

March 22, 1935.

Mr. J. P. Freeman  
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I have your letter of March 18, asking if, in our opinion, Chapter 152, Laws of Montana, 1935, applies to a constable who was elected to office at the general election held last November.

Chapter 152, *supra*, which became law on March 13, when it was approved by the Governor, is entitled: "An Act to Amend Section 4932 of the Revised Codes of the State of Montana, 1921, to Allow Constables Salaries in Certain Townships." Section 4932, R. C. M. 1921 is amended by said Act by adding thereto the following provision: "That constables in townships having a population of twelve thousand (12,000) people and not exceeding twenty thousand (20,000) people, shall each receive a salary of \$900.00 per annum, payable monthly from the county treasury. Constables in townships having a population of more than twenty thousand (20,000) people shall each receive a salary of \$1,500.00 per annum, payable monthly from the county treasury, and constables in such townships where the population is twelve thousand (12,000) people and not more than thirty-five thousand (35,000) people shall receive no other fees for civil suits or criminal actions except mileage in the performance of their duties. Any such fees received by the constables shall be turned over to the County Treasurer."

Section 31 of Article V of the Constitution of the State of Montana, declares that "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." (See State *ex rel. Jackson v. Porter*, 57 Mont. 343, 188 Pac. 375; *Broadwater v. Kendig*, 80 Mont. 515, 261 Pac. 264; *Throop on Public Officers*, Section 443.)

The office of constable was created by legislative enactment (Section 4726, R. C. M. 1921) and while some courts have held that a constitutional inhibition such as the one we are here considering, applies only to those offices which are created by the con-

**Opinion No. 65.**

**Constables—Offices and Officers  
—Salary.**

HELD: Chapter 152, Laws of 1935, amending Sec. 4932, R. C. M. 1921, by providing for the payment of salaries to constables in townships having a population of 12,000 or more, does not apply to incumbent constables who were elected or appointed prior to the passage and approval of the Act, and will not apply to such constables until their present term expires.

stitution (see 46 C. J. 256, and cases cited therein, and 8 Report and Official Opinions of Attorney General, pp. 340 and 374), the better reasoned cases which make up the great weight of authority are those holding that such a provision applies to officers holding offices created by the legislature as well as those created by the constitution and that no distinction should be made in applying the rule as between the two classes. (County Commissioners of Calvert County v. Monnett, 164 Atl. 155; Crawford v. Hunt, 17 Pac. (2d) 802; State ex rel. Gilbert v. Board of County Commissioners, 222 Pac. 654, 31 A. L. R. 1310; Annotation, 31 A. L. R. 1316; 46 C. J. 1022-1023; Ann. Cas. 1914C, page 214; Throop on Public Officers, Sections 1 to 15.)

In County Commissioners v. Monnett, supra, decided by the Court of Appeals of Maryland in 1933, the court quoted with approval the following language from *Richie v. Philadelphia*, 37 Pa. Super. Ct. 190, affirmed 225 Pa. 511, 74 A. 430, 26 L. R. A. (n.s.) 289: "Many important offices exist which are not provided for by the constitution, and the number is increasing from year to year. The duties of these officials are various and of some of them highly important. The compensation of many of them is large, their existence is in harmony with the constitution and we must assume that the framers of that instrument did not overlook the fact that the necessities or convenience of the commonwealth would call for an increase of public officers with various new duties. It is hardly to be supposed that the general expression of the constitution would have been used in view of the number of offices then in existence and likely to be created by the will of the legislature if the prohibition was only to apply to the comparatively small number whose existence was required by that instrument."

In *State ex rel. Gilbert v. Board of County Commissioners*, supra, the Supreme Court of New Mexico said: "\* \* \* we think a person who is elected to a public office for a fixed and definite term, whose functions and duties affect the public, is an officer within the intendment and meaning of the constitutional provision in

question, without regard to whether the office is one created by the Constitution or by the legislature."

As to those constables elected in November, 1934, who hold office in townships having a population of more than 12,000 people, do the provisions of Chapter 152, quoted above, result in an increase or diminution of the emolument heretofore received by them under Section 4932?

We believe that they may result in either or both since clearly under Section 4932, supra, before the passage of Chapter 152, supra, there was no limit to how much or how little the annual emoluments of such a constable might be.

"A constitutional provision forbidding the change of the compensation of an official during his term of office is inexorable. It admits of no exceptions and it affords no opportunity for evasion by the legislature or other body." (22 R. C. L. 534.)

"The fact that plaintiff is seeking to obtain compensation by salary, instead of by fees, is a very strong circumstance tending to show that the compensation has been increased by the amendatory act, for it is not probable he would be invoking the power of the court to obtain a salary which was no greater than he was receiving under the fee system." (*Keith v. Ramsey*, 167 Pac. 408.)

It is, therefore, our opinion that the provision quoted above from Chapter 152, supra, does not apply to incumbent constables who were elected or appointed prior to March 13, and will not apply to such constables until their present term expires. As to them the law is held in abeyance. (46 C. J. 1022.)