

Per Diem of County Commissioners, Cannot Be Increased During Term of Office. County Commissioners, Per Diem of Cannot Be Increased When. Constitutional Officers, County Commissioners Are. Salary, Cannot Be Increased or Diminished When. Traveling Expenses, May Be Claimed by County Commissioners When.

County commissioners are constitutional officers, and those holding office when Chap. 72, Laws of 1913, was passed, shall be paid the sum of five dollars per day, and no more, when inspecting any highway or bridge in the county, and the work done thereon. In such cases Sec. 1388, Revised Codes, governs, but in addition to the above sum of five dollars per day they may now claim actual traveling expenses as provided for in Sec. 13 of the new law.

June 6th, 1913.

Hon. X. K. Stout,
County Attorney,
Kalispell, Montana.

Dear Sir:

Under date of May 26th, 1913, you addressed this office as follows:

"The county auditor of this county has submitted the following question to this office for advice:

“Are the commissioners of Flathead County entitled to \$8.00 per day while out on road and bridge matters as allowed under the highway act passed by the last Legislature, or must they serve out their term under the per diem allowed when elected?”

“This involves a construction of the Sec. 31, Art. 5, of the State Constitution, as well as the validity of Sec. 13 of Chap. 72, Thirteenth Session Laws, as applied to officers elected and holding before the passage and approval of said act.

“In as much as this matter is of state-wide importance, and affects each commissioner of the state, I would ask you for your opinion concerning same.”

After careful consideration of the matter contained in your letter I beg leave to advise as follows:

The matter under consideration does not, in my opinion, involve any question concerning the validity of Sec. 13 of Chap. 72 Thirteenth Session Laws, but the question is whether the provisions of that act, as to compensation to be allowed commissioners for certain services, apply to officers holding office before the passage and approval of the act, or whether the provisions of 1388 of the Revised Codes of Montana of 1907 apply to such officers, and the basis of compensation as fixed in that section is controlling in the payment of such officers for any services performed by them as set forth in the act. County commissioners are constitutional officers. (Sec. 4, Art. XVI of the Constitution of Montana.) The constitution, as you are aware, provides that:

“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.”

There can be no question but that the Legislature has the inherent power to increase or diminish salaries and emoluments at pleasure, with the limitation that any legislative change shall not affect those already in office. The words “salary” and “emolument” as contained in the constitution have received judicial interpretation in many jurisdictions. In *Scharrenbroich v. Lewis and Clark County*, 33 Montana, 250, our supreme court said:

“‘Salary’ means what it ordinarily means: a fixed compensation made by law to be paid periodically for services, whether there be any services actually rendered or not. The word ‘emolument’ is more comprehensive than ‘salary.’ There are those who receive salaries and there are other officers who receive certain emoluments, which are not salaries. For instance, Sec. 4592 (3113, Revised Codes) of the Political Code says:

“The county surveyor, coroner, public administrator, justice of the peace and constable may collect and receive for their own use respectively, for official service, the fees and emoluments prescribed in this chapter. All other county offi-

cers receive salaries.' This last sentence, saying that 'All other county officers receive salaries,' is pregnant with meaning, being unnecessarily put into that section, unless it is placed there from an abundance of caution, to let the people know that certain county officers receive salaries, and that the words 'fees and emoluments' are not to include in their scope and meaning the word 'emoluments,' and that salaried officers are not to have 'fees and emoluments' other than salaries from the state and county. * * * We acknowledge that the word 'emolument' includes the meaning of 'gain,' 'profit,' 'compensation,' etc."

It would appear that the Legislature in enacting Sec. 4592 (3113, Revised Codes) regarded all public officers, save those enumerated in the section, as salaried officers, and it would appear that county commissioners fall within the class of those receiving salaries, but however this may be the word "emolument," as contained in the section of the constitution, has a broader scope and meaning than the specific term "salary." There can be no doubt that taken together the terms mean compensation or reward for public service, and salaries or emoluments may be paid an officer at one time by way of fees or per diem, and a fixed stipend at another.

Throop on Public Officers, Sec. 443.

It appears to be an inflexible rule of law that an officer can demand only such fees as the law has fixed and authorized for the performance of his official duties, and that this doctrine applies to cases where the compensation claimed is salary payable by the public authorities or fees payable either by the public authorities or by an individual. *Idem* 447.

"Emolument is the profit arising from office or employment; that which is received as compensation for services or which is annexed to the compensation of office as salary, fees and perquisites." (3, Words and Phrases, 2367.)

