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1. "COMPENSATION"—"SALARY"—WORDS USED INTERCHANGEABLY IN ARTICLE II, SECTION 20, CONSTITUTION OF OHIO—WHEN GENERAL ASSEMBLY HAS FIXED COMPENSATION OF ANY OFFICER, EITHER BY WAY OF SALARY OR FEES, ANY CHANGE IN COMPENSATION, EFFECTED BY THE ENACTMENT, AMENDMENT OF OR REPEAL OF ANY LAW, SHALL NOT OPERATE TO INCREASE OR DECREASE COMPENSATION OF SUCH OFFICER DURING EXISTING TERM, UNLESS OFFICE BE ABOLISHED.

2. COUNTY COMMISSIONER WHO WAS IN OFFICE PRIOR TO REPEAL OF SECTION 6502, G. C., BY HOUSE BILL 313, 95 GENERAL ASSEMBLY, EFFECTIVE SEPTEMBER 3, 1943, IS NOT AFFECTED DURING HIS THEN EXISTING TERM—ENTITLED TO COMPENSATION PROVIDED BY SECTION 6502 IN ADDITION TO COMPENSATION PROVIDED BY SECTION 3001, G. C.

SYLLABUS:

1. The words "compensation" and "salary" as used in Section 20 of Article II of the Constitution, are used interchangeably, and when the General Assembly pursuant to the authority of said section, has fixed the compensation of any officer, whether by way of salary or fees or both, any change in such compensation effected by the enactment, amendment of or repeal of any law, shall not operate to increase or decrease the compensation of such officer during his existing term unless the office be abolished.

2. A county commissioner who was in office prior to the repeal of Section 6502, General Code, by House Bill No. 313, passed by the 95th General Assembly, and effective September 3, 1943, is not affected during his then existing term by such repeal and is entitled to the compensation provided by said Section 6502, in addition to the compensation provided by Section 3001, General Code.

Columbus, Ohio, August 4, 1945

Hon. Charles Varner, Prosecuting Attorney
Celina, Ohio

Dear Sir:

I have your communication in which you request my opinion, as follows:

> "Does the recent legislation which abolished the ditch fees as provided for in Section 6502, General Code, affect such county commissioners during their present term of office because of the provision contained in Article II, Section 20, of the Constitution of the State of Ohio, which provides that the General Assembly shall fix the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished?"

Section 20, Article I, Constitution of Ohio, to which you refer, reads as follows:

> "The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Pursuant to the requirement of this section, the Legislature has fixed the compensation of the county commissioners by the enactment of Section 3001 of the General Code, which has been in effect in its present form since 1937. It reads in part as follows:

> "The annual compensation of each county commissioner shall be determined as follows: * * *."

I do not deem it necessary to quote this section in its entirety. It merely provides a salary schedule for each county commissioner, based on the population of the county at the last federal census next preceding his election. The statute establishes a maximum and a minimum.

Section 6502, General Code, prior to its repeal, hereinafter referred to, read as follows:

> "In addition to the salary otherwise provided by law for county commissioners, each commissioner shall receive, for performing all duties required of him in this chapter, five dollars per day for each day actually engaged in work on an improvement as defined in this chapter, but not to exceed one hundred days in any one year, and not to exceed four days on any one improvement, and said compensation shall be charged as costs in the location and construction of the improvement and paid in the first instance out of the general ditch improvement fund of the county."

This section in its above form was in effect from 1925. It was a part of the chapter relating to county ditches. Inasmuch as the term of office of a county commissioner is four years, it is evident that any county commissioner now in office who was elected and began his present term of service when both of the statutes above referred to were in force is entitled to receive the annual compensation provided by Section 3001, General Code, and in addition thereto the per diem compensation provided for in Section 6502 supra, for the duties required of him in connection with county ditches, unless the repeal of said Section 6502 is effective as to him.

House Bill No. 315, passed by the Legislature May 27, 1943, approved by the Governor June 3, 1943, and filed in the office of the Secretary of State June 4, 1943, became effective September 3, 1943. This bill merely repeals Section 6502 of the General Code, together with another section which is not involved in the present inquiry.

In considering the effect of this repeal of Section 6502 upon county commissioners who are now holding office, in the light of the provisions of Section 20, Article II, Constitution of Ohio, we may well start with the early case of *Thompson* v. *Phillips*, 12 O. S. 617, in which the Supreme Court had before it an action in mandamus brought by the treasurer of Franklin County against the county auditor to require him to allow to the treasurer the compensation to which he would have been entitled under the law as it existed at the time he entered upon his term of service. Subsequent to the beginning of his term, the Legislature had amended the fee schedule upon which the treasurer drew his entire compensation, with the result that his fees were reduced about $400.00.

