CIRCUIT JUDGES: The General Assembly has the power to increase the salary of circuit judges during their term of office.

CONSTITUTIONAL LAW:

October 4, 1946

Filed: #3

FILED 3

Mr. E. G. Armstrong, Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

> "Senate Bill 442 fixes the salary of certain circuit judges.
>
> "Will you please advise us the effective date of this bill, and furnish us an opinion as to when the changes in salary listed in this bill become effective as to incumbents in office."

You have presented two questions for opinion which will be answered in the order in which they are found in your request.

Senate Bill 442, relating to the compensation of circuit judges, was truly agreed to and finally passed before July 8, 1946, and subsequently approved by the Governor. The General Assembly recessed July 8, 1946 until 12:00 o'clock, August 7, 1946. Before recessing they passed a joint resolution, under the terms of which all laws passed by the General Assembly on or before July 8, 1946, and not effective by special provision, shall take effect ninety days from and after the beginning of the recess. This is in accordance with Section 29, Article III of the Constitution of 1945, which reads in part as follows:

> "* * * provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Therefore, Senate Bill 442 will become effective October 6, 1946.

The second question presented by your request is when will the salary changes relating to circuit judges in Senate Bill 442 become effective as to incumbents in office. As we have pointed out above, since Senate Bill 442 becomes effective October 6, 1946, all circuit judges affected by the bill would be incumbents in office. This raises a constitutional question of whether or not Section 13, Article VII of the Constitution of 1945 is controlling and prohibits the General Assembly from increasing the salary of circuit judges during their term of office. Section 13, Article VII of the Constitution of 1945 reads as follows:

> "The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Section 24, Article V of the Constitution of 1945, pertaining to the compensation of judges, reads in part as follows:

> "All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. * * * * * * * * * * *"

At first blush it would seem that the two above quoted sections of our Constitution are in conflict. Section 24 of Article V, dealing exclusively with the compensation of judges, does not specifically deny the General Assembly the power to increase their salaries during the term; but Section 13, Article VII prohibits the General Assembly from increasing the compensation of state, county and municipal officers during their term of office. Therefore, it will be necessary to apply the rules of constitutional construction so that we may determine the scope of application and the meaning of these two provisions.

In construing a constitution we should consider all provisions bearing on the same subject. In the case of State v. Adkins, 284 Mo. 680, l.c. 693, the court said:

> " * * * It is a fundamental rule of construction of all writings, whether they

> be laws, wills, deeds, contracts or constitutions, that they must be construed as a whole, and not in detached fragments; that they must be construed to effectuate and not to destroy their plain intent and purpose, and that in determining what is that intent and purpose all provisions relating either generally or specially to a particular topic are to be scrutinized and so interpreted, if possible, as to effectuate the intention of the makers. This rule does not need (though it does not lack) authority to give it vitality. It is inherent in the very nature of things, and springs from reason as Minerva sprang from the brain of Jove, full-grown and ready for battle."

When applying the above principle we must go even further and resolve seemingly overlapping provisions of the Constitution by harmonizing them. We should avoid a construction which renders any section meaningless or inoperative, and should lean to a construction that would render both sections operative, rather than one which may make a section idle and nugatory. State ex rel. Crutcher v. Koerln, 61 S.W. (2d) 750, and State on Inf. McKittrick, Attorney General, v. Williams, Sheriff, 144 S.W. (2d) 98.

A second principle of constitutional construction that we believe applicable in this case is that specific provisions should prevail over the general provisions when they affect the same subject matter. Citing the case of State ex rel. Gordon v. Becker, Secretary of State, 49 S.W. (2d) 146, this general rule, as set out in 16 C.J.S., Sec. 25, p. 65, reads as follows:

> "When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply.
>
> "Where there is a conflicting specific and general provision, or a particular intent which is incompatible with a general intent, the specific provision or particular intent will be treated as an exception, and should

> receive a strict, but reasonable construction. * * * *"

Further authority may be found for this principle in People v. Smith, 327 Ill. 11; People v. Field, 66 Colo 367, and State v. Carter, 77 Okla. 28.

