

TO: The Honorable H. K. Mangum
County Attorney, Coconino County
Flagstaff, Arizona

The Honorable William P. Mahoney, Jr.
County Attorney, Maricopa County
Phoenix, Arizona

The Honorable David H. Palmer, Jr.
County Attorney, Yavapai County
Prescott, Arizona

The Honorable Barry De Rose
County Attorney, Gila County
Globe, Arizona

RE: Salaries of justices of the peace
in precincts having more than
one thousand (1,000) registered
voters.

QUESTION: What is the effect of the amendment
to Article 4, Part 2, Section 17,
Arizona Constitution, upon the
salaries of justices of the peace
in precincts having more than one
thousand (1,000) registered voters,
as set forth in Section 12-711,
A.C.A. 1939, as amended?

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At its First Regular Session, the Twenty-first Legislature, by concurrent resolution, proposed an amendment to Article 4, Part 2, Section 17, Arizona Constitution, to be submitted to the qualified electors of the State of Arizona for their approval at the Special Election held on September 20, 1953. At that election the voters approved the proposed amendment, which became effective upon proclamation by the Governor. That amendment provides:

"Section 17. The Legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer, other than a justice of the peace, be increased or diminished during his term of office; provided, however, that when any legislative increase or decrease in compensation of the members of any court or the clerk thereof, or of any board or com-

mission composed of two or more officers or persons whose respective terms of office are not coterminous, has heretofore or shall hereafter become effective as to any member or clerk of such court, or any member of such board of commission, it shall be effective from such date as to each thereof."

The constitutional provision which was amended reads as follows:

"§17. (Extra Compensation.) The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office, provided, however, that when any legislative increase or decrease in the compensation of the members of any court, board, or commission, composed of two or more officers or persons, whose respective terms of office are not coterminous, has heretofore or shall hereafter become effective as to any member of such court, board, or commission, it shall be effective from such date as to each of the members thereof."

A comparison of the pre-existing provision and the amendment thereto reveals, with reference to the question of salaries of justices of the peace, the addition of the term "other than a justice of the peace" in the first sentence. In construing the effect of this amendment it is necessary to consider the purpose and object of the amendment, and in so doing we will trace the background of the history and development of this problem. The term of office of justices of the peace presently serving in office was fixed by Section 20-101, A.C.A. 1939, as amended, which provides as follows:

"20-101. Election and term of office.--In each justice precinct there shall be elected by the qualified electors of such precinct, at the general election one (1) justice of the peace, who shall hold his office for the term of four (4) years from the first day of January following his election."

This section amended the existing law and increased the term of office from two to four years. It first affected those justices of the peace elected in the General Election in 1950, and, thus,

the term of office of those justices of the peace now serving began January 1, 1951, and will end December 31, 1954.

The compensation for justices of the peace, now serving, was first fixed in 1950 for the first two years of the term by various boards of supervisors, pursuant to Section 12-711, A.C.A. 1939, which provides:

"12-711. Precinct officers' salaries fixed by supervisors.--At the regular June meeting of the various boards of supervisors preceding a general election, said boards shall fix the salaries of all precinct officers for the two (2) years commencing on the first day of the following January."

The above section was amended in 1952 to read as follows:

"12-711. Salaries of precinct officers.--(a) At the regular June meeting of the various boards of supervisors preceding a general election, said boards shall fix the salaries of all precinct officers, excepting justices of the peace and constables whose salaries are hereinafter specifically fixed, for the two-year period commencing on the first day of the following January.

(b) The monthly salaries of justices of the peace and constables in precincts having more than one thousand (1,000) registered voters shall be:

1. In precincts having more than one thousand (1,000) and not to exceed three thousand (3,000) registered voters: Justices of the peace, two hundred seventy-five dollars (\$275).

2. In precincts having more than three thousand (3,000) and not to exceed ten thousand (10,000) registered voters: Justices of the peace, three hundred fifty dollars (\$350).

3. In precincts having more than ten thousand (10,000) registered voters: Justices of the peace, five hundred dollars (\$500); constable, not to exceed three hundred seventy-five dollars (\$375).

(c) The salary of a justice of the peace or constable appointed to fill a vacancy caused otherwise than by expiration of term, shall be the same as that of his predecessor.

(d) As used in this section, 'registered voter' means a qualified elector of a precinct

registered on the date of an election of precinct officers."

The last cited section above provided for definite mandatory salaries for constables and justices of the peace in precincts having more than one thousand (1,000) registered voters. It removed from the various boards of supervisors the power to exercise their discretion as to the amount of compensation for the officers specifically mentioned. This statute, although effective in 1952, was inoperative by virtue of Article 4, Part 2, Section 17, above cited, which prohibited an increase or decrease in the compensation of justices of the peace during their term. The various boards of supervisors, therefore, in fixing the salaries of the justices of the peace for the remaining two years of the term ending December 31, 1954, could not constitutionally comply with the provisions of Section 12-711, supra, but could only provide those salaries fixed in June 1950, effective January 1, 1951.

