

Opinion No. 222.**Clerk of the District Court—Election,
Clerk of Court—Salaries, Clerk of
Court—Term, Salary of Clerk of Court.****Held: A person elected to the office
of clerk of the district court in
the election November 5, 1946,
to fill the unexpired term of one
elected to that office in 1944
should be paid under the salaries
fixed by Chapter 150, Laws of
1945.**

November 21, 1946.

Mr. H. E. Herrick
County Attorney
Custer County
Miles City, Montana

Dear Mr. Herrick:

You have requested an opinion as to whether a person elected to the office of clerk of the district court at the election November 5, 1946, to fill the unexpired term of one elected to that office in 1944 should be paid the salary prescribed for that office by Section 3867, Revised Codes of Montana, 1935, or should come under the salaries fixed by Chapter 150, Laws of 1945, an act which repealed Section 4867, Revised Codes of Montana, 1935.

In answering your question, we should take into consideration the reason for the enactment of Chapter 150, Laws of 1945. The legislature was confronted with the fact that in many counties of the state county officers were resigning and in many instances it was almost impossible to find any persons who would accept the offices because of the low salaries set by statute therefor. Hence the legislature, believing and intending by Chapter 150 to raise the salaries of the county officers therein mentioned, enacted said chapter.

"In September of any year in which the county treasurer, county clerk county assessor, county school superintendent, county sheriff, county attorney, or clerk of the district court is to be elected, the county commissioners shall, by resolution, fix the salaries of the officials to be elected in conformity with the schedule in section 1, based on the population as shown in the last decennial federal census and on the taxable valuation of the county at the time the salaries are fixed. Salaries so fixed shall apply during the entire term for which the foregoing officials are elected and should a vacancy occur the person appointed or elected to fill the unexpired term in the office vacated shall receive the same salary as the person vacating the office." (Emphasis mine.)

It is to be noted that the above section provides that in any year in which the designated officers are to be elected including a clerk of the district court, the county commissioners shall fix the salaries in conformity with the provisions therein set forth.

The legislature did not qualify the kind of an election, whether at the regular election at the end of a term or an election to fill a vacancy, and of course the legislature, having in mind that either contingency might occur, used the general term. It could have limited the application if it had so desired.

The last sentence of Section 5 of Chapter 150, Laws of 1945, applies only to those officers whose salaries have been fixed by the board of county commissioners under the terms of the section. Here we have an officer elected by the people to fill the office for the unexpired term of two years—from the first Monday in January, 1947. The contingency of electing this officer was, of course, known to the board of county commissioners at the time of the vacancy, and it is presumed it has performed its duty as provided in said section 5, *supra*.

Because the elected clerk of court is a new officer and is not in such office by election on July 1, 1945, Section 7 of the Act would not apply. Section 7 obviously was intended to conform with Section 31, Article V of the Montana Constitution. It was not to add anything new. Insofar as this is

true, the increase would not run contra to the constitutional provision. This is well pointed out in the case of *Adami v. Lewis and Clark County* (1943) 114 Mont. 557, 138 Pac. (2d) 969.

In that case the constitutionality of Chapter 169, Laws of 1943, was in question. Chapter 169 was an act "to increase the salary of all elective county officers, including justices of the peace and constables, reciting the need of such increased salaries, declaring an emergency for a certain time." The court said at page 970:

"There can be no possible doubt that the decision with reference to Chapter 169 is correct, and that the legislative intent to make it effective as to terms of persons elected or appointed prior to its effective date is unconstitutional as in excess of the legislative power. The people could hardly have made clearer or more definite the provision of section 31 of Article V forbidding the legislature either to increase or to diminish the salary or emolument of any officer after his election or appointment. On the other hand, it is apparent that the constitutional provision does not forbid the application of Chapter 169 to an officer whose election or appointment occurs after the effective date of the Act, and that as to him Chapter 169 is valid. *State ex rel. Jackson v. Porter*, 57 Mont. 343, 188 P. 375." (Emphasis mine.)

It is therefore my opinion that a person elected to the office of clerk of the district court in the election November 5, 1946, to fill the unexpired term of one elected to that office in 1944 should be paid under the salaries fixed by Chapter 150, Laws of 1945.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General