

GOVERNOR: APPROPRIATIONS: Neither regular general
LEGISLATURE assembly or specially
called general assembly
can pass deficiency ap-
propriation.

September 11, 1942

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

We are in receipt of your request for an opinion
of recent date, which partially reads as follows:

"Your opinion is respectfully re-
quested on the following questions:

- (a) May the governor, during
the period of time remain-
ing in the present biennium,
on his certificate legally
certify for allowance and
payment out of the state
treasury, as other demands
against the state, the
expenses of some messenger
to whom the governor has
issued his warrant, under the
seal of the state, and who
has received the fugitive
named in the warrant and con-
veyed such fugitive to the
county in which an offense was
committed, or is by law cogniz-
able, in an amount which exceeds
the sum remaining in the ap-
propriation for the present bi-
ennium for the Apprehension of
Criminals?
- (b) May the payment of the expenses
referred to in question (a) be
legally made from an appropria-

tion by a session of the
General Assembly which shall
hereafter convene?"

Section 48 of Article IV of the Constitution of
Missouri, reads as follows:

"The General Assembly shall have
no power to grant, or to authorize
any county or municipal authority
to grant any extra compensation,
fee or allowance to a public officer,
agent, servant or contractor, after
service has been rendered or a con-
tract has been entered into and per-
formed in whole or in part, nor pay
nor authorize the payment of any
claim hereafter created against the
State, or any county or municipality
of the State, under any agreement or
contract made without express authority
of law; and all such unauthorized agree-
ments or contracts shall be null and
void."(Underscoring ours.)

This section was adopted October 30, 1875, and went
into operation November 30, 1875, and no similar section
was in the Constitution of 1865. Under this section,
any contract or agreement, made without express authority
of law, shall be null and void.

Section 19, of Article X of the Constitution of
Missouri, reads as follows:

"No moneys shall ever be paid out
of the treasury of this State, or
any of the funds under its manage-

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ment, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Under the facts set out in your request the appropriation for the present biennium for the apprehension of criminals is practically exhausted, there being only Seven Dollars and Nineteen Cents (\$7.19) remaining.

Under Section 19, Article X of the Constitution of Missouri, supra, no money can be paid out of the treasury of this State, or any funds under its management, except where the money has been appropriated by law. Since there is no money in the treasury to pay more than Seven Dollars and Nineteen Cents (\$7.19) out of the appropriation for the apprehension of criminals, any order made by the Governor, or contract which binds the State, would be null and void, if there was not sufficient money in the appropriation to pay the claim or demand against the State.

In 1933, the legislature saw fit to enact Article 1, Chapter 3, which is known as the "State Budget Law." Under Section 10907 R. S. Missouri, 1939, which is part of the State Budget Law, the legislature prohibited expenditures, where there was not sufficient money in the appropriation, to any department to pay the same.

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In that section it is specifically stated:

"The auditor shall keep accounts showing the appropriations and allotments. Such accounts shall show all charges and obligations incurred against such appropriations and allotments. No expenditure shall be made and no obligation incurred by any department without the certification of the auditor that there is a sufficient unencumbered balance in the allotment and a sufficient unencumbered cash balance in the treasury to the credit of the fund from which such expenditure or obligation is to be paid, each sufficient to pay the same. The auditor shall be liable personally and on his bond for any certification in excess of any allotment or in excess of the cash balance available. Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certification from the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation. For any department maintaining its principal office outside of Jefferson City, the auditor shall be authorized to establish a system for certification of obligations and expenditures so as to prevent inconvenience and delay."

Under the above section it will be specifically noticed that the word "obligation" is used, meaning, the incurring of a debt. This section also provided

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that the auditor would be liable personally, and on his bond, for any certification in excess of any allotment, or in excess of the cash balance available. Also, in this section, it will be noticed that the following sentence is included, "Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certification from the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation." In other words, any officer who enters into a contract attempting to bind the State, where there is not sufficient money in the appropriation to pay the obligation, is liable personally and on his bond.

That part of Section 10907, supra, which provides that the cash balance should be available seems to be very impractical, but it is not for this department to say whether or not that part of the section is constitutional. The Supreme Court of this State has held that the balance of a statute is constitutional although certain parts of the section of the statute is unconstitutional.

