Legislature—Representatives—Apportionment—Constitution —Census.

In view of section 2 of article VI of the constitution of Montana the Nineteenth Legislative Assembly is not permitted to amend the laws of 1921 providing the apportionment for representatives.

David R. Smith, Esq., February 6, 1925.
Chairman House Committee on Apportionment and Representation,
Helena, Montana.

My dear Mr. Smith:

You have requested my opinion whether section 2 of article VI of the constitution prohibits the nineteenth legislative assembly from re-

vising the apportionment for representatives, in view of the fact that in 1921 the legislature made an apportionment.

Section 2 of article VI of our constitution provides:

> "The legislative assembly shall provide by law for an enumeration of the inhabitants of the state in the year 1895, and every tenth year thereafter; and at the session next following such enumeration, and also at the session next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for representatives on the basis of such enumeration according to ratios to be fixed by law."

Pursuant to this constitutional provision the legislature in 1921 by sections 44-47, R. C. M. 1921, provided for an apportionment based upon the federal census of 1920.

I find among the adjudicated cases on this question under similar constitutional provisions that the courts have held that when the legislature once exercises the authority under the constitution it cannot do so again until the expiration of the time named in the constitution.

This question was before the supreme court of Indiana in the case of Denney v. State, 42 N. E. 929. Section 4 of article IV of the constitution of that state provided that:

> "The general assembly shall, at its second session after the adoption of this constitution, and every six years thereafter, cause an enumeration to be made of all the male inhabitants over the age of twenty-one years."

Section 5 of the same article provided:

> "The number of senators and representatives shall, at the session next following each period of making such enumeration, be fixed by law, and apportioned among the several counties, according to the number of male inhabitants above twenty-one years of age in each."

The court, in holding that when an apportionment was once made it stood for the period named in the constitution, said:

> "We think the legitimate and necessary conclusion to be drawn from these two sections is that an enumeration of the voters shall be taken once every six years, and that, upon such enumeration as a basis, the apportionment of members of the legislature shall be made at the next ensuing session of the general assembly, and only then. Otherwise, and (as said by this court in Parker v. State, supra) 'unless the general assembly is to be governed by the enumeration, when made, in the matter of districting the state for legislative purposes, the enumeration is a useless ceremony, and an unnecessary expense. The purpose in requiring the enumeration is to fix the number of voters in each county at the time the apportionment is made, in order that the legislature may form districts so as to secure to each voter, as near as may be an equal voice with each other voter in the state

in the selection of senators and representatives * * * The enumeration at the short period of six years was intended to secure a readjustment and correction of the inequalities that might arise from the growth and shifting of the population within that period.' In case, then, there is in existence a valid apportionment law, and one passed within the proper enumeration period, it may be confidently affirmed that an attempt to make another apportionment, and at a time further removed from the time of taking the enumeration is a violation, not only of the spirit, but of the letter, of the constitution, all of whose provisions are mandatory, unless by their own terms made directory or simply permissive. The fixing, too, by the constitution, of a time or a mode for the doing of an act, is by necessary implication, a forbidding of any other time or mode for the doing of such act. So it was said, in Morris v. Powell, 125 Ind. 281, 25 N. E. 221: 'When the constitution commands how a right may be exercised, it prohibits the exercise of that right in some other way.'—Citing Cooley, Const. Lim. 64. See, also, Town of Williamsport v. Kent, 14 Ind. 306; City of Evansville v. State, 118 Ind. 426, 21, N. E. 267; Page v. Allen, 58 Pa. St. 338. * * * Since the constitution thus provides that an enumeration of the voters of the state shall always be made as preliminary to the enactment of an apportionment, it is evident that the theory of the framers of the constitution was that a valid apportionment can be made only after the taking of such enumeration, and that, when such valid apportionment is once made, it should stand until after the making of the next enumeration."

In California the same conclusion was reached in the case of Wheeler v. Herbert, 92 Pac. 353. The constitutional provision involved in that case was as follows:

"The census taken under the direction of the congress of the United States, in the year one thousand eight hundred and eighty, and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the legislature shall, at its first session after each census, adjust such districts and reapportion the representation so as to preserve them as nearly equal in population as may be."

In speaking of this provision the court said:

"The provisions of section 6, Art. 4, being construed as limitations, and being mandatory and prohibitory, it follows from their terms, and from the application of the maxim, 'Expressio unius est exclusio alterius,' that the legislative power to form legislative districts can be exercised but once during the period between one United States census and the succeeding, and that, having been thus exercised in 1901, the districts cannot be again adjusted until the session of 1911."

In Slauson v. City of Racine, 13 Wis. 398, the court had under consideration a constitutional provision directing that:

> "At their first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants."

The court, in discussing that provision of the constitution of that state, said:

> "In our constitution there is no express prohibition against the alteration of assembly districts, and whatever limitation exists upon the power of the legislature in that respect is to be derived from the general scope and objects of the provisions of the constitution concerning the apportionment of senators and representatives. But it may be said that these furnish a limitation, and that, when the instrument provides for an apportionment and organization of districts once in five years, *this implies that it shall not be done at any other time.* This would seem clear with respect to a general apportionment, and perhaps the same implication would extend to any particular reorganization of assembly or senate districts, by any law passed directly for that purpose."

In Illinois a similar constitutional provision was interpreted in People vs. Hutchinson, 50 N. E. 599, and the court, after an exhaustive review of the authorities, held that an apportionment once made at the proper time prohibited the legislature from amending the act making such apportionment. The court said:

> "When the legislature of 1893 made the apportionment of that year, the conditions existed which authorized the exercise of the power, and the legislative discretion was exercised based upon the federal census of 1890—a division of the population by 51, and the resulting quotient as the ratio of representation. That power and discretion, when fully exercised, were exhausted, and the power will not again arise until the conditions provided for in the constitution shall again exist."

There are cases holding that the duty imposed by such constitutional provisions is a continuing one until discharged, and that if it is not performed at the time named in the constitution it may be performed by the next succeeding legislature; also that if it is attempted to be performed by the legislature at the proper time, but the law was either vetoed or held invalid by the courts the duty then devolved upon succeeding legislatures until performed. The following cases are illustrative:

> Botti v. McGovern (N. J.) 118 Atl. 107;
> State ex rel. Meighan v. Weatherill (Minn.) 147 N. W. 107;
> In re Constitutionality of Apportionment Bill (Colo.) 21 Pac. 480;
> State v. Cunningham (Wis.) 51 N. W. 724;
> In re Reynolds (N. Y.) 92 N. E. 87;
> Rumsey v. The People (N. Y.) 19 N. Y. 55.

I have not been able to find any cases, however, that have held that the legislature may make an apportionment at a time other than that named in the constitution, after it had once exercised the right at the time stated in the constitution.

It is, therefore, my opinion that the nineteenth legislative assembly is without authority to make an apportionment for representatives, and that the present apportionment cannot be changed until 1927, and then only in the event that an enumeration of the inhabitants of the state is made in 1925 pursuant to the above quoted section of our constitution.

Very truly yours,

L. A. FOOT,
Attorney General.