The treasurer claimed he was not affected by the amendment of the law and relied upon the constitutional provision above referred to. The court refused the writ, and, after quoting Section 20, Article II, Constitution of Ohio, said:

> "It is manifest, from the change of expression in the two clauses of the section, that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time, and not on the amount of the services rendered. Where the compensation, as in this case, is to be ascertained by a percentage of the amount of money received and disbursed, we think it is not a salary within the meaning of the section of the constitution."

The court, in the case of *Gobrecht* v. *Cincinnati,* 51 O. S. 68, had occasion again to apply this constitutional provision to a case which is sufficiently stated in the syllabus, reading as follows:

> "1. Compensation of a public officer fixed by a provision that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance,' is not 'salary' within the meaning of section 20 of article 2, of the constitution, which provides that 'the general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'
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> 2. An increase in the compensation of such officer during his term is not prohibited by the constitution."

Judge Spear, speaking for the court, at page 72 of the opinion, referred to and quoted from *Thompson* v. *Phillips,* supra, and then said:

> "It is contended that section 20, of article 2, of the constitution, prohibits an increase of compensation during the existing term. That section is as follows: 'The general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'
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> The question, therefore, is, whether or not the pay of a member of the board is 'salary' within the meaning of the above section.

We think it is not. A general definition of salary includes compensation. General definitions do not, however, cover all cases. Salary is compensation, but, under the section quoted, compensation is not, in every instance, salary. The point is emphasized by this court in the case of *Thompson* v. *Phillips,* 12 Ohio St. 617, where it is said that "it is manifest from the change of expression in the two clauses of the section that the word "salary" was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time and not on the amount of the service rendered.' And it was there held that a percentage compensation allowed by law to a public treasurer for official duties, could be altered during his term. It is the 'salary" which shall not be changed during the term, not necessarily, the compensation.

We think the compensation in the case at bar comes within the principle of the case cited, although a *per diem* compensation. It is not, within the meaning of the section quoted, 'salary.' Hence, an increase in the pay of a member during his term, is not prohibited by the constitution.

Nor is this conclusion inconsistent with the holding in *The State, ex rel.* v. *Raine,* 49 Ohio St. 580. The act of April 8, 1886, gave to the commissioners of Hamilton county a salary of $2,000 per year each, and necessary traveling expenses when traveling outside the county on official business. The amendment under review undertook to give them, for expenses, $1,000 per annum additional. The holding is that the addition, though in terms for expenses, was in effect an increase of salary, which was unauthorized as applied to the existing term of a commissioner in office when the increase was made."

The syllabus of the case of *State, ex rel.* v. *Raine,* supra, is as follows:

"A statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office, contravenes section 20, of article II, of the Constitution of this state, in so far as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted."

This case seems to me to be the only one of the early Ohio cases which even suggests the reason and purpose underlying the constitutional provision in question. In that case it appeared that the salary of the county commissioners had been fixed at two thousand dollars, in addition to which they were allowed their necessary expenses when traveling *out-*

side the county on official business. An act was passed which would allow them an additional sum of one thousand dollars for expenses incurred within the county. The court after quoting Section 20 of Article II of the Constitution, said:

> "This section of the constitution, as will be observed, denies to the General Assembly power to *affect* the 'salary' of any officer during his existing term. In terms the statute in controversy allows a thousand dollars per annum to each county commissioner for expenses incurred in the discharge of his duties within the county, the word salary not being used at all, and from this wording of the statute it is contended that it creates no increase of salary but merely allows compensation for expenses. *Constitutional guarantees would afford but slight barriers to encroachments by any of the departments of the government, if the forbidden object could be accomplished by simply using a form of words that did not name it in express terms. If the effect of the statute under consideration is to increase the salary of those county commissioners who were serving current terms of office, it is unconstitutional to that extent.* * * *
>
> The one thousand dollars allowed by the section under consideration, as well as the two thousand dollars allowed by the former law, is a '*reward paid* to a public officer for the performance of his official duties,' and is therefore 'salary.' 2 Bouvier, 492; Cowdin v. Huff, 10 Ind. 83; 2 Abb. Law Dic. 440.
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> It necessarily follows, from the view of the statute we have taken, that to the extent that it sought to *affect* the salaries of officers during the terms which they were serving, when it was enacted, it is unconstitutional and void." (Emphasis added.)