In any event, under Section 19, Article X, of the Constitution of Missouri, Section 48, Article IV of the Constitution of Missouri, and Section 10907 R. S. Missouri, 1939, which are a part of the State Budget Law, no contract can be made binding the State where there is no appropriation for the demand against the State, or where the appropriation has been exhausted. We base this reasoning on the fact that since Section 48, Article IV of the Constitution of Missouri prohibits the payment or authorization of the payment of any claim against the state, county, or municipality, under any agreement or contract made without express authority of law and Section 10907, supra, prohibits the incurring of any obligation without first securing a certification from the auditor that there is sufficient money in the appropriation to pay the obligation.

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The sections of the Constitution and the section of the Statutes hereinbefore set out clearly express that it was the intention of the framers of the Constitution and the legislature to keep the expenditures of any biennium within the appropriation made for that biennium. The intention of the framers of the Constitution may be construed by the action of the legislature in enacting laws to carry out certain parts of the Constitution. The legislature in enacting Section 10907, supra, construed Section 19, Article X and Section 48, Article IV of the Constitution of Missouri to mean that the expenditures of any biennium should not be more than the appropriation made for the same biennium. That the intention of the framers of the Constitution could be construed by the legislature in the enactment of a statute was held in the case of State ex rel. O'Connor v. Riedel et al., 46 S. W. (2d) 131, Par. 5, where the court said:

"In determining the constitutionality of statutes, great weight has always been given to the contemporaneous construction placed upon the several provisions of the fundamental law. This is particularly true with regard to the construction given by the Legislature to the constitutional provisions dealing with legislative powers and procedure. Though not conclusive, such interpretation is entitled to great weight and should not be departed from unless manifestly erroneous. 6 R. C. L., pp. 63, 64. * * * * *"

The Missouri Constitution is a limitation on, and not a grant of, power to the legislature. (Gaines v. Canada, 59 Sup. Ct. 65, 305 U. S. 580, Mandate 131 S. W. (2d) 217.) The intent and purpose of lawmakers is of primary importance in determining the true meaning and scope of constitutional provisions. (Graves v. Purcell, 85 S. W. (2d) 543.)

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Section 3977 R. S. Missouri, 1939, reads as follows:

"The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

This section is to the effect that where the Governor agrees to pay the expenses of a return of a fugitive, the expenses should be paid out of the State Treasury the same as other demands against the State. Under this section the Governor is not restricted as to the amount of the expenses, and it does not set out any statutory fees or costs that can be allowed by the Governor, and he, alone, must determine the amount he should allow the messenger who returns the fugitive, as set out under Section 3976 R. S. Missouri, 1939. That it is in his discretion as to the amount of allowance was held in the case of State ex rel. See, Marshal, v. Allen, Auditor, 180 Mo. 27, l. c. 31, 32 where the court said:

"Under the statute quoted (sec. 2744, R. S. 1899) the duty of determining the question of the compensation and expenses of such messenger, is vested solely in the Governor, and he is the head of a co-ordinate branch of the government, and all his acts as such are in that capacity, and hence he can not be interfered with in the discharge of his duties by the courts. * *

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"* * * The Governor alone has the power to determine how much shall be paid, and to order it paid. Until he does so the Auditor can not lawfully issue a warrant therefor. * *"

There is no question but that the allowance of expenses in the apprehension of criminals is a contract for the reason that the Governor enters into an agreement with the messenger as to the amount of expenses allowed for the return of the fugitive. Since the appropriation for the apprehension of criminals is practically exhausted, and the Governor allows a messenger the amount of his expenses, which is in excess of the present balance in the appropriation, he is contracting to bind the State to pay the expenses of a messenger, in violation of Section 19, Article X of the Constitution of Missouri, and Section 10907, supra, and the contract of the Governor with the messenger would be null and void, as set out in Section 48, Article IV of the Constitution of Missouri. The reason that the contract would not be binding on the State, is the fact that there is not sufficient money, or no money, in the appropriation to pay the claim. It was held that such contract, where no money was appropriated for the payment of a claim, would be null and void, in the case of State ex rel McKinley Pub. Co. v. Hackmann, State Auditor, 282 S. W. 1007, Par. 10, where the court said:

