

**Senator, Death of State. Senator, Compensation of State.**

The constitutional prohibition against the increase of salary of public officers generally applies to the term of office and not to the individual officer. However, in the case of state senator, the senate itself is the final arbiter of its membership and in the event that the state senate to convene in 1913 should seat W. H. Dunnigan under the election of November 1910, then his compensation should be \$10 per day during the present session. If on the other hand the senate holds the election of Senator Dunnigan to be only for the unexpired term of Senator Patrick Daly, deceased, then his compensation should be only \$6.00 per day.

February 28, 1911.

Hon. H. R. Cunningham,  
State Auditor,  
Helena, Montana.

Dear Sir:

I am in receipt of your letter of January 23rd, 1911, wherein you ask my official opinion as to your course of action under the following statement of facts:

Senator Patrick Daly was elected state senator from Deer Lodge county at the general election held in November, 1908. After the expiration of the regular session of the eleventh legislative assembly, Senator Daly died. At the regular election held November 8th, 1910, Hon. W. H. Dunnigan was elected senator from Deer Lodge county. The legislature, of which Senator Daly was a member, increased the per diem of senators from six dollars to ten dollars per day.

You now enquire as to the per diem which you should pay to Senator Dunnigan.

I have had occasion heretofore to interpret Section 31, Article V, of the constitution of the state of Montana, and have always held that the prohibition therein contained against increasing or diminishing the salary or emolument of a public officer after his election or appointment was directed rather against the term of office than against the individual who might be temporarily holding the office.

On December 31, 1910, I rendered an opinion to the county attorney of Yellowstone county, where a similar condition has arisen with regard to the office of clerk of the court, there being a vacancy in such office caused by failure to elect at the general election held in November 1908, which vacancy was filled by appointment by the board of county commissioners, and which appointment under our rulings, could hold only until the next general election which was held in November 1910. The present clerk of the court was elected at the last election, and under the then classification of Yellowstone county was entitled to receive an advance in salary over the amount to which the clerk elected in that county in 1908 would be entitled. Notwithstanding the fact that the classification of the county took effect prior to the election of the present incumbent, I was constrained to hold, in view of all the authorities, that the present incumbent must serve on the salary basis provided for a clerk elected at the general election of 1908.

This seems to be the rule in California, as laid down in the case of *Larew v. Newman*, 81 Cal. 588. The California statute and constitutional provisions are identical with ours, and the case above referred to having been decided prior to the adoption of our constitution and code would, in my opinion, be of great weight with the supreme court of this state.

However, in the question under consideration at the present time, another element enters into its decision in that the courts of last resort are the final arbiters of the right of claimants to hold office in all cases where the claimants seek a public office other than a seat in the legislative assembly of the state.

Sec. 9, of Art. V, of the constitution provides *inter alia*,

"Each house shall choose its other officers and shall judge of the elections, returns and qualifications of its members."

The supreme court of the state of Montana, in *State v. Kenny*, 9 Mont. 332, interprets this section of the constitution as conferring the ultimate right of determination upon the house where a person claims a seat.

In view of the last mentioned construction I am unable to say what

the action of the senate of the thirteenth legislative assembly would be in the event that Senator Dunnigan presented his credentials to that body showing his election thereto in November, 1910. If that senate should determine that under the credentials presented Senator Dunnigan is entitled to sit in the thirteenth legislative assembly, that action would dispose of the question of salary as it would mean that he was elected for a full term after the passage and approval of the law increasing the compensation of members.

In view of the fact that the proper officers of the senate have certified to you the per diem to which Senator Dunnigan is entitled, and in view of the further fact that it is impossible at this time to say what the action of the senate would be in the event that Senator Dunnigan claims a seat under his election at the last general election, I advise you, in view of the provisions of Section 9, Art. V, of the constitution, that you draw your warrant in favor of Senator Dunnigan in the amount certified to you by the proper officers of the senate, who are the ultimate judges of his qualifications, term, and, therefore, compensation.

Yours very truly,

ALBERT J. GALEN,

Attorney General.