The court would certainly have used the same reasoning and arrived at the same conclusion if the act under consideration had undertaken to deny to the commissioners in office the provision for their expenses while traveling outside the county. Neither act would have actually *changed* the salary as fixed; but certainly both would have "affected" it, the one to his advantage and the other to his detriment. And let us keep in mind that what the Constitution prohibits is not a *change* in salary, but any action of the legislature either by *changing the term or compensation* which would *affect* the salary. Can anyone argue that a reduction in an incumbent's term would not "affect" his salary, even though it plainly does not change it? It is significant that the court in this case made not

the slightest reference to the earlier case of *Thompson* v. *Phillips*, 12 O. S. 617, to which I have already called attention.

The Gobrecht case is not convincing. A careful reading of the opinion discloses not the slightest reference to an underlying principle. It rests solely on the technical definition of the word "salary". And it held that the compensation of five dollars per meeting prescribed by the legislature for members of the board of legislation of Cincinnati, could be doubled during the term of a member, without violating the constitutional provision above referred to, simply because that compensation was not within the technical scope of the definition of the word "salary." Consistent with that holding a friendly legislature could have raised the pay to fifty dollars a day, or a hostile one could have reduced it to fifty cents. Consistent with that holding if an office to which one had been elected carried with it a very substantial remuneration by way of fees, in addition to a nominal salary, the value of the office might be practically destroyed by greatly reducing or eliminating the fees; or if the fees were inconsiderable, the incumbent could be enormously enriched by increasing them. These possible actions are clearly subversive of the obvious purpose of the framers of the Constitution. Adherence to its letter seems to me to have caused the courts in some of these early cases to lose sight of the spirit of that document.

Furthermore, the court in the Gobrecht case chose to adopt the narrow definition of "salary", which the best authorities recognize has other and broader meanings. For instance, Bouvier's Law Dictionary gives these, as its primary definitions:

> "A reward or recompense for services performed. It is usually applied to the reward paid to a public officer for the performance of his official duties."

Bouvier devotes nearly a page to various applied meanings that have been given to the word in many jurisdictions, but the meaning adopted in Thompson v. Phillips, and Gobrecht v. Cincinnati, supra, is barely mentioned.

The principle upon which restrictions like that contained in Section 20, Article II of our Constitution are founded is well recognized by the authorities. As stated in 43 Am. Juris., p. 143:

> "The purpose of constitutional provisions against changing the compensation of a public officer during his term or incumbency is to establish definiteness and certainty as to the salary pertaining to the office, and to take from public bodies therein mentioned the power to make gratuitous compensation to such officers in addition to that established by law. It is deemed that as a general proposition, better service will be rendered if the matter of salary is laid at rest at the outset. In such situation, an incumbent and his friends have no incentive to attempt by improper means to bring about an increase, nor are other persons, whether their motives are prompted by economy or vindictiveness, moved or induced to attempt to bring about a reduction. Limitations of this type are designed to establish the complete independence of the officers affected by them, and to protect them against legislative oppression which might flow from party rancor, personal spleen, enmity, or grudge."

Citing Du Pont v. Green, 38 Del. 566; Riley v. Carter, 165 Okla. 262; Springer v. Board of Education, 117 W. Va. 413; State, ex rel. v. Dammann, 201 Wis. 84.

To like effect see 46 C. J., page 1021.

The principle was strongly stated in State v. Sierra County, 29 N. M. 209, as follows:

> "It was designed to protect the individual officer against legislative oppression which might flow from party rancor, personal spleen, enmity, or grudge. These could well harass and cripple the officer by reducing his compensation during his service; while, on the other hand, party feeling, blood, or business relations might be combined in such pernicious activity in the form of strong and powerful lobbying as to sway the members of the Legislature and cause the bestowal of an unmerited increase. To obviate these conditions is the purpose of this wise constitutional provision."

