for the recovery of such payment.

Columbus, Ohio, October 25, 1943.

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

Gentlemen:

I acknowledge receipt of your communication requesting my opinion, reading as follows:

> "During the recent audit of the office of Jefferson County, it was noted that the Common Pleas Judges drew additional compensation as provided by Section 2252, General Code, based on the 1930 census for the period April 1, 1940, to December 31, 1941.
>
> Computed on this basis, the annual compensation was $3,032.28, which was paid to each of the two judges at the rate of $252.69 per month.
>
> Beginning January 1, 1942, their compensation, based on the 1940 census, amounts to $3,425.16, and is paid at the rate of $285.43 per month.
>
> Later, payments were made to each of the judges in the amount of $698.04, which amount represents the difference between the amount drawn each month during the period from April 1, 1940, to December 31, 1941 ($252.69 per month) and what the amounts would have been had the additional compensation been paid as computed on the 1940 census.
>
> As disclosed by the copy of the examiner's report and the attached correspondence, a finding for recovery for $698.04 was made against each of the judges.
>
> May we respectfully request your opinion on whether the Bureau of Inspection and Supervision of Public Offices was correct in making the findings for recovery based on the facts in these cases."

As your communication does not set out the facts upon which the answer to your question depends, I must recapitulate briefly the substance of the correspondence attached to your letter which passed between your examiner and the two judges concerned. I quote the following from the examiner's findings:

> "While it is acknowledged that Judges H. and W. could have drawn the increased compensation, as provided in section 2252, G. C., based on the 1940 census, each month during the twenty-

one month period (April, 1940, to December, 1941), we hold that the payment of $698.04 to each of the judges in the year 1942 constitutes an illegal expenditure of public funds for the following reasons:

> Each and every month during the twenty-one month period previously referred to payroll vouchers were presented to the county auditor, containing the following statement in compliance with Section 2988, G. C., and bearing the names 'A.L.H——' and 'C.A.W——':
>
> 'In full for services as Judge Common Pleas Court for month ending ————.'
>
> It is held that these vouchers constituted a waiver by Judges H. and W. of an additional salary that might be due them at the time the vouchers were presented to the county auditor's office."

Later on in the report the examiner concludes by saying:

> " * * * Judges H. and W. waived their rights to the increase in salary based on the 1940 Federal Census, by presenting vouchers for the lesser amounts and accepting and cashing the warrants tendered in payment of the salary vouchers and that said presentment and acceptance on their part was a voluntary act, and done without protest."

The letter signed by the two judges flatly denies that they or either of them at any time signed a voucher such as is mentioned in the examiner's findings. I quote the following from their letter:

> "Upon receipt of your finding we investigated the correctness of your assumption of facts and we find the same to be absolutely incorrect and untrue for the reason that at no time did we, or either of us, sign a voucher or statement on which was the notation referred to by you, to-wit:
>
> 'In full for services as Judge Common Pleas Court for month ending ————.'
>
> nor did anyone sign such a statement for or on our behalf. We further advise you that according to our county auditor there is no such record in our county as referred to by you and on which you base your finding either signed by us or anyone else."

Endorsed on this letter is the following statement by the county auditor:

"August 9, 1943.

I have read the above letter and find the facts stated therein, so far as the same pertain to records in my office, to be true.

(Signed) E. Y. McDougal
Auditor Jefferson County, Ohio."

This makes a direct issue of fact as to the signing of the salary vouchers by the judges. Later on in the correspondence the examiner states that his finding was not based entirely on the presentation of the vouchers but also on the acceptance of the salary payments. The examiner's letter reads in part as follows:

"Whether there were or were not vouchers presented would be immaterial as findings have been made and approved on the basis of the fact that auditor's warrants were accepted and cashed. In fact, a finding was so made by the writer, based solely on the acceptance of warrants on my last assignment."

I do not find any statement in the examiner's report or correspondence to the effect that the salary warrants which were accepted and cashed by the judges contained any recital or admission that the amounts paid were in full of their salaries.