In the case of *State ex rel. Donyes v. Board of County Commissioners of Granite County*, 23 Montana, 250, our supreme court held that where an officer is paid by fees or a per diem compensation, measured by the services performed and the time employed, his emoluments are not, within the meaning of Sec. 31 of Art. V of the Constitution, diminished by a statute taking effect after his election, which relieves him of the obligation to perform duties resting upon him, and destroys the compensation which had theretofore been prescribed for their discharge. Upon first thought, it would appear that the doctrine announced in this case is "decisive of the matter under consideration, but a careful reading of the opinion, and as well the opinion on motion for re-hearing, convinces me that the doctrine there announced is inapplicable to the question under consideration. A few pertinent excerpts, however, are of interest, and deserve quoting here:

"It (the act of 1897, relating to duties of county surveyors) attempted to increase or diminish the rate of compensation

for the performance of services which were required of him by the statutes in force when the act was passed, it was to that extent inoperative with respect to a surveyor then in office, because in conflict with the prohibitory provision of the constitution. * * * It is a well settled principle of law that a provision such as is contained in the constitution of this state, prohibiting any law increasing or diminishing the salary or emolument of a public officer after his election or appointment, does not forbid the allowance of compensation for new and different services exacted from him during his term, where the statute imposing the duties also prescribes the compensation for their performance. The constitutional limitation in question was intended to apply only to the salary and emolument to which the officer was entitled for services required of him by the law in force at the time of his election or appointment, unless the salary then provided was intended as compensation for all services which the officer, as such, might render."

The facts in the case from which this excerpt is quoted are not parallel to those under consideration, for in that case the point decided was as to the right of the Legislature to relieve a county surveyor from the performance of duties theretofore devolving upon him, and with the removal of the duties to take away the compensation incident thereto, and it was held that the Legislature was clothed with such power and that a person then in office could not complain. In this case the question for determination is, what law shall govern in the payment of county commissioners whilst engaged in the work of inspecting the condition of highways or bridges within their respective jurisdictions, and the work done thereon, before paying therefor? In a case cited by your supreme court in the opinion on rehearing in the Granite County case, supra, and which the court did not consider applicable to the matter then under inquiry, is to be found succinctly stated the rule of law which, I think, must be made to apply here. I refer to the case of *Bright v. Stone*, 43 S. W. 207 (Ky), in which case it was held that under the Kentucky constitution, which contains a section somewhat similar to our own, that an officer in office at the time of the enactment of a statute, would not be entitled to its benefits where the statute allowed to such officer compensation for services for which nothing had not theretofore been allowed.

It was intimated in the opinion that however just it might be to pay the officer for services rendered by him as provided in the new act, its benefits could not be construed so as to apply to an officer in office at the time of its passage. In *Galpin v. City of Chicago*, 159 Ill. App. 135, it was held that it is not within the power of the Legislature to make a change in the compensation of a state's attorney during his term, and I think the doctrine, as announced in that case, is entirely applicable here, since the general doctrine seems to be that where the word "emolument" is used in the constitution it embraces all kinds of compensation, including per diem allowance.

The act of 1913, in so far as it attempts to increase the per diem allowed a commissioner for the performance of certain services, may be held to be applicable to all commissioners elected and taking office after its passage, and yet to be inapplicable to those already in office.

State ex rel. Bray v. Long, 21 Montana, 27.

It might be argued that when some one or more of the members of the board of county commissioners in conjunction with the surveyor inspects the condition of any highway or bridge in the county and the work done thereon, that they are not performing services within their official capacity, and that such work might be performed by any citizen designated by the commissioners, and that the mere fact that one may be a county commissioner, he should not for that reason be denied the compensation fixed by the act. But such argument is without weight, for the statute specifically designates the members of the board of county commissioners as the persons charged with the duty, and this duty is a duty incident to the office and not delegable.

House v. Los Angeles County, 104 Cal. 73.

Schally v. County of Butte, 67 Cal. 249.

It is one of the duties prescribed in general terms by Sec. 2894, Revised Codes. Contention might also be made that the new law is mandatory, whilst the old is directory in terms, but such an argument appears to be without force, for the duties when performed at all are identical under either law and the new law provides that the inspection shall be made by some member or members of the board, whereas the old law contained the expression "any member of said board," therefore it does not impose any new additional duties or burdens upon the commissioners, and the doctrine of the Granite County case, supra, is not applicable.

I am of the opinion, therefore that members of the board of county commissioners in office when the act of 1913, supra, was passed, when engaged in the work of inspecting the condition of any highway or bridge in the county of their jurisdiction and the work done thereon, shall be paid therefor the sum of five dollars per day, and no more, and that Sec. 1388 of the Revised Codes of Montana, governs in such cases, but in addition thereto they may now claim actual traveling expenses, as provided for in Sec. 13 of the new law.

Yours very truly,

D. M. KELLY,

Attorney General.