"It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of section 19, article 10, of the Constitution, no money may be paid out of the state treasury, except in pursuance of an appropriation by law, the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid

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pursuant to an appropriation act, where it is paid out of money specifically appropriated for a different purpose. And it might be said in passing that the Legislature could not now pass a valid act appropriating money out of which re-lator's claim could be paid, because his claim is based upon a contract entered into without authority of law, and section 48 of article 4 of the Constitution expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or contract made without express authority of law, and that all such authorized contracts shall be null and void." (Underscoring ours.)

In the above quotation, the court specifically held that the legislature could not now pass a valid act appropriating money for the payment of an illegal claim, because the claim was based upon a contract entered into without authority of law, and was in violation of Section 48, of Article IV of the Constitution of Missouri, which prohibits the appropriation of money for the payment of such a claim. This case is the last and ruling case on this particular point.

A further reason is the fact that under Section 10907, supra, which is part of the State Budget Law, the auditor is prohibited from certifying such a claim, and under Section 10895 R. S. Missouri, 1939, which is also part of the State Budget Law, the Governor is responsible for the preparation of the Budget and its presentation to the legislature, and shall enforce observance of the appropriation made by the legislature under the State Budget Law.

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We are aware of the case of State ex rel. Kelly et al. v. Hackmann, 205 S. W. 161, which opinion was to the effect that architects by the name of Kelly & Kelly were entitled to money for services rendered in the building of the new State Capitol, although their claim was not demanded before the end of the biennium in which they performed their services, but in that case it was not a question of appropriation, for the reason that there was sufficient money in the fund earmarked for the building of the State Capitol.

Section 43, Article IV of the Constitution of Missouri, reads as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:

"First, For the payment of all interest upon the bonded debt of the State that may become due during the term for which each General Assembly is elected.

"Second, For the benefit of the sinking fund, which shall not be less annually than two hundred and fifty thousand dollars.

"Third, For free public school purposes.

"Fourth, For the payment of the cost of assessing and collecting the revenue.

"Fifth, For the payment of the civil list.

"Sixth, For the support of the eleemosynary institutions of the State.

"Seventh, For the pay of the General Assembly, and such other purposes not herein prohibited as it may deem necessary; but no General Assembly shall have power to make any appropriation of money for any purpose whatsoever, until the respective sums necessary for the purposes in this section specified have been set apart and appropriated, or to give priority in its action to a succeeding over a preceding item as above enumerated."

Here This section is designated as a limitation on legislative power and specifically prohibits the appropriation of money by successive general assemblies in any other manner except as set out in this section. In reading this section we find no order of appropriation for the payment of claims arising in a former biennium, or at a former time, for which no appropriation had been made. In fact, it specifically states that no money shall be diverted from the treasury except in pursuance of regular appropriations made by law.

Another limitation on the legislative power is Section 44, Article IV of the Constitution which partially reads as follows:

"The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State, or to issue bonds or other evidences of indebtedness thereof, except in the following cases: * * * * *"

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This section specifically prohibits the contracting or authorization of the contracting of any debt or liability on behalf of the State, except in certain instances which are set out in four separate paragraphs which are too lengthy for this opinion. The first exception being a renewal of certain bonds, the second exception which allows the creation of the debt in the case of an unseen emergency which may arise by reason of the fact that the revenue is not sufficient for the appropriation made. This exception does not mean that a debt can be created when the appropriation is exhausted, but means a deficiency of the revenue and shall not exceed the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars for any one year. The third exception provides for the general assembly to submit an act providing for the loan of \$250,000.00 for any one year, this submission must be made to the voters of the State. The fourth exception is for the relief of members of the military service in World War Number One.

In reading both Sections 43 and 44 of Article IV of the Constitution of Missouri, we do not find any provision allowing the general assembly to appropriate money for expenditures created in the previous biennium.

