Salary — Secretary of State Fair — Appropriation, Increase By—No Statute—Auditor, Duties Of.

The Legislature is without authority to increase the salary of a state officer whose salary is fixed by law, by an appropriation measure, and the State Auditor cannot issue a warrant in payment thereof in excess of the amount fixed by law.

Sept. 5th, 1919.

Mr. Geo. P. Porter,
State Auditor,
Helena, Montana.

Dear Sir:

By yours of the 30th ultimo you wished to be informed whether you have authority to issue a monthly salary warrant to the Secretary of the Montana State Fair at the rate of $3600.00 per annum, citing as the reason for your request Section 6 of Chapter 47 of the Session Laws of 1911, which fixes the salary of the secretary at $3000.00 per annum, and calling attention to the fact that subsequent thereto there has been no legislation relative to this office, except the general appropriation bill of the Sixteenth Legislative Assembly, being House Bill No. 437, which makes an appropriation of $3600.00 for such office for years ending February 29th, 1920, and February 28th, 1921, respectively.

The statement of your letter to the effect that Section 6 of Chapter 47 of the Laws of 1911 has not been specifically amended or repealed is correct, and consequently your interrogatory directly presents for consideration the proposition whether the legislature can effect in a general appropriation measure an increase in the salary of an officer whose salary has been fixed by statute.

Chapter 47 of the Session Laws of 1911 amends the law creating and establishing the State Fair and Section 6 thereof provides:

> "The Secretary of the Board of Directors shall hold office for a period of four years and shall receive a salary of three thousand ($3000.00) dollars per year for his work and services in connection with the business and affairs of said fair * * *"

The legislature at the last regular session passed a general appropriation bill, Laws of 1919 on page 602, the title of which together with the provision in question are as follows:

> "An Act Appropriating Money for the Maintenance and Betterments and Expenses of the Several State Institutions of Montana for Two Years, Commencing March 1st, 1919, and Ending February 28th, 1921."
>
> Be it enacted by the Legislative Assembly of the State of Montana:
>
> Section 1. That the following sums, or so much thereof as may be necessary be and the same are hereby appropriated out of any money in the state treasury not otherwise appropriated

for the objects and purposes hereinafter expressed, for a period commencing March 1st, 1919, and ending February 29th, 1920, * * *

Salary of Secretary of State Fair, Thirty-six Hundred Dollars .....$3600.00."

Thereafter follows Section two of the bill, which provides a like amount for the year following, that is for the year ending February 29th, 1921.

A close examination of the authorities leads me to the opinion that where it is sought to either reduce or increase the salary of an officer or employee of the state whose salary is fixed by statute, the procedure prescribed by the Constitution must be followed to effect such a purpose.

Section 23 of Article V of our Constitution provides as follows:

"No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

A casual reading of the appropriation bill in question immediately discloses that its title relates merely to one subject, and that is to the appropriation of money for the purposes of maintaining the various institutions of the state government, and it does not in any manner mention or refer to the question of fixing or of changing any of the salaries for which it is necessary to make an appropriation. The matter of fixing or of determining what shall be the salary of an officer or employee is a subject for legislation and entirely distinct from the financial conduct of the various departments of the state or of its institutions in the matter of appropriations.

Neither can it be contended that the appropriation measure amended Section 6 of Chapter 47 of the Laws of 1911, for by Section 25 of Article V of the Constitution it is provided that:

"No law shall be revised or amended, or the provisions thereof extended by reference to its title only, but so much thereof as is revised, amended or extended shall be re-enacted and publishd at length."

Consequently when a statute is amended, the procedure outlined must be followed, and it must be re-enacted and published at length, which of course was not done in the present instance. However, it might be said that the section providing for the salary of the Secretary of the State Fair was repealed by implication by the appropriation measure or that its operation was suspended and the latter act treated as a substitute for the former, but even though such a line of reasoning would undermine the position taken under this section of the Constitution, still to give effect to the appropriation act in this respect would be to do violence to Section 23 of Article V of the Constitution quoted above.