It can readily be seen that Section 13 of Article VII is a general provision applying to all state, county and municipal officers, while Section 24 of Article V applies only to judges. Therefore, in applying the two preceding rules of construction, by looking to both sections, since they affect the same subject matter that is before us, and since Section 24 of Article V is a specific section, affecting judges only, then this section does not contain any constitutional prohibition on the General Assembly regarding compensation of circuit judges. In reading this section it is noted that the only prohibition on the General Assembly is that the salary shall not be diminished during a judge's term of office. There being no other prohibition on the General Assembly they would be able to increase the salary of a circuit judge whenever they deemed it necessary by virtue of the principle that a state constitution is not a grant of power to a legislature, but a limitation thereon and the legislature may pass laws on any subject not forbidden by state or federal constitutions. State ex rel. McDonald v. Lollis, 33 S.W. 98, 326 Mo. 644; State ex rel. Gaines v. Canada, 113 S.W. (2d) 783, 342 Mo. 121.

After determining that Section 24 of Article V is controlling in regard to our problems, it will be necessary to examine this section more closely. When interpreting a section of a constitution the intent and purpose of the lawmakers is of primary importance in determining its true meaning and scope. State ex rel. Harry L. Hussmann Refrigerator & Supply Co. v. St. Louis, 5 S.W. (2d) 1080, 319 Mo. 497; Graves v. Purcell, 85 S.W.(2d) 543, 337 Mo. 574. Further, authority may be found in State ex Inf. Norman v. Ellis, 28 S.W. (2d) 363, 325 Mo. 154, where the court stated, l. c. S.W. 367:

> " * * *There is another rule superior to that, which is that the intention of the lawmakers and Constitution makers must be gathered when interpreting an act or a constitutional provision. * * *"

In ascertaining this intent we believe it proper to examine the debates of the Constitutional Convention so that we may de-

termine what was in the minds of the framers of our organic law when they adopted this particular section. We further realize that there is a limit to the reliance that may be placed on these debates, as was pointed out in State ex rel. Donnell v. Osburn, 147 S.W. (2d) 1065, wherein the Court said, l. c. 1068:

> "In the debates before the Constitutional Convention of 1875 which proposed Section 3, it seems to have been agreed that upon aggregating the votes from the face of the returns the candidate with the highest vote would prima facie be entitled to the office and to enter upon his duties. Any attack upon the returns would have to be made thereafter by a contest before the general assembly. See Debates of the Missouri Constitutional Convention of 1875 by Loeb and Shoemaker, Vol. IV, p. 428, et seq. We refer to the debates with knowledge of the rule which limits the reliance which may be placed in them. State ex rel. Heimberger v. Board of Curators, 268 Mo. 598, 188 S.W. 128."

After a thorough reading of this case it will be noticed that, regardless of their stated rule of limited reliance, the court did in fact actually use the record of the proceedings to ascertain the true intent of the lawmakers. As declaratory of the rule that the records of the Constitutional debates may be examined to determine the true meaning of a section of the Constitution, we direct your attention to Ex parte Oppenstein, 233 S.W. 440, wherein the Supreme Court said; l. c. 444:

> "This substitute was rejected by a vote of 42 to 23. Three members were absent. The power to inspect and examine the ballots in 'judicial proceedings' would have been given by this amendment. The convention rejected it.
>
> "It is clear from this that the constitutional convention had before it, in the proposed substitute section, the very question which counsel discuss. This sub-

> stitute would have expressly given the authority now sought to be exerted. When the convention defeated it, it passed upon the question in this case. Its intent could hardly have been more clearly exhibited than by the vote upon the substitute section."

In a very recent case before the Supreme Court en banc, they again relied on the Constitutional debates to determine the true intent and meaning of a section of the Constitution. We quote from State ex rel. Montgomery et al., County Judges, v. Nordberg, Clerk of County Court, et al., 193 S.W. (2d) 10, l.c. 12.

> "An examination of the Journal of the Constitutional Convention discloses that the main purpose prompting the adoption of Sec. 23 was to facilitate state bookkeeping, so to speak. Thus it was stated by Dr. McCluer, on the 145th day, Friday, May, 19, 1944, p. 2417: 'The principal change is in the date of the fiscal year from the calendar year to the dates as indicated, a change which is desirable to bring the fiscal business of the state in line with that of the nation and for other reasons that were set forth by representatives of the State Auditor's office.'
>
> "Again, Mr. Hemphill, apparently reading from a memorandum prepared by the State Auditor, said:
>
> "'The efficiency of every department of the state government would be materially benefitted and the lost motion which occurs during the first six months period following the meeting of the Legislature will be done away with. * * * * * * * * * * * * *
>
> "'If this change is made, the only confusion which would result is the confusion which would still exist in cities and counties where the fiscal year and the calendar year coincide. However, this could easily be

> corrected by the Legislature when it next meets, by creating a statute fixing the fiscal year of the county and the city the same as the fiscal year of the state.'"