I would not consider it within my province to decide an issue of fact thus raised between the examiner and the judges whose salary is under criticism. Assuming, however, that the vouchers were issued to the judges as claimed by the examiner and that payments of salary were made pursuant thereto for the period from April 1, 1940, to December 31, 1941, on the basis of the 1930 census, it would appear clear that the judges did not then receive the salary to which they were entitled. This conclusion would be strictly in accord with the first branch of the syllabus of my opinion No. 4967, rendered March 28, 1942, Opinions Attorney General for 1942, p. 214, where it was said:

"1. Under the holding of the Supreme Court in the case of The State, ex rel. Mack, Judge, v. Guckenberger, Aud., 139 O. S. 273 (1942), a Common Pleas Judge who took office on January 1, 1929, to serve a term extending to January 1, 1935, should have been paid by the county, in so far as the county's share of his salary is concerned, on the basis of the 1930 Federal census."

It should be noted in passing that the above quoted syllabus is inaccurately worded in that the salary which was to be paid on the basis

of the 1930 federal census should have been limited to the period beginning April 1, 1930, that being the date when the population of the county, according to the new census, was ascertained.

The case of State ex rel. Mack v. Guckenberger, Auditor, 139 O. S. 273, and referred to in the opinion above quoted, involved a question of judicial salary precisely identical with the situation presented in your communication, and the judgment of the court was reflected in the third branch of the syllabus, which reads as follows:

> "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 court had under consideration Section 2252 of the General Code, which in its present form became effective August 10, 1927, 112 O. L., 345, and which reads 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 three cents per capita for the first fifty thousand of the population of the county in which he resided when elected, or appointed, as ascertained by the latest federal census of the United States, and four cents per capita for the population of such county in excess of fifty thousand and not in excess of one hundred thousand, and four and one-third cents per capita for the population of such county in excess of one hundred thousand and not in excess of one hundred and eighty thousand, and one-third cent per capita for the population of such county in excess of one hundred and eighty thousand. Such additional annual compensation shall not be more than nine thousands dollars, payable monthly from the treasury of such county upon the warrant of the county auditor."

The court held that the relator who had been elected in 1938 as common pleas judge for a term of six years beginning January 3, 1939, was entitled for the month of October, 1941, to the increased salary based on the 1940 federal census, and a writ of mandamus was awarded requiring the auditor to issue his warrant accordingly.

It follows that the judges named in your communication, who were in office prior to the taking of the 1940 census, were entitled from and after

April 1, 1940, to the increase of salary brought about by the increased population of the county as shown by that census.

The question of waiver or estoppel, to which I shall shortly refer, did not enter into that case. My opinion, however, above referred to, proceeds as shown by the second branch of the syllabus to deal with the question of a waiver by the official, in that for a period of many months he presented his vouchers and received and receipted for his salary based upon an earlier census, and it was held that he thereby waived his right to recover later the balance of the salary to which the new federal census entitled him.

Therefore, if the judges involved in your inquiry were now seeking to obtain or to recover the increased salary to which they were entitled for the period from April 1, 1940, to December 31, 1941, they would, under the conclusion expressed in the second branch of the syllabus of the opinion aforesaid, and assuming that the facts were as set forth by your examiner, be barred from such recovery by virtue of their waiver.

The case of State ex rel. Hess v. City of Akron, 132 O. S. 305, was relied upon by your examiner as justification for making the finding in question. This case was largely the basis of my opinion No. 4967. In that case, which was in mandamus, it appeared that the relator was one of several deputy bailiffs in the municipal court; that during a certain period of financial stringency the amount allowed by the city council for the payment of salaries of deputy bailiffs was insufficient to meet the payroll of the bailiffs in office, and that the relator, Hess, agreed to accept a less amount than his stipulated salary, and did thereafter accept monthly a reduced amount and receipted therefor as being in full payment. The court, by Weygandt, C. J., quoted from the answer relative to this agreement and dwelt at some length on the fact that the relator, for a period of many months, presented his vouchers received payment and receipted on the payroll sheet, which expressly recited either that this was "am't due" or that he "received pay in full to date". The court held that this conduct was wholly inconsistent with any theory except the waiver, and refused the writ prayed for. That case might well have been decided upon the basis of the express contract for which there was an apparent consideration. I do not feel justified in extending the principle laid down in that case to the point of compelling the restitution by an officer of salary to which he was lawfully entitled and which he has received, merely because he had at one time acted so as to constitute a waiver of his right to enforce payment.