What, then, is the effect on Section 12-711, supra, of the amendment to Article 4, Part 2, Section 17, which amendment excepts justices of the peace from the prohibition against increase or decrease in salaries during the term of office? This question is discussed in 67 C. J. S., "Officers", Section 95, Sub-section d, l.c. 350, wherein it is stated:

"Partial invalidity of changes. A statute providing for an increase or decrease of the compensation of an officer who is protected against such change during his term by virtue of constitutional provision is not entirely invalid; the constitutional limitation merely affects the date at which the statute becomes effective. Thus in the application of such provisions of the constitution it has generally been held that an act making a change in the compensation or salary of a public officer may be valid, as far as these sections of the constitution are affected, and yet have no application to a certain officer, before the expiration of his term, or, in other words, be invalid as to such officer during his term; and, where a statute of this nature does not expressly state that it shall apply to existing officers, it will be presumed not so to apply, so as to conform to the constitutional prohibition. Accordingly, the effect of such a provision is to hold in abeyance laws fixing the salaries of public officials, in so far as their operation would otherwise increase or diminish the salary or emoluments of an official after his election or appointment, until after the expiration of the term

of such officer. Where a constitutional amendment permits the legislature to suspend a previously existing constitutional prohibition against any increase in compensation, and the legislature passes a statute suspending the constitutional prohibition for a specified period, an increase previously held in abeyance as to an incumbent, by virtue of the original constitutional prohibition, takes effect; under such circumstances the increase need not be postponed until the end of the incumbent's term."

The above cited general rule of law finds strong support in the California case of *BUSCH v. TURNER*, (1945) 26 Cal. 2d 817, 161 P. 2d 456, 171 A.L.R. 1063. This case involved a situation strikingly similar to the one at hand. California had a prohibition against the increase or decrease of salary of a public officer during his term of office. The Legislature, notwithstanding the prohibition, passed a statute dealing with salaries of certain officers. Subsequent to the passage of the act dealing with salaries, the constitutional prohibition was suspended and the plaintiff sued for an immediate increase in his salary, in accordance with the statute previously passed. The court decided two things: First, that the statute which had been passed increasing salaries was not invalid because of the constitutional prohibition, but was merely inoperative as to incumbents. Second, the court in deciding that the salary increase as prescribed by the Legislature became effective immediately upon the suspension of the constitutional prohibition used the following language, 1.c. 458:

"* * *A statute purporting, in general terms, to increase salaries would ordinarily be construed to include incumbents, and but for the constitutional bar it would do so. When the prohibition of the Constitution ceases to operate, there is no longer any reason to limit the statute, and its literal meaning may be carried out in full. The reason why the prohibition ceases to operate is entirely immaterial, whether it is because of expiration of the period designated in the Constitution or because of an amendment changing the Constitution. We hold, therefore, that the 1943 act increasing the salary of the District Attorney of Lake County was intended to take effect as soon as it lawfully could, including the contingency of a constitutional amendment permitting an operative date earlier than would have been permissible under the Constitution as it existed in 1943.

There appears to be no constitutional objection to such an interpretation. Although the taking

effect of the act as to incumbents would thus depend upon the happening of a contingency, namely, passage of a constitutional amendment, it has been held in many states that a statute which is expressly made contingent upon the adoption of a constitutional amendment is valid everywhere, as here, the Legislature would have had no power to so act in absence of the amendment. *Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 242 P. 658; * * *"
(Emphasis supplied)

It is the opinion of this office that Section 12-711, supra, was not invalid when passed, but was merely inoperative as to incumbents. The question arises, since the removal of the prohibition against changes in salary, as to what date the salaries set forth in Section 12-711, supra, will become effective. Inasmuch as the Legislature and the people have not indicated that the authority to increase or decrease salaries is retroactive, it can only be considered to have prospective effect. It is well settled in Arizona that constitutional provisions do not have retroactive effect unless the provision, with particularity, so provides. This rule was laid down by the Arizona Supreme Court in the cases of *CITY OF PRESCOTT v. O'SULLIVAN*, (1935) 46 Ariz. 551, 53 P. 2d 69, and *AMERICAN FEDERATION OF LABOR v. AMERICAN SASH AND DOOR CO.*, (1948) 67 Ariz. 20, 189 P. 2d 912.

It is our opinion that Section 12-711, supra, became operative as to those salaries fixed in Subsection b on October 31, the date of the Governor's proclamation.

In the event that there are required budget increases as a result of the immediate operation of Section 12-711, supra, and such increases were not contemplated in the budget, it is our opinion that the Board of Supervisors in order to receive authority to expend the sums for this purpose for which no budget allowance was made, must apply to the State Tax Commission for authority to make such increase pursuant to Section 73-504, A.C.A. 1939, as amended.

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