in R. P. Woodruff's Subdivision of the south half of the south half of Lot No. 278 of R. P. Woodruff's Agricultural College Addition, subject to certain exceptions therein noted.

With the abstract of title considered in said opinion, there was submitted a deed form of the warranty deed to be executed by said Minnie M. Daniel and by John J. Daniel, her husband, conveying this property to the State of Ohio. I am now in receipt of said warranty deed executed and acknowledged by said Minnie M. Daniel and John J. Daniel, and find said execution and acknowledgment to have been executed in the manner required by law; and that said deed as to its form is sufficient to convey to the State of Ohio a fee simple title to said property free and clear of the dower interest of said John J. Daniel, and free and clear of all encumbrances whatsoever except such taxes and assessments as may be due and payable on and after December, 1930.

Said deed so approved is herewith returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2074.

COMPENSATION—COMMON PLEAS JUDGES—SALARY INCREASE CAUSED BY 1930 CENSUS NOT PAYABLE TO THOSE IN OFFICE PRIOR TO ANNOUNCEMENT—APPOINTEES FILLING VACANCIES, SWORN IN AFTER ANNOUNCEMENT ENTITLED TO INCREASE.

SYLLABUS:

1. *The annual compensation of common pleas judges, under Section 2252, General Code, who were elected and took office prior to the taking of the 1930 census, should be based on the 1920 census.*

2. *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.*

COLUMBUS, OHIO, July 9, 1930.

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

GENTLEMEN:—I am in receipt of your recent communication as follows:

> "We are enclosing herewith a letter from one of our examiners, submitting a number of questions with reference to the compensation of common pleas judges. You are respectfully requested to furnish this department your written opinion upon the questions so submitted."

The letter enclosed with your communication reads as follows:

> "I am requested to obtain an opinion of the Attorney General relative to the construction of Section 2252, G. C., relative to the compensation to be paid common pleas judges.
>
> You will note that this section states that such additional compensation is based on *'the latest* Federal census," and not like that of other county officers, which is upon *'that shown by the last federal census next preceding his election."*

(1) Now the question arises, do the common pleas judges draw compensation based upon the 1930 census, even though they were elected prior to the taking of the new census, or took office prior to said taking of said census, or must their compensation be based on the 1920 census?

(2) If common pleas judges are now appointed to fill the vacancy until the next regular election, is such appointee entitled to the additional compensation, if he took office after the announcement of the population?

(3) Is such an appointee entitled to the additional compensation, if he was appointed before the announcement of the census, but was sworn into office after the announcement?

I have quoted the words of the statutes relative to the judges' compensation, and the words relative to other county officers, so that the different language in these statutes may be brought to the attention of the Attorney General."

Before considering separately the three specific questions propounded in the enclosed letter, it is well to set forth the constitutional provisions which bear on all of said questions. Section 20 of Article II of the Ohio Constitution provides:

"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."

Section 14 of Article IV of the Ohio Constitution reads:

"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 of 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."

While the Constitution has provided that the term of office of all common pleas judges shall be for six years (Art. IV, Sec. 12), it has not provided for their compensation and salary. Consequently, the legislature is endowed with full power to fix and regulate the salaries of common pleas judges so long as a provision is not made whereby such judges may receive a change in their compensation during their term of office. Acting under the authority thus conferred on it by the Constitution, the legislature has provided for the salary and compensation of common pleas judges by the enactment of Sections 2251 et seq., General Code.

I shall now consider the first question submitted. Section 2252, General Code, was last amended in 1927 (112 O. L. 345). It was amended along with other sections of the Code in an act entitled: "An Act—To amend Sections 2251, 2252 and 2253 of the General Code, and to further supplement 2253 by the enactment of supplemental Sections 2253-2 and 2253-3, to provide for salaries of judges of the Supreme Court, Court of Appeals and Court of Common Pleas, and to provide per diem compensation and expenses of judges while holding court outside of the county of residence." It may thus be observed that the purpose of the amendment of Section 2252, General Code, as disclosed by the title of the act in which it was amended, was mainly to provide for salaries of judges of the Court of Common Pleas. Said Section 2252, General Code, reads as follows:

"In addition to the salary allowed by § 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 thousand dollars, payable monthly from the treasury of such county upon the warrant of the county auditor."

Prior to its amendment, said Section 2252 read as follows:

"In addition to the salary allowed by Section 2251, each judge of the Court of Common Pleas and of the Superior Court, shall receive an annual compensation equal to twenty-five dollars for each one thousand population not in excess of one hundred and twenty thousand, and five dollars for each one thousand population over one hundred and twenty thousand, of the county in which he resided when elected or appointed, as ascertained by the federal census next preceding his assuming the duties of such office. In no case shall any additional salary be more than five thousand dollars and such additional salary shall be paid quarterly from the treasury of said county upon the warrant of the county auditor."

