

Opinion No. 40

**Salaries, District Judges, County
Attorneys—District Judges
—County Attorneys—
Appropriations.**

Held: The salary as provided by law of a District Judge, and the one-half of the salary of a County Attorney have been appropriated by law and may be paid out of the general fund of the State, upon warrants issued by the State Auditor's office.

June 5, 1947

Honorable John J. Holmes
State Auditor
Capitol Building
Helena, Montana

Dear Mr. Holmes:

You have submitted the following for my opinion:

“Chapter 150, Laws of 1945, provides in its computation for an increase in the salaries of county attorneys to be effective January 6, 1947. No provision to take care of this salary increase was made by the Thirtieth Legislative Assembly for the biennium ending June 30, 1947.

“Chapter 80, Laws of 1947 provides for an 18th Judicial District and a District Judge to be paid, in text, the same as any other District Judge. The Thirtieth Legislative Assembly made no appropriation to pay the salary of Harry A. Bolinger, District Judge of the 18th Judicial District, appointed March 24, 1947. Judge Bolinger has been paid since his appointment out of the regular salary appropriation for District Judges, thus leaving an insufficient balance on June 30, 1947,

in the District Judges salary appropriation to pay the District Judges salaries in full for the quarter ending June 30, 1947.

“The department respectfully requests your opinion as to whether or not the State Auditor may issue warrants directly against the State General Fund to pay salaries set by law when the appropriation has become exhausted.”

Your inquiry is no doubt based on the restriction contained in Section 34 of Article V of our State Constitution, which is as follows:

“No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt.”

However, the Constitution of our state is also law—the supreme law of our state—and, of course, ranks above statutory law. All statutory law must yield to it and be measured by it.

The State Constitution provides for all constitutional officers and provided the salaries therefor until set or changed by law.

The officers of District Judge and County Attorney are constitutional officers, their respective salaries having been set by the Constitution until fixed by the legislature, by Section 29 of Article XIII and Section 19 of Article XIII of our Constitution, respectively. The legislature has since the fixing of the first salaries by the Constitution increased the salaries of both the District Judge and the County Attorney.

Thus, by the Constitution itself there is an appropriation made by law, as is ably stated by our Supreme Court in the case of *State ex rel. Buck v. Hickman*, State Treasurer, 10 Mont. 497, wherein a similar question arose, the Court stated, among other things:

“There is no legislation of this character, but the salary has been fixed by the Constitution in this section: ‘The judges of the District Courts shall each be paid quarterly by the State a salary, which shall

not be increased or diminished during the terms for which they shall have been respectively elected. Until otherwise provided by law, . . . the salary of the judges of the District Courts shall be \$3,500 per annum each. (Art. viii, § 29.) It is further declared that 'vacancy in the office of . . . judge of the District Court . . . shall be filled by appointment, by the governor of the State.' (Art. viii, § 34.) **All judges of the District Courts, who have been elected or appointed, are governed by the same provisions of the Constitution.** In the absence of any statute, they are entitled to receive from the State the salary which has been defined in the Constitution, section supra. We reaffirm the doctrine of *State v. Hickman*, 9 Mont. 370, that the language which has been quoted is an appropriation made by law". (Emphasis mine).

The Court further stated, "The chief reason of the rule thus announced is the necessity of preserving the State, which is paramount to all other considerations."

The appropriations, provided for in the Constitution, have priority over any acts of the legislative assembly which relate to the disbursements of the moneys in the State Treasury.

In the case of *Thomas*, Comptroller v. *Owens*, 4 Maryland, 189, it was held that when the Constitution declared a salary to be paid a state officer, that it was an appropriation made by the supreme law of the state and no legislative act was necessary.

The doctrine set forth in the case of *Thomas v. Owens*, supra, has been accepted for years without a question, and has remained inflexible under every test.

"The framers of the constitution of this State numbered upon their roll most eminent jurists and lawyers. They studied with wisdom and ability the charters which the people had granted to the States of the Union, in their efforts to obtain the best articles from all. They knew the precedents which have been enumerated, and the canons

of interpretation which had been formulated by the courts, and deliberately created the sections of the constitution which fix the salaries of many State officers. In their action upon this subject they did not incorporate the provisions which are frequently in force in the instruments of this solemn character, and did not permit the legislature to have this great power. In order that there should be no erroneous construction of the clauses under examination, the following section was adopted: 'The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.' (Art. iii, § 29.) When, therefore, it is plainly declared that the Secretary of State, or any other officer, shall receive a certain sum as compensation for his services, an appropriation is 'made by law', and the proper officer is empowered to draw his warrant on the State Treasurer in pursuance thereof; and the respondent is required to pay the above-described warrant to the relator."

State v. Hickman, 9 Mont. 370, 379.

Since these decisions were rendered in 1890 and 1891, no action has been taken by the legislature or the people to change the law, or the interpretation, so it has become the law of our state.

Therefore, in my opinion the salary as provided by law of a District Judge, and the one-half of the salary of a County Attorney have been appropriated by law and may be paid out of the general fund of the State, upon warrants issued by your office.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General