

Opinion No. 60**State Treasurer—Salary, Increase Shall Be Granted to Appointee
To Office of State Treasurer.**

Held: 1. The salary to be paid to a person appointed to fill a vacancy in the office of State Treasurer shall not be limited by Article V, Section 31 of the Montana Constitution, where the vacancy and appointment occurred after the passage, approval, and effective date of a law increasing the salary to be paid the State Treasurer, since the vacancy and appointment were both subsequent to the passage and approval of the law authorizing the salary increase.

September 27, 1949.

Mr. Thomas J. Ferguson
Chief Deputy State Treasurer
Helena, Montana

Dear Mr. Ferguson:

You have requested my opinion as to the salary which should be paid to Mrs. Alta E. Fisher, who was recently appointed to fill the vacancy created in the office of State Treasurer by the death of her husband, Neil Fisher.

Section 1 of Chapter 182, Laws of 1949, provided that the annual salary of the State Treasurer shall be Five Thousand Dollars (\$5,000.00). This is an increase of Eight Hundred Dollars (\$800.00) over the sum provided for in Section 436, Revised Codes of Montana, 1935, repealed by Chapter 182, supra.

You have raised the question of whether the Montana Constitution prohibits Mrs. Fisher from receiving such increase in salary until the expiration of her present term. The applicable provision of the Constitution is Article V, Section 31, which reads 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."

This section of the Constitution has been interpreted by the Montana Supreme Court on several occasions. The extent of the prohibition and its purpose are well stated in the case of *State ex rel. Jackson v. Porter*, 57 Mont. 343, 188 Pac. 375. In the Jackson case the salaries paid to District Judges had been increased by the 1919 Legislature. In October of 1919, the District Judge of the 2nd Judicial District having been elected in 1916 for a four-year term, resigned and the relator in this case, Joseph R. Jackson was duly and regularly appointed to finish the unexpired term. The relator presented a salary claim based upon the increase granted by the 1919 Legislature. The State Auditor, the defendant in the action, refused to allow the claim to the extent of the increase. In arriving at a decision the court outlined the purpose of the prohibition contained in Article V, Section 31 as follows on page 347:

"The purpose is to secure, as far as possible the independence of each co-ordinate branch of government, and to that end relieve the law-making branch from the importunities of office-holders who might seek increased compensation, not for the office, but for themselves, and what was of infinitely greater consequence, remove from the lawmakers the temptation to control the other branches of government by promises of reward in the form of increased compensation or threats of punishment by way of reduced salaries: or, stated differently, 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."

In holding that the Relator was entitled to the salary increase and that the Constitutional prohibition did not apply in such case the Court on pages 347-8 held as follows:

"At the time the bill for the amended Act was before the Legislature in March, 1919, it was impossible that any member could have known that Judge Dwyer would resign in October following and that Joseph R. Jackson would become his successor. No possible importunity on the part of Mr. Jackson in March, 1919, could have influenced the enactment of the amended statute for his own benefit, and no Legislative promises then made to Mr. Jackson could have tended to sway his judicial mind seven months later when for the first time he became clothed with judicial power and authority. The circumstances remove Relator's case from the operation of the rule."

The rule of the Jackson case has been uniformly followed in Montana down to the present date. The most recent decision affirming the Jackson decision was in the case of *Adami v. County of Lewis and*

Clark, 114 Mont. 557, 138 Pac. (2nd) 969. See also State ex rel. Jau-motte v. Zimmerman, 105 Mont. 464, 73 Pac. (2nd) 548; Broadwater v. Kendig, 80 Mont. 515, 261 Pac. 264; Drolte v. Board of Commissioners of Ellis County, 56 Pac. (2nd) (Oklahoma) 800.

Applying the law of Montana as expressed in the Jackson case to the facts in the instant case it is apparent beyond question that the Constitutional prohibition has no application and does not prevent Mrs. Fisher from receiving the salary increase. Mrs. Fisher was appointed to the position of State Treasurer some six months after the 31st Legislative Assembly voted an increase in the salary to be paid to the State Treasurer. Under these circumstances there is no possibility that Mrs. Fisher could have influenced the Legislature in the enactment of the law increasing the salary of the State Treasurer, more over, the Legislature did not enact the law for the purpose of controlling the conduct of Mrs. Fisher by reason of the law having increased the salary of the State Treasurer. Since the dangers and pitfalls which the framers of the Constitution intended to guard against do not exist in this case there is no reason why the salary to be paid Mrs. Fisher for her tenure should not be the Five Thousand (\$5,000.00) per annum as prescribed by Chapter 182, Laws of 1949.

A prior opinion rendered by this office being Opinion No. 19 Vol. 23, Report and Official Opinions of Attorney General, adopted a similar position with reference to County offices, the opinion being that Section 31 of Article V of the Montana Constitution did not apply and did not prevent a person who was appointed to fill a vacancy in the office of County Treasurer, from receiving a salary increase provided for by law enacted and in full force and effect before the date of his appointment.

Therefore, it is my opinion that where a salary increase is legally provided for by law and after the effective date of said law a vacancy is created in the office of the State Treasurer by the death of the incumbent, the duly and regularly designated appointee to such office is not prevented by virtue of Article V, Section 31 of the Montana Constitution from receiving the salary increase provided for by law.

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