Section 43, Article IV of the Constitution of Missouri, supra, prohibits the payment of money out of the state treasury on any claim where no appropriation has been made. It was so held in the case of State ex rel Gordon, 236 Mo. 142, l. c. 158, where the court said:

"The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have

no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department, nor would relator be entitled to the audit and allowance of his accounts for salary and expenses. * * * * *

Section 48 of Article IV of the Constitution of Missouri, supra, became effective on November 30, 1875, and in the laws of 1877, page 17 a general deficiency appropriation was made by the general assembly, which was the first general assembly after Section 48, of Article IV became effective. The legislatures from that time on have enacted deficiency appropriations under that name, and under the name of "Relief", but if the relief or deficiency appropriation is made for the payment of a contract or obligation that is null and void, then the appropriation would be a violation of Section 46, of Article IV of the Constitution of Missouri, which reads as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

The legislature on many occasions since 1877 has made deficiency and relief appropriations to most of the departments, but that fact cannot be taken advantage of by reason of laches, for the reason that the sections of the Constitution hereinbefore set out

are still in full force and effect. It was so held in the case of Alfred Harfst et al, Appellant, v. A. J. Hoegen, et al, Respondent, No. 37264, in the Supreme Court of Missouri, unreported. In that case Judge James Douglas, who wrote the opinion said:

"It is of no purpose to discuss or decide other questions raised except to point out that long acquiescence of appellants in the management of the school cannot make such management proper. ¹⁸ No one may waive the public interest ¹⁹; the constitutional provisions are mandatory and cannot be waived."

¹⁸
(Knoulten v. Baumhover, 182 Iowa 691, 166 N. W. 202, 5 A. L. R. 841; ¹⁹ De May v. Liberty Foundary Co., 372 Mo. 495, 37 S. W. (2) 640, 16 C. J. Const. Law, Sec. 89; ²⁰ State ex rel United Railways Co., v. Public Service Commission, 270 Mo. 429, 192 S. W. 958.)

In Paragraph (b) of your request you ask the following question:

"May the payment of the expenses referred to in question (a) be legally made from an appropriation by a session of the General Assembly which shall hereafter convene?"

We are assuming that when you say, and refer to the, "General Assembly which shall hereafter convene", you mean either the "Regular General Assembly", or a "Specially called General Assembly." Under the authorities hereinbefore set out, we believe that the contract with the messenger, where no money is in the appropriation, is null and void, and for that reason the next general, or specially called assembly, if one is called, is prohibited from appropriating any money on any demand against the State under any contract which is null and void.

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We are enclosing a copy of an opinion rendered by this department on February 19, 1942, to you, in reference to a deficiency appropriation for the relief of the Grain and Warehouse Commission. In that opinion we held that a deficiency appropriation would be unconstitutional.

CONCLUSION

It is, therefore, the opinion of this department that the Governor during the period of time remaining in the present biennium, cannot, on his certificate, legally certify for allowance and payment by the State Treasurer, as other demands, against the State, the expense of some messenger to whom the Governor has issued his warrant, under the seal of this State, and who has received the fugitive named in the warrant and conveyed the fugitive to the county in which the offense was committed, or is by law cognizable or in an amount which exceeds the sum remaining in the appropriation for the present biennium for the apprehension of criminals.

It is further the opinion of this department that the payment of such expenses cannot be legally made from a later appropriation by a session of the regular general assembly, or by the session of a specially called session of the general assembly.

In view of the fact that legislatures, beginning in the first general assembly after the adoption of Section 48, Article IV of the Constitution of Missouri, have passed deficiency appropriations and appropriations for the relief of most of the departments of the State, and the last legislature of 1941 made a deficiency appropriation to many of the departments, including the Judiciary Department, we suggest that this matter should be tested in the Supreme Court by proper procedure so that there will be no doubt as to the legality of appropriations made by future legislatures.

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We say this, not for the reason that we are in doubt about this opinion, but for the reason that such a decision would be final and leave no doubt as to the purposes of the framers of the Constitution in adopting Section 48 of Article IV and Section 19 of Article X, and the legislature, in enacting Section 10907, R. S. Missouri, 1939.

Respectfully submitted

W. J. BURKE
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APPROVED:

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