

County Officers, Deputies of. Deputies, of County Officers. Board of County Commissioners, Discretion in Allowing Deputies to County Officers.

The number of deputies allowed to the sheriff or other officers within the maximum number named by law is within the discretion of the Board of County Commissioners.

March 10, 1915.

Hon. H. W. Bunston,
County Attorney,
Hardin, Montana.

Dear Sir:

I am in receipt of your communication under date the 8th instant, submitting for my consideration the three following questions:

"Has the Board of County Commissioners the authority to allow or disallow a county officer, a deputy, and to fix the salary of the same within the limit fixed by the session laws 1911, page 376?"

"Have the County Commissioners the authority to refuse the Clerk of the Court a deputy at all, and if they allow him one, have they the right to fix his salary?"

"Have the Commissioners the right to refuse the sheriff a deputy while under the Session Laws of 1911 he is allowed one?"

The second of these questions was answered in an opinion to Hon. William L. Hyde, County Attorney in an opinion under date November 18th, 1914, found in Volume 5 of the Opinions of the Attorney General at page 656. The other questions were answered in an opinion of this office found at page 25 of Volume 4 of the Opinions of the Attorney General. We have, however, had several inquiries of late upon this subject, and as there still seems to be doubt in the minds of the authorities in this regard, I feel that it is well to examine the law upon the subject and to state clearly what the present law of the state is in regard to this matter. The earliest enactment of which we need take notice in this connection is the act of March 9th, 1893, Session Laws of the Third Legislative Assembly, page 60. This was an Act entitled:

"An Act to amend an Act entitled 'An act concerning the compensation of county, district and township officers.'"

Among other provisions of this Act, we find provided:

"The number of deputies and their compensation allowed to the county officers within the maximum limits named in this Act shall be determined by the Board of County Commissioners."

The language of this provision is plain and as we shall see hereafter vests in the Board of County Commissioners the discretion as to the employment of deputy county officials. An examination of the political Code of 1895, shows that this Act was carried forward as a part of the law. This was done by the Act of March 13th, 1895, which appeared in the Political Code of that year, as Section 5181, et seq.:

"An Act entitled An Act to create the office of county auditor, approved March 7, 1891, and all Acts of the Third and Fourth Sessions of the Legislative Assembly of the State of Montana, shall be and remain in full force and effect in like manner as if adopted after the adoption of the Four Codes, namely."

The Supreme Court had these provisions under consideration in the case of *Jobb vs. Meagher Co.* 20 Mont. 424, decided January 31, 1898. In that case it was contended by the appellant that an Act of March 19th, 1895, which amended the Section providing for the maximum annual compensation allowed to deputies of officers conflicted with, and was inconsistent with, and therefore, operated as a repeal of the Act of March 9th, 1893. Upon this point the court said:

"We are clearly of the opinion that there is nothing in the Act of March, 1895, so inconsistent with the Act of March 9th, 1893, as to repeal that part of said Act conferring authority upon the Board to determine the number of deputies."

In other words they held that that portion of the Act of 1893, above quoted, was still in force, and show further that only certain parts, and not the whole of the Act of March 9th, 1893, were revised by the Act of March, 1895, and that the latter did not treat of the supervisory control of the commissioners with respect to appointments, but left that subject to be covered by the former Act. This, then, was the law at the date of the decision, since the court had very fully explained the history of the legislation and commented very freely upon it in answering the argument of the appellant.

This question was again before the court in the case of *Hogan vs. Cascade Co.*, 36 Mont. 183, decided November 18, 1907, and the court reiterated the position taken in the *Jobb* case, and say that the number of deputies is still within the discretionary power of the Board of County Commissioners. They go further, and also decided that the Act of 1905, Section 3119, Revised Codes of 1907, providing:

"The whole number of deputies allowed the sheriff, is one under-sheriff, and in addition not to exceed the following number of deputies; in counties of the first and second classes, six; in counties of the third and fourth classes, two; in counties of the fifth, sixth, seventh and eighth classes, one.

The sheriff in counties of the first, second and third classes may appoint two deputies and in the fourth, fifth and sixth classes, one deputy, who shall act as jailors at a salary of not to exceed ninety dollars per month."

did not create a new class of deputies in addition to the maximum already provided by law, and make their appointment an exclusive function of the sheriff. After an examination and comparison of the amendments with the Code provisions which they change, the court used this language:

"In view of these considerations, are we justified in concluding that by the amendment of the portion of Section 4597, relating to sheriff's deputies, the legislature intended to change its policy with reference to the two deputies who are to serve as jailers, and concluded that in appointing them, the sheriff is not subject to the discretionary control of the Board? We think not."

Examining now the Revised Codes of Montana, 1907, we find that the provisions of the Political Code of 1895, Section 5181, et seq., bringing forward and declaring to be the law, the Act of March 9, 1893, are embodied in our present Code, Section 3566, Revised Codes of 1907. That is, it is still the law of the State, as it was declared to be in the Hogan case, unless it has been repealed or amended. We find no express repeal or amendment. It remains to inquire then, whether the Acts of 1909, known as Chapter 93 and Chapter 119 of the Session Laws of the Eleventh Legislative Assembly or the Act of 1911, known as Chapter 132, Session Laws of the Twelfth Legislative Assembly, have by implication amended the Act of 1893, giving discretion to the County Commissioners as to the number of deputies. The Supreme Court has passed upon the first two of these later laws, Chapters 93 and 119 of the Session Laws of 1909, compared them and pronounced the legislative intent in the case of State ex rel Hindson, 106 Pac. 362:

"This statement appears to us to disclose beyond controversy that in enacting House Bill 335, the one purpose which the law-makers had in mind was to change the compensation allowed to a deputy sheriff who acts as jailor, and the only purpose in enacting Senate Bill 120 was to increase the number of deputies allowed certain clerks of District Courts from three to four."

It is to be noted in this connection that the language used in these Acts is not different in regard to deputy sheriffs than that of the Act of 1905. Section 3119, 1907, except the last clause thereof, relating to remuneration. An examination of Chapter 132 of the Laws of 1911, clearly shows that it did not affect the question of deputy sheriffs, or the power to appoint such officers, but only the salary to be paid such officers.

In view of the interpretation put upon the various Acts and amendments by the Supreme Court, and because we find nothing in any enactment of the legislature since the last of these decisions, directly or impliedly repealing the Act of March 9, 1893, we must conclude that that law carried forward in our present Code is still the law, and the number of deputies allowed to the sheriff or other officers within the maximum number named by law, is within the discretion of the board of County Commissioners.

Yours very truly,
D. M. KELLY,
Attorney General.