Our Supreme Court, however, seems to have reversed the early and narrow construction of the constitutional provision which we have been considering. In the case of *State ex rel. Lueders* v. *Beaman, Auditor,* 106 O. S., 651, the court appears to have ignored the technical distinctions employed in the earlier cases and to have applied the constitutional provision according to its reasonable and manifest purpose. The relator, a probate judge, sought by mandamus to compel payment to him of certain fees for services in inheritance tax cases, provided by a statute enacted

during his term of office. As stated by the court, "the question presented is whether a probate judge who was in office when the act giving an increased compensation took effect, is entitled to receive and retain such fees; or is debarred from receiving such additional compensation by reason of the provisions of our Constitution." The per curiam opinion then proceeds:

> "Our decision depends upon the interpretation of Section 20, Article II of the Ohio Constitution, which reads: 'The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'
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> (1) Since Section 7, Article IV of the Constitution, provides that probate judges 'shall receive such compensation, payable out of the county treasury, as shall be provided by law,' it is argued that no limitation should control legislative action in increasing or diminishing compensation during the existing term of a probate judge. The majority of the court, Judges Hough, Wanamaker, Robinson, Jones, Matthias and Clark, are of opinion that the provisions of Section 20, Article II, apply to the office of probate judge, where the constitution itself does not fix the term or compensation. State, ex rel. Metcalfe, v. Donahey, Aud., 101 Ohio St., 490."

It appears that the five judges differed somewhat in reaching this conclusion, Judges Jones and Matthias holding that the fact that no new duties were assigned the judges by the new law was important, while the other three held that they were barred from receiving the increase whether or not new duties were imposed. There is nothing in that difference of viewpoint which detracts in the least from the unanimity of their general finding and their judgment refusing the writ. It is, of course, unfortunate that they did not discuss the principles involved, but it is highly significant that the opinion wholly ignores the earlier cases to which we have referred.

In this case the court clearly indicated a disposition to sweep away the narrow distinction drawn by earlier decisions between "salary" and "compensation" as used in Section 20, Article II of the Constitution and in effect to hold them, in the light of the obvious purpose of that section, to be interchangeable. If any doubt remains of that disposition on the part of the court it is, I believe, entirely removed by the language of the

court in the later case of *State, ex rel.* v. *Kelser,* 133 O. S., 429. Here the law fixing the compensation of a county commissioner on the basis of the tax duplicate was changed during the term of the relator to compensation based on population. He sought to compel payment to him of the increase resulting from this change. After quoting the provision of Section 20 of Article II of the Constitution with emphasis on the words "compensation" and "salary" and referring to the argument of counsel for the relator that these two words are not synonymous, the court said:

> "Counsel for relator contends that the distinction between 'compensation' and 'salary' is made more manifest by considering that 'the word "salary" appears in no other section of the Ohio Constitution and there must have been some reason for including it in the last member of the compound sentence which comprises said Section 20, instead of repeating the word "compensation".' He cites several nisi prius opinions in support of his distinction between these words.
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> We direct attention to the provision of Section 7, Article IV of the Constitution, which provides that probate judges 'shall receive such *compensation,* * * * as shall be provided by law' (Italics ours), and to the decision of this court in State, ex rel. Lueders, Probate Judge v. Beaman, 106 Ohio St., 650, 140 N. E., 396, wherein it was *held that the inhibition contained in Section 20, Article II of the Constitution, applied to increasing the compensation during the term of office of an incumbent probate judge."* (Emphasis added.)

That the framers of our Constitution regarded the words "salary" and "compensation" as substantially synonymous is shown by reference to two other provisions plainly designed to guard against the same abuse as that which was aimed at in Article II, Section 20. Article IV, Section 14, provides in part:

> "The Judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this State, or the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this State, given by the General Assembly, or the people, shall be void."

Section 31 of Article II provides:

> "The members and officers of the General Assembly shall receive a *fixed compensation,* to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; *and no change in their compensation* shall take effect during their term of office." (Emphasis added.)

It will be noted that in neither of the above quoted sections does the word "salary" appear.

Section 14 of Article IV came under consideration in connection with Section 20 of Article II in the case of *State, ex rel.* v. *Donahey,* 101 O. S., 490. This case, it will be noted, was cited by the court in the opinion which I have quoted in the Lueders case. This was an action by a judge of the court of appeals to compel payment to him of an increase in salary provided by an act of the legislature passed during his term. He attempted to convince the supreme court that because Section 14 of Article IV applied only to judges of the supreme and common pleas courts, there was no limitation as to other judges. The discussion by the court shows clearly that it regarded both sections as in pari materia and as having the same purpose. The court said at page 493:

> "The question is, What was the intention of the constitution-makers at the time Section 14, Article IV, was adopted? We can conceive of no process of reasoning by which it could be said that the constitution-makers intended by Section 14, Article IV, to give assent to the increase of salaries, during the term, of incumbents of judicial positions not then in existence. * * * But in this case there is an express provision in Section 20, Article II, which directly prohibits the application of a statute which increases the salary of any officer during his term of office. We are admonished that the court shall not by implication extend a provision of the constitution so as to disregard an express provision."