In examining the Constitutional debates on Section 24, Article V, we note that an amendment was offered which is found on pages 2739 and 2740 of Part 6 of the Stenotype Transcript of the Debates, and reads as follows:

> "PRESIDENT: Are there any amendments?
>
> "MR. TEE: I have an amendment, please
> "(Amendment submitted and read as follows.)
>
> > AMENDMENT NO. 1 FOR SUBSTITUTE NO. 1 FOR SECTION 24. Amend Mr. Righter's substitute for Section 24 by inserting the words 'increased or' between the words 'be and diminished' in line 6 of said substitute as the same appears on page 16 of the Journal of May 25, 1944.
>
> "PRESIDENT: Do you move the adoption of the amendment?
>
> "MR. TEE: I do.
>
> "(Motion was seconded.)
>
> "MR. TEE: Now, Mr. President, I have called attention to the sentence in Section 24 of the Committee's report reading as follows and found in lines 2, 3, 4 of the section. 'No judge's salary shall be increased or diminished during his term of office.' Now, the Committee gave that part of the section a great deal of attention. Those words were not placed in there without consideration. Those words are also found in the present Constitution and I believe they should continue to be part of the Constitution with reference to this subject matter. Now, I . . .
>
> "MR. BRADSHAW (Interrupting): Mr. President, may I interrogate Mr. Tee?

"PRESIDENT: Does the gentleman yield?

"MR. TEE: I do.

"MR. BRADSHAW: Mr. Tee, is not the same purpose served by Section 6 of File No. 7? I am reading here from the Phraseology report which provides the compensation of state, county and municipal officers shall not be increased during the term of office nor shall the term of any officer be extended?

"MR. TEE: That was the very action that I was about to refer to.

"MR. BRADSHAW: Is there any reason for your amendment?

"MR. TEE: I think so because I am of the belief from remarks here made that this section, as amended, 24, as amended, would be considered an exception to their language in File No. 7 which you just read.

* *

"MR. TEE: Well, it all means the same thing. Now, there is no reason why that this salary or this compensation should not be fixed and it should not be susceptible to be juggled around and juggled around like it has been or like this amendment would permit it to be in one direction only. Judges, those men who are competent to be judges, I think are competent to decide, that is to understand the terms upon which the office to which they aspire and which is offered and I think it not an unjust thing to expect them to continue throughout the term of that office upon the terms upon which it is offered. We are not taking any undue advantage of those people by making the limitation on both ends of this matter. I think it should be retained."

After a long discussion (found in the Debates on pages 2738 to 2751) on the merits of allowing the General Assembly to increase the salaries of judges during their terms of office,

the amendment was defeated, clearly showing the intention of the framers of the Constitution to leave this problem to the wisdom of the General Assembly.

Also, when interpreting a section of the Constitution we should look to the history of the particular section. In the case of Application of Lawrence, et al., Gramling, et al. v. Lawrence, et al., 185 S.W. (2d) 818, the Supreme Court had before it a problem that necessitated the interpretation of a section of the Constitution that had been changed by amendment. The court said at l. c. 819:

> "* * * We think the latter is clearly evident upon a consideration of the history of the constitutional and statutory sanctions of the practice of absentee voting. To hold otherwise would be to say that the then existing statutory requirement of presence within the state, as an incident of the process of voting, was merely continued without change. Such, we think, was not the case."

To the same effect is the following from State ex rel. McGaughey v. Grayson, 163 S.W. (2d) 335, l. c. 338:

> "In determining the meaning and extend of a constitutional provision the reason for its adoption must be borne in mind. Therefore, we may look to the history of the times and the conditions existing when the Constitution was framed and adopted."

Section 33, Article VI of the Constitution of 1875 dealt with compensation of judges and read as follows:

> "The judges of the Supreme, Appellate and Circuit Courts, and of all other courts of record receiving a salary, shall, at stated times, receive such compensation for their services as is or may be prescribed by law; but it shall not be increased or diminished during the period for which they were elected."

Here again is, clearly, evidence that the delegates to the Constitutional Convention intended to give the General Assembly the power to increase the salary of judges during their term

of office, because the words "increased or" were left out of the new section affecting compensation of judges of the Constitution of 1945.

CONCLUSION

Therefore, it is the opinion of this department that Senate Bill 442 will become effective October 6, 1946, and, it is further our opinion that the circuit judges of this state should be paid, after October 6, 1946, in accordance with Senate Bill 442.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General