

office" under the Constitution. There are no constitutional or statutory provisions in this state which prohibit the employment of a Legislator in a position created by the assembly of which he was a member.

March 1, 1934.

I have your request for an opinion as follows:

"This date the office of the State Auditor received a supplemental payroll of the State Board of Equalization for the month of February, 1934, which said payroll includes the name of Jerry O'Connell, who, according to the said payroll, is occupying the position of Assistant Income Tax Auditor for the State of Montana at the rate of pay of \$200.00 per month.

"It would appear as if Jerry O'Connell, named in the payroll, is the duly elected, qualified and acting State Representative from Silver Bow County and has served as such elective member of the Legislative branch of the State Government in the regular and extraordinary sessions of the Twenty-third Legislative Assembly.

"Section 7, Article V of the Constitution of the State of Montana provides interalia:

'No \* \* \* representative shall, during the term for which he shall have been elected, be appointed to any civil office under the State;'

"It is apparent to this office that the appointment of Mr. O'Connell to the office in question has been made during the term for which he was elected a State Representative.

"Your opinion is respectfully requested as to whether a warrant may be legally issued, pursuant to the above mentioned payroll, in light of the above quoted Constitutional provision."

The request does not state the exact duties of assistant income tax auditor but upon investigation we find nothing in the statutes which creates such a position or defines its duties either directly or indirectly. We enclose herewith copy of an opinion No. 477, this volume, upon the same question relating to liquor vendors, which we think answers your question namely, that the position of Assistant Income Tax Auditor is not a "civil office" within the meaning of said constitutional pro-

**Opinion No. 478.**

**Legislative Assembly—Members—  
Assistant Income Tax Auditor—  
Appointment—Civil Office.**

**HELD:** The office of Assistant Income Tax Auditor is not a "civil of-

vision. Further inquiry indicates that the duties of the position and the conditions surrounding it do not bring it within the five tests set down in the case of *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411, cited in the opinion referred to.

There seems to be abundant curbstone opinion to the effect that a legislator may not hold an office created by the legislative assembly of which he was a member. There is an axiom to the effect that volunteer advice is worth no more than is paid for it.

A number of states have constitutional or statutory provisions prohibiting the employment of legislators in positions created by the assembly of which they were members. There is no constitutional or statutory provision in the State of Montana of the same import and we can find no established rule of law which prohibits such employment in the absence of constitutional or statutory inhibition. The reported decisions dealing with the subject invariably refer to constitutional or statutory provisions.