

**Opinion No. 19****County Officers—County Treasurer—County Clerk and Recorder—  
Salary of Appointee to Office of County Treasurer.**

**Held: 1. Article V, Section 31 of the Constitution of Montana has no application to an appointee to a public office so as to prevent him from receiving a salary increase provided for by law enacted and in full force and effect before the date of his appointment.**

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May 9th, 1949.

Mr. Nat Allen  
County Attorney  
Golden Valley County  
Ryegate, Montana

Dear Mr. Allen:

You have submitted the following question for my opinion:

"In a situation where the County Treasurer tendered his resignation to the County Commissioners and the County Commissioners approved the resignation of the County Treasurer thereby creating a vacancy in the office of County Treasurer, if the County Clerk and Recorder resigns as Clerk and Recorder and accepts the appointment from the County Commissioners to fill the vacancy in the County Treasurer's office, will such appointee be entitled to the salary as County Treasurer by appointment as is now provided for in House Bill No. 105 passed by the Thirty-First Legislative Assembly and approved by the Governor."

House Bill No. 105 is now Chapter 177, Montana Session Laws of 1949 and Amends Chapter 91, Montana Session Laws of 1947, and Chapter 150, Montana Session Laws of 1945, and constitutes the present law as to salaries of County officials.

Section 2 of Chapter 177, Montana Session Laws of 1949 is as follows:

"This act shall be in full force and effect from and after its passage and approval, but nothing contained herein shall be construed to or shall in any manner effect an increase of the salary or emolument of any of the public officers listed in section one (1) who are in office at the date this act goes into effect, such officers being entitled to the same salaries they are receiving at the date this act takes effect for the remainder of the terms for which they were elected. If a vacancy occasioned by death, resignation, or otherwise, should occur in any of the public offices listed in section one (1) after this act takes effect, the person elected or appointed to fill such vacancy shall be entitled to receive the salary therefor set out in section one (1) of this act."

The above quoted section is clearly authority for paying to an appointee to an office, the salary designated for such office by Section 1 of Chapter 177, Montana Session Laws of 1949.

The only question that remains is whether or not Section 2 of Chapter 177, Montana Session Laws of 1949, in any way tends to violate or is in conflict with any of the provisions of the Montana Constitution.

Article V, Section 31 of the Montana Constitution is as follows:

"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; provided, that this shall not be construed to forbid the Legislative Assembly from fixing the salaries or emoluments of those officers first elected or appointed under this constitution, where such salaries or emoluments are not fixed by this constitution."

Our Montana Supreme Court has held that Section 31, above quoted, refers to the incumbent and not to the office, and by reason thereof a person appointed to an office, after a salary increase had been authorized by law, was entitled to such increase.

In *State ex rel. Jackson v. Porter*, 57 Mont. 343, 188 Pac. 375, the court said:

" . . . the sole purpose of the constitutional limitations is to remove from the sphere of temptation every public officer whose office is created by the Constitution and whose official conduct in the remotest degree might be influenced by the hope of reward or the fear of punishment. So far as there is reason for the rule which underlies the limitations, it must be enforced with the utmost rigor, but whenever the reason for the rule ceases, so does the rule itself."

The latest affirmance of the above rule was in *Adami v. County of Lewis and Clark*, 114 Mont. 557, 138 Pac. 2nd 969, wherein the court in speaking of Chapter 169, Montana Session Laws of 1943, which increased salaries of all elective county officials, said:

"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."

It is therefore my opinion that in the factual situation set forth in the question submitted, the appointee to the position of County Treasurer should be paid a salary as provided for in Chapter 177, Montana Session Laws of 1949.

This opinion applies only to the factual situation presented herein. The Boards of County Commissioners in the various counties should exercise extreme caution to see that all resignations are bona fide and are not made for the purpose of circumventing the prohibitions contained in Article V, Section 31 of the Montana Constitution. A situation wherein

County positions are traded back and forth in order to gain an increased salary or where the officials resign in order to be reappointed cannot be tolerated as it is well established that what the law forbids the doing of directly cannot be done indirectly.

Very truly yours,  
ARNOLD H. OLSEN,  
Attorney General.