The other provision of the Constitution above quoted, to wit, Section 31 of Article II, came before the court in the case of *State, ex rel.* v. *Tracy,* 128 O. S., 242. The legislature had enacted House Bill No. 4, making an appropriation of not to exceed $4.00 per day to pay the expenses incurred by members of the General Assembly in attending special sessions of the Ninetieth General Assembly. The court held:

> "House Bill No. 4 is in violation of the provisions of Section 31, Article II, of the Constitution of Ohio, and is therefore invalid."

The court, after declaring that the expense allowance in question did increase the compensation of the members, proceeded at page 253 of the opinion to quote the syllabus of *State, ex rel.* v. *Raine,* supra, and then uses the following highly significant language:

> "This case is cited for the sole and only purpose of showing that the terms 'salary' and 'compensation' do not mean a thing when cases of this character are being considered, the whole question being, *'Can the number of dollars payable to an incumbent of a public office be increased by the enactment of a statute during his term of office?"* (Emphasis added.)

The judgment and opinion in the foregoing case of State, ex rel. v. Tracy were concurred in by all the judges including Judge Matthias, who participated in the decision of the Lueders case.

The three constitutional provisions to which I have referred, are all certainly directed at the same abuse, and it is inconceivable that the framers of the Constitution intended to establish one rule for one or more classes of public officers and another rule for the remainder.

Supporting authority in other jurisdictions is not lacking for the modern view which our Supreme Court has plainly taken. In the case of *Higgins* v. *Glenn,* 65 Utah, 237 P. 513, we find a constitutional provision remarkably like that of our own Constitution, viz.:

> "The Governor * * * and such other state and district officers as may be provided for by law, shall receive for their services quarterly, a compensation as fixed by law, which shall not be diminished or increased so as to affect the salary of any officer during his term."

The facts of that case are sufficiently indicated by the syllabus:

> "Any attempt to increase or decrease expense to be allowed district attorneys * * * would of necessity result in affecting their salaries or compensation, and in so far as it affects an incumbent at time of its enactment it would be violative of Constitution, Article 7, Section 20, as terms 'salary' and 'compensation' are used synonymously and interchangeably."

In the opinion the court said:

> "Fixing by law salaries of state officers, including allowance for necessary expenses incurred while engaged in the performance of their official duties, is concededly a subject exclusively within the constitutional power of the Legislature.
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> Any legislative enactment granting mileage or other items of expense to the incumbent of a public office must of necessity be evidence of the legislative intent that such mileage and expense shall be a part of the compensation for the services to be rendered by such officer. Any legislation essaying to grant a greater or lesser amount for mileage, or expense to become effective after the election or appointment of one to office and during the term of such office must of necessity have a direct bearing upon the compensation to which such officer is entitled." * * *
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> The terms 'salary' and 'compensation' appear to be synonymous and used interchangeably in our state constitution. Marioneaux v. Cutler, 32 Utah, 475."

A case of quite similar character is *State, ex rel.* v. *Board of Commissioners,* 48 Wash. 461, 93 P. 920: In this case it appears that the county surveyor was by law compensated by fees. During the term of a surveyor the name of his position was changed to "county engineer", and a salary was provided which materially increased his compensation. The Constitution provided:

> "The Legislature shall fix the compensation by salaries of all county officers, * * * The salary of any county, * * * officer shall not be increased or diminished after his election or during his term of office."

The court held that this constitutional provision forbade the increase accomplished by the new law, and in its opinion pointed out that the words "salary" and "compensation" were used interchangeably.

The principles laid down in the foregoing authorities forbid the application of a new statute to the compensation fixed by law for an office, by way of *reducing* the compensation as well as by way of *increasing* it. Either result "affects" the compensation or salary of the office.

In specific answer to your question, it is my opinion that by reason of the provisions of Section 20 of Article II of the Constitution, the repeal

by the 95th General Assembly of Section 6502, General Code, could not affect the right of county commissioners who were in office when such repeal became effective, to receive the fees provided by said Section 6502.

Respectfully,

HUGH S. JENKINS

Attorney General