

County Clerk and Recorder—Resignation of—Appointment by Board of County Commissioners—Right to Receive Increased Compensation.

A County Clerk and Recorder who resigns his office and is thereupon reappointed to fill the vacancy thus created is not entitled to the increase of salary provided for such officers by Chapter 151 of the Laws of the 17th Legislative Assembly.

R. W. Blakesley,
Chairman Board of County Commissioners,
Forsyth, Montana.

My dear Mr. Blakesley:

You have requested an opinion of this office whether, upon the resignation of the present Clerk and Recorder of your county, who was elected at the general election of November, 1920, and his reappointment by the Board of County Commissioners to fill the vacancy thus created, he would be entitled to receive the increased salary for the office as provided in Chapter 151 of the Laws of 1921.

Section 31 of Article V of the Constitution of Montana reads as follows:

"Except as otherwise provided in this constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment: provided, that this shall not be construed to forbid the legislative assembly from fixing the salaries or emoluments of those officers first elected or appointed under this constitution, where such salaries or emoluments are not fixed by this constitution."

The office of County Clerk and Recorder is a constitutional office and subject to the above provisions. (Art. XVI, Sec. 5.)

In considering Section 31, Article V, *supra*, in the case of *State ex rel. Jackson v. Porter*, 57 Mont. 343, our Supreme Court held that it did not apply to the appointment of a person to fill the vacancy in a district judgeship created by the resignation of a District Judge after the enactment of the law.

That case, however, is readily distinguishable from the situation here presented. The above constitutional provision reads "increase or diminish his salary or emolument after his election or appointment." In the case of *State ex rel. Jackson v. Porter*, *supra*, the appointee was not the same person as the one who vacated the office. The increase was therefore not "after his (the appointee's) election or appointment." In the present case the appointee is the same person elected and the increase in salary would take effect after his election within the terms of the above section.

The reasoning of *State ex rel. Jackson v. Porter*, *supra*, tends rather to oppose than to favor the allowance of the increased salary to the appointee under the facts stated by you. While there are many decisions to the effect that the constitutional provision applies to the term of office rather than to the person, so that an appointee to fill a vacancy for the unexpired term would not under that rule be entitled to the increase, the Supreme Court in the *Jackson Case*, following another line of cases, applied the prohibition to persons rather than to the term of office and held, in allowing the appointee to the judgeship the increased salary, that inasmuch as the appointee

was not in office at the time that the law was passed, he could not in any way have been instrumental in procuring an increase in salary for his own advantage. The language of the court in that case, at pages 347 and 348, is as follows:

"No possible importunity on the part of Mr. Jackson in March, 1919, could have influenced the enactment of the amended statute for his own benefit, and no legislative promises then made to Mr. Jackson could have tended to sway his judicial mind seven months later when for the first time he became clothed with judicial power and authority. The circumstances remove relator's case from the operation of the rule."

This reasoning is opposed to the allowance of the increased salary in the present case, for the Clerk and Recorder was in fact elected and in office at the time of the passage of Chapter 151 of the Laws of 1921.

A number of opinions of this office have been rendered on the general subject of increase of salaries of public officers during their term of office which, although not upon the precise point here presented, are valuable for the citations given and the discussion of the subject generally. See Vol. 8, Opinions Attorney General, pages 94, 340, 374 and 519.

It is therefore my opinion that a County Clerk and Recorder who resigns his office and is thereupon reappointed to fill the vacancy thus created is not entitled to the increase of salary provided for such officers by Chapter 151 of the Laws of 1921.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.