CONSTITUTIONAL LAW: (1) Constitutional Amendment No. 1, appearing on the ballot as Proposition No. 3 in the November 4, 1958 general election amending Sections 22 and 28 of Article IV of the Missouri Constitution of 1945, is "self-executing" and the full operation of the same is not dependent upon legislative action. (2) Any and all statutory provisions in "conflict" with said amendment (the amendment being the last expression of the lawmaking power) and its full operation, are, insofar as their future operation is concerned after the effective date of the amendment, deemed repealed. (3) The signature of the state auditor on the form of warrant now in supply would not in anyway affect its efficacy.

STATE COMPTROLLER:

STATE AUDITOR:

FILED

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December 5, 1958

Honorable John W. Schwada
Comptroller and Director of Budget
State Capitol Building
Jefferson City, Missouri

Dear Dr. Schwada:

Reference is made to your request for an official opinion, which request reads in part as follows:

> "Constitutional Amendment No. 1, appearing on the ballot as Proposition No. 3, submitted to the voters of the State the Fourth Day of November, 1958, amends Sections 22 and 28 of the Constitution. The changes in these sections affect the duties of the State Auditor and the duties of this office. * * *
>
> "Since Sections 22 and 28 of the Constitution, as amended, make significant changes in the responsibilities of this office and the office of the Auditor, I am asking for your written opinion on these questions:
>
> (1) Are the amended provisions self-executing?
>
> (2) If the answer to the first question is in the affirmative, must the Auditor and the Comptroller act in accordance therewith, regardless of the existence of conflicting statutory provisions?
>
> (3) If the answer to the first question is affirmative, may the Comptroller, while certifying claims and accounts directly to the Treasurer for payment in accordance with the last sentence of Section

22, as amended, pass the warrants prepared by this office through the office of the Auditor for the addition of his signature? (At present the warrant contains a space for the signature of the Auditor. Should we continue to use the identical warrant form until our existing supply is exhausted and should the Auditor not place his signature thereon, it is possible that some unnecessary correspondence would be required to explain the absence of his signature.)"

Constitutional Amendment No. 1, which appeared on the ballot as Proposition No. 3 in the November 4, 1958 general election, reads as follows (Laws of Missouri, 1958, Second Extra Session, pp. 195-196):

"Section 1. Sections 22 and 28 of Article IV of the Constitution of the State of Missouri are repealed and two new sections enacted in lieu thereof, to be known as sections 22 and 28 of Article IV of the Constitution of Missouri, and to read as follows:

"Section 22. The department of revenue shall be in charge of a director of revenue, and shall have divisions of collection, budget and comptroller, and other divisions as provided by law. The division of collection shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law. The division of the budget and comptroller shall assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly. The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state treasurer for payment.

"Section 28. No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of

> be incurred unless the comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

The ballot title to said amendment was as follows:

> "An amendment relating to the department of revenue and its divisions; together with the manner in which money may be withdrawn from the state treasury."

(The resolution calling for the submission of the proposed amendment to the qualified voters of the State of Missouri, while found in the Session Laws 1958, Second Extra Session, was actually adopted at the Regular Session of the 69th General Assembly.)

Before proceeding to your first question, we wish here to note the changes contemplated by said amendment. First, Section 22 of Article IV of the 1945 Constitution provided that:

> " * * * The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state auditor for payment."

Under the amendment above set out, this provision was changed to read:

> " * * * The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state treasurer for payment."

The only change was the substitution of the word "treasurer" for the word "auditor." The effect of the change is this. Whereas previously the comptroller made the required certifications to the state auditor, under this amendment the certifications by the

comptroller would be made to the state treasurer. No further changes in Section 22 were encompassed within the amendment.

Section 28 of Article IV of the 1945 Constitution provided that:

> "No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. * * *"

By the amendment, the words "the state auditor" were deleted. The effect of the change is this. Whereas previously it was the constitutional duty of the state auditor to certify "that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it", this duty placed upon the auditor was, insofar as the Constitution is concerned, eliminated by the amendment and the same duty placed upon the comptroller. No other and further changes were made in Section 28 by the amendment.

Bearing in mind these changes sought to be accomplished by the amendment and assuming that said amendment carried, we proceed to your first question as to whether the amended provisions (particularly the changes above noted) are self-executing.

The term self-executing simply means capable of fulfillment without the aid of any legislative enactment. State ex inf. v. Duncan, 265 Mo. 26, 175 S.W. 940, l.c. 945; State ex rel. v. Toberman, 232 S.W. 2d 904, l.c. 905.

The rule for determining whether a constitutional provision is or is not self-executing has been laid down by the Supreme Court of Missouri in the case of State ex rel. v. Smith, 194 S.W.2d 302, l.c. 304, wherein the court quoted with approval from 11 Am.Jur. Constitutional Law, Sec. 74, pp. 691-692, as follows:

> " * * * 'One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of

> which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. * * * Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.' * * *"

See also State ex rel. v. Toberman, 232 S.W.2d 904, 906, and Wann v. Reorganized School District No. 6, 293 S.W.2d 408, wherein the same rule is recognized.

In the case of State ex inf. v. Ellis, 28 S.W.2d 363, l.c. 365, the Supreme Court of Missouri recognized the rule stated in 12 C.J., p. 729 as follows:

> "The general rule is thus stated in 12 C.J. p. 729:
>
> "'It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *
>
> "'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.'
>
> "And further, page 730:
>
> "'A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on the legislative will.'"

See also State ex inf. v. Wymore, 119 S.W.2d 941, wherein the latter rule was again recognized.