That constitutional provision is today common to practically all of the states of the Union, though at one time, and before its necessity was demonstrated, there were few state constitutions which contained such a clause. The Supreme Court of Montana has on a number of occasions stated its purpose and the reasons which prompted its enactment.

> "The purpose of the clause of the constitutional mandate that the subject of a bill shall be clearly expressed in its title have been considered and defined by this court in State v. Mitchell, 17 Mont. 67, 42 Pac. 100; Jobb v. County of Meagher, 20 Mont. 424, 51 Pac. 1034, and the authorities cited in these cases. Briefly summarized they are: To restrict the legislature to the enactment of laws the objects of which legislators and the public as well may be advised of, to the end that any who are interested, whether as representatives or those represented, may be intelligntly watchful of the course of the pending bill. The limitation is likewise designed to prevent legislators and the people from being misled by false or deceptive titles, and to guard against fraud in legislation by way of incorporating into a law provisions concerning which neither legislators nor the public hav had any intimation through the title read or published." State v. Anaconda Copper Min. Co., 23 Mont. 498.

The case of State v. McKinney, 29 Mont. 375, also contains a recitation of the reasons which impelled the adoption of this measure, and it can be readily seen that one of its purposes is to prevent the very thing which this appropriation would seek to accomplish: that is, there is nothing in the title of the appropriation measure which would throw any legislator on his guard or warn any citizen or interested person that the bill itself provided for an increase in the salary of a state officer or employee.

The Supreme Court of our state has never passed upon the question raised by your letter, but the courts of other states having practically the same constitutional provisions have had the proposition before them, among whom, however, there is a conflict of opinion, though in my mind the better course of reasoning seems to be in harmony with the views heretofore expressed.

The two most recent and most notable cases bearing upon the subject arose in the States of Idaho and Washington, the first of which is Hailey v. Houston, 13 6Pac. 212, 25 Idaho 165, and the second is State v. Clausen, 138 Pac. 653 (Wash.), both of which, by virtue of the similar constitutional provisions of their respective states and the analogous set of facts have a direct bearing upon the question presented.

In the Idaho case, the salary of the librarian of the State Historical library was fixed by statute at $1200.00 per annum; the legislature thereafter appropriated in a general appropriation bill a lump sum for the salary of the librarian and his assistant, which considerably increased the amount fixed by statute for the office. The court in rendering its decision said:

> "Where we have a specific statute fixing said salary, and it was not contemplated by the framers of the Constitution that such a statute should be amended in any other manner than by that

provided by the Constitution, it certainly was not contemplated that an amendment to a salary statute could be tucked away in a general appropriation bill, and no reference made to it in the title of the bill. The title to said appropriation bill would not give to any member of the legislature or to any other person any inkling of a purpose to increase a salary. That section of the Constitution which provides that every act shall embrace but one subject and matters properly connected therewith, and that such subject shall be expressed in the title, was for the purpose of giving the members of the legislature, as well as citizens generally, notice of the purpose and object of the bill, and provides for title to all bills, as well as for a unity of title and subject matter. Said appropriation in the general appropriation bill would not and could not amend the statute fixing the salary of the officer referred to."

Though the case itself cites no authority for the position the court takes, the holding is sustained by the following cases:

State v. Cutler, 39 Utah 99, 95 Pac. 1071;
Linden v. Finley, 92 Tex. 454, 49 S. W. 578;
State v. Steele, 57 Tex. 200;
State v. Cook, 57 Tex. 205.

The Washington case, supra, under a similar state of facts arrives at the contrary conclusion, and severely criticises the decision in Hailey v. Houston, supra. In this case, it appears that the salary of the Deputy State Auditor was fixed by statute at $1200.00 per year; the legislature thereafter passed a general appropriation measure covering a two year period in which the sum of $3600.00 was appropriated for the salary of the official in question. A writ, by a divided court, was ordered to issue directing the State Auditor to draw warrants for the payment of the salary at the rate of $1800.00 per year. The language of the two dissenting Justices is significant:

"The Constitution requires that the subject of an act shall be expressed in the title. Const. Art. 2, Sec. 19. The title of the act in question neither mentions nor suggests the matter of fixing or raising salaries. So far as the title goes, it is an 'Act making appropriations for' certain specific purposes.