It may be noted that the main purpose of amending Section 2252, General Code, as I have already pointed out, was to provide for an increase of salary of common pleas judges. However, in amending the section it may be further noted that the Legislature changed the wording of the phrase "as ascertained by the federal census next preceding his assuming the duties of such office" to "as ascertained by the latest federal census of the United States". In other words, the Legislature did not see fit to specifically state that the latest federal census in existence at the time of assumption of office of a common pleas judge would be the basis for calculating his annual compensation from the county.

As I have already shown, the constitutional provisions quoted above would compel the annual compensation to be determined before a judge becomes an incumbent of the office, and would prevent the salary and compensation of a common pleas judge from being changed at any time during his term of office. In fact, it has been held in the case of *Zangerle* vs. *State ex rel.*, 105 O. S. 650, that such compensation as is provided for in Section 2252, General Code, is salary within the inhibition of Article II, Section 20 of the Constitution. It has further been held in the case of *State ex rel.* vs. *Zangerle*, 117 O. S. 507, 510, 511, decided December 21, 1927, some time after Section 2252, General Code, was last amended, that the increase or diminution of compensation, found in Section 14, Article IV, Ohio Constitution, refers to the legislative increase or diminution of the regular anual compensation attached to the office of common pleas judge.

It is a familiar principle of law that a statute will be construed if at all possible so as to render it constitutional. See *Hopkins* vs. *Kissinger*, 31 O. A. R. 229. It is also a familiar principle that when the Legislature enacts a statute, it has in mind all the constitutional provisions which are applicable to the subject matter thereof. See *State ex rel.* vs. *George*, 92 O. S. 344, 346. Therefore, it is my opinion that the words "as ascertained by the latest federal census of the United States" refer to the

latest complete federal census existing at the moment before a judge becomes an incumbent of the office.

Inasmuch as the facts as submitted show that the judges concerned in your first question were elected and took office prior to the taking of the 1930 census, I am of the view that their compensation, computed under the terms of Section 2252, General Code, must be based on the 1920 census.

I come now to your second question. It is apparent that this question has two important phases. The first phase is—does the constitutional inhibition against increasing or decreasing the salary and compensation of a common pleas judge refer to the full term of office for which the judge is elected or to the officer? In other words, is it personal or does it have reference solely to the constitutional span of six years? The second phase is—If the answer to the first phase is that the constitutional inhibition refers to the officer, when does the term of an appointee to fill a vacancy in a judge's office actually begin?

Before considering the first phase of the second question, it is well to note what provision has been made by law to fill a vacancy in a judgeship. Article IV, Section 13, Ohio Constitution, provides as follows:

> "In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

Thus it may be noted that the Governor fills a vacancy in the office of a judge by appointment, until a successor is elected and qualified.

I shall now consider the first phase of your second question. It may be stated that the courts throughout the United States have been divided on this matter. Fortunately, however, there have been recent expressions on this question by the Ohio courts and my predecessor. These expressions commit Ohio to a definite stand on the question. It was held in an opinion appearing in Opinions of the Attorney General for 1928, Volume I, page 256, as disclosed by the syllabus:

> "A common pleas judge, appointed subsequent to the effective date of the amendment of Section 2252 of the General Code (112 O. L. 345), to fill an unexpired term, is entitled to the increased compensation provided by that section."

The facts before my predecessor in the above opinion disclosed that one F. W. C. was appointed judge of the Court of Common Pleas of Meigs County to fill a vacancy, on September 15, 1927. He qualified and began his term of office on October 1, 1927. The amendment of Section 2252, General Code, as previously stated, increasing the annual compensation of judges, had become effective August 10, 1927. The question incidentally involved was whether the constitutional inhibition against change of salary was personal or referred to the constitutional span of six years. The cases of *Zangerle* vs. *State ex rel.* 105 O. S. 650, and *State ex rel.* vs. *Tanner,* 27 O. C. A. 385, were cited and thoroughly reviewed to show that the constitutional inhibition referred to the incumbent of the office rather than the time of the incumbency of the office. The case of *State ex rel.* vs. *Tanner,* bases its holding on the syllabus of *State ex rel.* vs. *Raine,* 49 O. S. 580, and on the case of *State ex rel. Bashford* vs. *Frear,* 138 Wisc. 536. In short, it is pointed out that the constitutional inhibition against a change in the compensation of an officer during his incumbency of an office is founded on considerations of public policy in guarding and protecting the public against office-holding interests and log-rolling legislatures in an effort to raise their salaries, and that the

framers of the Constitution had in mind the incumbent of the office rather than the office itself.

It is unnecessary to again go into a minute observation of those cases, since my predecessor has already carefully analyzed them. Suffice it to say that I am inclined to agree with his conclusion, and am of the opinion that an appointee who took office after the completion of the 1930 census would be entitled to compensation based on that census, and would not be restricted to the 1920 census, merely because he was appointed to fill the vacancy in a term of six years begun before the 1930 census was completed.