We further note the following from the case of State ex rel. v. Toberman, supra, at l.c. 905-906:

> "In State ex inf. Barker v. Duncan et al., 265 Mo. 26, 175 S.W. 940, loc. cit. 945, this court, quoting with approval from an opinion of the Supreme Court of Colorado, held that: 'Constitutional provisions are self-executing when it appears that they shall take immediate effect, and ancillary legislation is not necessary to the enjoyment of the right thus given, or the enforcement of the duty thus imposed; in short, if a constitutional provision is complete in itself, it executes itself'; and further held, quoting from an opinion of the Supreme Court of the United States, Davis v. Burke, 179 U.S. 399, 21 S.Ct. 210, 45 L.Ed. 249, that: 'Where a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down * * * general principles, * * * it may need more specific legislation to make it operative; in other words, it is self-executing only so far as it is susceptible of execution. But where a Constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions.'"

Lastly, we call attention to the case of McGrew Coal Co. v. Mellon, 287 S.W. 450, 454, wherein it is stated:

> "There can be no question that constitutional provisions, creating a right or imposing a duty or a liability, where none existed before, and making no provision for the passage of laws by the Legislature to enforce same, are self-enforcing. * * *"

Viewed in the light of the above noted rules, we have no hesitancy in stating that in our opinion the above amendment is self-executing. The constitutional duty placed upon the comptroller by said amendment to certify that the expenditure is within the purpose of the

appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it, was not contained in the 1945 Constitution. Neither was the new constitutional duty placed upon the comptroller to certify claims and accounts to the "state treasurer" for payment contained in the 1945 Constitution. These new duties are not mere general principles but are duties, the nature and extent of which are fixed by the Constitution itself. Nothing need be done by the Legislature to define the nature and extent of these duties. Indeed, it is inconceivable wherein legislation could more clearly specify these duties. Further, nothing contained in the amendment, either directly or indirectly, indicates that the subject matter contained therein was to be referred to the Legislature for action.

By the same token, it is no longer the constitutional duty of the state auditor, previously imposed upon him by Section 28 of Article IV of the 1945 Constitution, to make the certification now imposed upon the comptroller by the amendment.

Lastly, we invite attention to the history of this constitutional amendment. By House Bill No. 301, enacted by the 67th General Assembly, there was established "The State Reorganization Commission" for the study of state executives, offices, departments and agencies. This Commission submitted its report to the Governor under date of January 10, 1955. One of the recommendations contained in this report was "that all preauditing functions be placed as the direct responsibility of the comptroller." Assigned as reasons for the recommended changes was that the procedure by which the auditor preapproves warrants before he countersigns them does not in practice constitute added protection against unwarranted expenditures because the auditor must use the ledgers maintained by the comptroller to ascertain that the expenditures are within the appropriation and that there is a sufficient balance upon which the warrant is drawn to pay it. This Commission further pointed out that no good purpose seemed to be served in having the state auditor make a postaudit of the comptroller's office since he had already approved and signed all warrants issued by the comptroller. In other words, under his duty to postaudit, the auditor would merely be auditing his own preaudit.

The matters above considered, it is readily seen that the purpose of the amendment was to remove an existing "mischief." Under such circumstances, the constitutional amendment should not be construed as dependent for its efficacy and operation on the legislative will. State ex inf. v. Ellis, supra.

Before passing to your next question, we wish to note the following from the opinion of the court in the case of State ex

rel v. Romero, 124 P. 649, 651, which rule is, we believe, founded upon reason and logic, consistent with the rules laid down by the Supreme Court of Missouri, noted supra, and in conformity with the conclusion herein reached:

> "If a constitutional provision, either directly or by implication, imposes a duty upon an officer, no legislation is necessary to require the performance of such duty."

You next inquire whether the auditor and the comptroller must act in accordance with the constitutional amendment when the same becomes effective regardless of the existence of "conflicting" statutory provisions. Our answer is in the affirmative. Such statutory provisions as are in "conflict" with the constitutional amendment and the enjoyment of its full operation would be deemed repealed. The rule in this regard is succinctly stated by the Supreme Court of Missouri, en banc, in the case of Marsh v. Bartlett, 121 S.W.2d 737, 745, as follows:

> "With statutes inconsistent with Amendment No. 4 we have nothing to do. Such as were inconsistent, including said section 8270, were expressly repealed by that instrument. Repeal in that manner is all-sufficient, for a statute may be nullified, in so far as future operation is concerned, by a constitution or a constitutional amendment as well as by statute; and the constitution or the amendment, as the highest and most recent expression of the lawmaking power, operates to repeal, not only all statutes that are expressly enumerated as repealed but also all that are inconsistent with the full operation of its provisions. 12 C.J., sec. 97, pp. 725, 726. A provision may be so framed, however, that, while legislation is necessary to put into effect its affirmative principles, it repeals existing statutes inconsistent with it. Id., pp. 727-728, sec. 4."

It is the opinion of this office that where, as is now provided by the amendment, the comptroller is directed to certify claims and accounts to the "state treasurer for payment," such certification is sufficient warrant for the treasurer to make payment and that the treasurer would not be justified in refusing to pay the same because of any lack of certification by any

other state officer. On the other hand, and in answer to the last question, we do not believe that the signature of the state auditor on the form of warrant now in supply would in anyway affect its efficacy.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that: (1) Constitutional Amendment No. 1, appearing on the ballot as Proposition No. 3 in the November 4, 1958 general election amending Sections 22 and 28 of Article IV of the Missouri Constitution of 1945, is "self-executing" and that the full operation of the same is not dependent upon legislative action. (2) Any and all statutory provisions in "conflict" with said amendment (the amendment being the last expression of the lawmaking power) and its full operation, are, insofar as their future operation is concerned after the effective date of the amendment, deemed repealed. (3) The signature of the state auditor on the form of warrant now in supply would not in anyway affect its efficacy.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

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