I do not deem it necessary, however, for the purpose of reaching a

conclusion in this matter, to determine the issue of fact presented by the correspondence between the examiner and the judges. Admitting that they may have waived the right to insist upon or to enforce payment to them in a subsequent year of the salaries to which they were entitled in 1940 and 1941, by reason of the increase in the population of the county, it does not follow that your department has the right now to make a finding against them for a recovery of the money which the county has paid to them covering this increase of salary.

In my opinion above referred to, I quote from 40 O. Jur., p. 1234, the distinction between estoppel and waiver:

> "The terms 'estoppel' and 'waiver' are often treated as interchangeable, and it has been said that waiver is only another name for estoppel. Undoubtedly they are closely related, and this is particularly true as to implied waiver. Nevertheless, it is inaccurate to use them as convertible terms as they rest upon different bases. As stated above, a waiver is an intentional relinquishment, either expressly or constructively, of a known right. An estoppel arises when one is concerned in or does an act which in equity will preclude him from averring anything to the contrary, as where another has been innocently misled into some injurious change of position.
>
> * * * As a general rule, a person may waive all personal rights or privileges to which he is individually entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided the waiver does not constitute a violation of public policy."

It could not, of course, be claimed in the present case that the elements of estoppel arise because there are no facts which would indicate that the county was in any way misled or induced to change its position or suffered a detriment by reason of the waiver on the part of the judges. 67 Corpus Juris, p. 313, defines waiver as a "legal defense", citing Lutheran Church v. Rooks Evangelical Church, 316 Ill. 196, where it was held:

> "Waiver is a legal defense and is intentional relinquishment of a known right; both knowledge of right and an intent to relinquish being essential."

An examination of "Words and Phrases" shows numerous definitions of very similar tenor, all of them based upon the assumption that the party waiving had a legal right and that he by his action gave up the right to enforce it. We are confronted here, however, not by the case of an officer undertaking to enforce a right which he is said to have waived, but one in which the officer has, by the voluntary action of the county, obtained

payment of the salary which was his right and which it is now sought to compel him to pay back. I cannot see that the principle of waiver which might deny one the right to *enforce payment* of something to which he was originally entitled can be extended so as to permit the county to force him to refund what it has already paid him.

The principle laid down by the Supreme Court in the case of State ex rel. Hunt v. Fronizer, et al., 77 O. S. 7, while based on dissimilar facts, appears to me to have force as applied to the situation under consideration. That was a case where the county made a contract for building a bridge and failed to obtain the certificate of the county auditor required by law as a condition precedent to the making of a valid contract. The statute contained a provision that "all contracts, agreements or obligations and all orders or resolutions, entered into or passed contrary to the provisions of this section *shall be void.*" The bridge, however, had been constructed and was accepted and in use by the county, and had been partially paid for. The prosecuting attorney, acting under a statute which gave him the right and made it his duty to bring action for recovery of funds which had been misapplied or illegally drawn out of the county treasury, brought suit to recover the money paid to the contractor. The holding of the court was as follows:

> "Section 1277, Revised Statutes, which authorizes a prosecuting attorney to bring action to recover back money of the county which has been misapplied, or illegally drawn from the county treasury, does not authorize the recovery back of money paid on a county commissioners' bridge contract fully executed but rendered void by force of section 2834b, because of the lack, through inadvertence, of a certificate by the county auditor that the money is in the treasury to the credit of the fund, or has been levied and is in process of collection, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of such contract for such work, nor any claim of effort to put the contractor in statu quo by a return of the bridge or otherwise, the same having been accepted by the board of commissioners and incorporated as part of the public highway."

In that case it is clear that the contractor could not have recovered on the contract for constructing the bridge. Lancaster v. Miller, 58 O. S. 558; Bridge Co. v. Campbell, 60 O. S. 406; Wellston v. Morgan, 67 O. S. 219. But the payment having been made, the court declared that it would leave the parties where it found them.

In specific answer to your question, it is my opinion that where a judge of the common pleas court, serving a term which began prior to April 1, 1940, and continued through December, 1941, presented vouchers

for and received monthly from the county a salary based upon the 1930 federal census, and thereafter was paid by the county the difference between the amount so received and the salary to which he was entitled under the 1940 census, as provided in section 2252, General Code, the county would be without power to recover from said judge the additional amount so paid to him, and the bureau of inspection and supervision of public offices is not authorized, under the provisions of section 286, General Code, to make a finding for the recovery of such payment.

Respectfully,

THOMAS J. HERBERT,
Attorney General.