

County Commissioner, Appointment. Salary, County Commissioner. Appointee, When Entitled to Increased Pay.

The county commissioner appointed to fill the vacancy since the enactment of Chapter 3, Session Laws of 1913, is entitled to the increased pay allowed by that act.

December 18th, 1913.

Hon. T. A. Thompson,
County Attorney,
Kalispell, Montana.

Dear Sir:

I am in receipt of your letter of the 5th instant, submitting for my consideration the following questions:

"Is the appointee to fill a vacancy on the board of county commissioners, who was appointed since the approval of Chapter 72 of the Session Laws of the Thirteenth Legislative Assembly, entitled to the increased fees named and allowed by Section 13 of Chapter 3 of the said act?"

I note that you are of the opinion that the constitutional provision prohibiting increase of salaries or emoluments of an officer after election or appointment applies, and that such appointee is not entitled to the increased pay. The general question here involved has been raised in a number of different jurisdictions and passed upon by the courts thereof. It must be borne in mind constantly, however, that the various constitutions have used different language and varying expressions in providing for the prohibition involved and that as a consequence these various courts have arrived at different results, and that very few of them can be held to apply to the case in hand. It may be said, however, that as a general rule the point upon which most of the decisions turn is upon the exact meaning of the word "term" as it is used in the prohibition clause of the different constitutions. The question naturally arising is, whether the prohibition expressed relates to the term of the office, that is the period elapsing between elections at which incumbents of the office are chosen, or whether it relates to the time during which each separate incumbent, whether elected or appointed, happens to occupy the office.

"An office is a place created or at least recognized by the law of the state, and to which certain eminent public duties are appointed by the burden of the law itself, or by regulations abated under authority of law."

29 Cyc. 1364.

And an office once created continues until abolished by the power having authority to abolish it. Keeping in mind then the idea of continuity of offices, once created, the word "term" may be defined as that period existing and determined by law during which a person chosen to fill it may exercise the functions and take the emoluments thereof. In the case of county commissioners this period is specified by the constitution at six years.

"In each county there shall be elected three commissioners, whose term of office shall be six years."

Sec. 4 of Art. XVI of the Constitution of Montana.

The framers of the constitution here used the word "term" in its broad and ordinary signification.

The question now arises—Did the framers of the constitution have in mind this division of the office into six-year periods when they enacted Sec. 31 of Art. V, of the Constitution, and did they intend that the prohibition should apply to all who occupied it during such six-year period?

"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."

Sec. 31 of Art. V of the Constitution.

As noted above, the constitution itself fixes the term during which the office of county commissioner may be held by an election thereto. The office having been created by the constitution, and the division of it into terms having been also made by the constitution, no change could be made by the legislature. Therefore we must conclude that the first portions of Sec. 31 of Art. 5 must refer to offices the terms of which are not fixed by the constitution. The office of county commissioner is not one of these.

The word "term" in this provision of the constitution is used in connection with the prohibition in regard to extending the period during which an office may be held. But it is not used in connection with the prohibition in regard to increase of salary or emoluments. The words used in connection with this subject are "after his election or appointment." That is, a man once elected to an office must continue to hold it with all the limitations and conditions existing at the time of his election or appointment. This does not mean that the conditions appertaining at the beginning of the six-year period designated by the constitution as a term for a county commissioner, must apply to everyone who may chance to occupy the office during that period, for two reasons—first, Sec. 31, Art. V, refers to offices created by the legislature, and, second, "his election or appointment" refers to each and every man who comes into the office, no matter at what time or by what method. "After his election or appointment" cannot relate back to a time previous. This leads us to the conclusion that the framers of the constitution did not use the word "term" as any designated period established by the constitution during which an incumbent might hold the office.

Our supreme court has held in the case of *State ex rel. McGowan v. Sedwick*, 46 Mont. 187, that:

"The rule that persons appointed to fill vacancies in state, district and county offices shall hold only until the next general election, applies as well to the office of county commissioners."

The construction of our constitutional provisions as there laid

down makes possible three or more tenures of the office during any one six-year term, under the constitution. Whenever the office becomes vacant, a new incumbent may be appointed by the district judge, and the tenure of such new incumbent extends until the office is filled for the remainder of the term, as designated by the constitution, by the electors at the next general election after the vacancy occurs. Each one of these incumbents holds under a tenure, independent and distinct from the tenure of the others; the first by election and the second by appointment, the third by election, etc. In no case can it be said that the "term" of any one depends upon that of the others; if that is the proper expression to be used, the "term" of the first begins upon his election and ends with his resignation or death. The "term" of the second begins with his appointment and ends at the next general election. The "term" of the third begins upon his election and extends to the end of the six-year period, as that is determined by the constitution, and no one of them succeeds to the "term" of his predecessor. But as we have noted above, the prohibition as to increase in salary or emoluments of an officer begins to operate from and after his "election or appointment." "His" refers to the man elected or appointed and no one else. It could not, therefore, apply to a person elected or appointed after the increased salary or emolument had been allowed by the legislature.

This result is not in accord with that reached by you. The rule as laid down in California was under a constitutional provision containing the words "or during his term," in addition to those used in our constitution. Also, the case in which the rule was expounded, that of *Lareu v. Nooman*, 23 Pac. 227, arose under the construction of a law which, while it increased the salary of certain officers, contained also a specific provision that "this act shall not effect the present incumbent," and further that:

"A vacancy in an office should be filled by an appointment by the supervisors, an appointee to hold office for the unexpired term."

It will be seen that the court rendering that decision had three provisions of law before it, which are not present in the case at hand. It might well be held that where a person was appointed to fill the unexpired term of his predecessor, that he would take the office subject to all the limitations and conditions which existed when his predecessor took it, because he is appointed "for the term," as that expression is used in defining the office, but our constitution provides that "the appointee shall hold his office until the next general election."

Sec. 5, Art. XVI, Constitution.

And examination of other cases following the rule laid down by the California case shows that in these cases there were also peculiar constitutional or statutory provisions which would indicate an intention on the part of the constitution or the legislature that the appointee to fill a vacancy succeeded to the term of his predecessor.

I am, therefore, of the opinion that the prohibition, as to the

increase of salary or emoluments of officers, as expressed by Sec. 31, Art. V, does not apply to persons appointed to fill the office of county commissioner, made vacant by the death or resignation of the original electee, after the increased pay was allowed by the legislature, and that such persons are entitled to the increased fees provided for and allowed by Sec. 13 of Chap. 3 of Chap. 72 of the Laws of the Thirteenth Legislative Assembly, if appointed subsequent to the approval of the said act.

Yours very truly,

D. M. KELLY,
Attorney General.