I now come to the second phase of the second question, which is as I have heretofore stated—when does an appointee begin his term within the meaning of the constitutional inhibitions? It should be mentioned here that the term "officers" as used in Section 20, Article II of the Constitution, includes both appointive and elective officers. See *State ex rel.* vs. *Campbell,* 94 O. S. 403.

It was held in the case of *State of Ohio* vs. *McCollister,* 11 Ohio, 46, at page 50:

> "But I cannot concur with counsel, that a man appointed or elected to an office, thereby becomes an 'incumbent' of that office. An incumbent of an office is one who is legally authorized to discharge the duties of that office. For instance, a man who is elected county treasurer is required to give bond and take an oath of office. Now these things must be done before he can discharge the duties of the office; and if not done in due time, the office itself is vacant. There is no incumbent. So, where a man is elected judge, he does not, by the election, become a judge. He must receive a commission as evidence of his authority to act; must take an oath of office, and have it endorsed on his commission. When this is done, and not before, he is an 'incumbent' of the office. *State* vs. *Moffit,* 5 Ohio, 358."

Section 7 of Article XV of the Ohio Constitution provides that "every person chosen or appointed to any office under this state, before entering upon the discharge of his duties, shall take an oath or affirmation, to support the constitution of the United States, and of this State, and also an oath of office."

It is provided by Section 2, General Code, that each person appointed to an office under the constitution or laws of this state, "shall take an oath of office before entering upon the discharge of his duties." It is also provided by Section 138, General Code, that a judge of a court of record "shall be ineligible to perform any duty pertaining to his office, until he presents to the proper officer or authority a legal certificate of his election or appointment, and receives from the Governor a commission to fill such office."

From the above case, constitutional provision and statutes, it is evident that every appointee before he presumes to exercise the office of a judge must have a commission, must signify his acceptance of the appointment and must take an oath of office.

Without further discussion, I am of the view that a judge appointed to fill a vacancy does not become an incumbent of the office or start his term until he has received his commission and taken an oath of office. Therefore, in specific answer to your second question, I am of the opinion that if common pleas judges are now appointed to fill vacancies, and do not take office until after the official certification and announcement of the population of 1930, they will be entitled to additional compensation based on the 1930 census.

I now come to your third question as submitted in the enclosed letter. Inasmuch as I have come to the concusion above that a person who is appointed to an office does not begin his term until he has actually qualified for the office, I am of the opinion, in specific answer to your third question, that if an appointee to fill a vacancy in the office

of judge of the Common Pleas Court should be designated at the present time, before the official certification and announcement of the 1930 census, but is not sworn in until after such certification and announcement, he will be entitled to the additional compensation resulting from an increased population.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2075.

LEASE—ABANDONED CANAL LANDS—AUTHORITY OF PUBLIC WORKS SUPERINTENDENT TO EXECUTE NEW LEASE WHEN MUTUAL MISTAKE EXISTED IN ORIGINAL LEASE.

SYLLABUS:

Where the Superintendent of Public Works, acting under statutory authority, executes a lease of adandoned canal lands to a lessee therein named, and after the execution and acceptance of such lease it is ascertained that by mutual mistake of the parties to the lease, the same covers canal lands theretofore sold by the State and not owned by it at the time of the execution of such lease, such lease may be cancelled by agreement of the parties, and the Superintendent of Public Works may execute a new lease covering the abandoned canal lands intended to be conveyed by such former lease.

COLUMBUS, OHIO, July 9, 1930.

HON. A. T. CONNAR, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication which reads as follows:

"On September 13, 1928, a lease for a portion of the abandoned Hocking Canal lands at Lock No. 16 on said canal, was leased to Daisy Ferrenburg, of Logan, Ohio. It was subsequently discovered that all of the State lot that lies 50 feet north of the center line produced, of Lock No. 16, that was leased to Mrs. Ferrenburg, had been deeded by the State of Ohio to J. H. Brown, September 4, 1895.

It therefore became necessary to recall the lease in order to correct the description to fit the part still retained by the State. Accordingly, Mrs. Ferrenburg surrendered her lease for cancellation, subject to the approval of a new lease by the Governor, and a new lease was recommended by my predecessor, Mr. R. T. Wisda, on the 26th day of July, 1929, and was approved by the Governor on October 11, 1929.

Mr. W. S. Stone, of Logan, Ohio, the present owner of the tract sold by the State to Brown, contends that as an abutting property owner, he had a prior right to lease this property.

There is no law that requires the Superintendent of Public Works to grant leases exclusively to the abutting property owners, but it has been customary to give the abutting property owners the first option to lease the adjacent canal property.

Mr. Stone came to the office several times making inquiry about a lease, but was advised that it would be necessary to wait until some action had been taken under Section 14152-3a of the General Code by the State Highway Director, but in the meantime, the present Ferrenburg lease was granted.