"The title, it is true, does not need to be an index to the body of the act, but it must be sufficiently broad to indicate its scope or purpose. There is nothing in the title of the act here in question to indicate to an inquiring mind that in the body of the act there might be included a provision fixing salaries."

From an examination of the reasoning of the case and a careful review and comparison of the authorities cited, taking into consideration the constitutional provisions of the respective states, it seems that the Idaho case, supra, is the stronger of the two. The Washington court in outlining the issues raised and the questions to be decided states as follows:

"Whether the legislature can provide in a general appropriation bill for an increase of salary to any officer whose salary has been theretofore fixed by a general law, and, if so, whether the

title of the general appropriation bill of 1913 is sufficient under Article 2, Sections 19 and 37, of the State Constitution, are the questions to be decided."

It is to be observed that there is in reality but one question, and that the first cannot be decided without reference to the constitutional provisions, which, of course, is the issue of the whole case. The court then takes up and considers as authorities for the general proposition that an appropriation bill may increase the salary of an officer which is fixed by law the following cases decided by the Supreme Court of the United States, construing federal statutes, and, of necessity, without regard to constitutional provisions:

United States v. Fisher, 109 U. S. 143;
United States v. Mitchell, 109 U. S. 146;
Belknap v. United States, 150 U. S. 588.

In the course of the opinion, it refers to the case of the United States v. Langston, 118 U. S. 389, which seems contrary to the above, and considers that it is not sound, on the authority of the Belknap case, supra, decided more recently.

In the first place it is to be noted that the Federal Constitution contains no such provisions as those of the states requiring that the subject of a bill must be expressed in the title thereof, and consequently these cases cannot be in point upon the deciding factor, in the case and are not authority for the holding of the court; and in the second place the decision in the case of the United States v. Vulte, 233 U. S. 509, approves the Langston case, supra, and that the court in that case uses this language:

"This court has had occasion to deal with such instances of legislation and their intended effect on existing law. In the United States v. Langston, 189 U. S. 389, 394, it was decided that a statute which fixed the annual salary of a public officer at a designated sum without limitation as to the time is not abrogated or suspended by subsequent enactment which merely appropriated a less amount for that officer for particular years, and which contained no words that expressly or by clear implication modified or repealed the previous law."

The other cases cited to support the decision of the court are:

Collins v. State, 3 S. D. 18, 51 N. W. 776;
Riggs v. Brewer, 64 Ala. 282;
Owen v. Beale, 39 So. 907 (Ala.);
Brooks v. Jones, 80 S. C. 443, 61 S. E. 946.

A reading of these cases discloses that the point in issue was not raised, presented or decided in any of them; the South Dakota case involved an office of the Territory, and in addition to resting upon the Fisher and Mitchell case, supra, the facts hardly bring it within the limits of the present situation, or of the case for which it is cited as an authority; the Riggs case, supra, was decided upon an entirely different ground, the constitutional provision not being considered, and the latter case of that state is briefly disposed of upon the authority of the earlier

decision; the South Carolina case, Brooks v. Jones, supra, was decided upon the ground that the legislature may increase the salary of an officer, where such intention is manifest and the appropriation statute is considered to be in conflict with the previous statute, which thereby becomes suspended during the time of the operation of the appropriation bill providing there is no constitutional inhibition, and the court evidently considered that there was none such.

It is apparent that the Washington case, State v. Clausen, supra, is not sustained by the authorities cited, and is materially weakened by the dissenting opinion of two of the Justices of that Court.

This discussion has reached an undue length, but the importance of the matter justified and required a careful review of the authorities, construing similar constitutional provisions, and the apparent conflict of authority necessitated an exposition of the reasons leading to the conclusion reached, especially in view of the fact that conditions prevailing at the present time perhaps merit an increase of salary, over that of former years, of any who render deserving service, but a decision cannot be dictated by such circumstances.

It is therefore my opinion that you have no authority in law to draw monthly warrants in payment of the salary of the Secretary of the Montana State Fair at the rate of $3600.00.

Respectfully,

S. C. FORD,

Attorney General.