CONSTITUTIONAL LAW: Sections 29 and 52, Art. III, Constitution of 1945, must be read together in determining effective date of bills.

LEGISLATION: Emergency clauses in S. B. 85, 86 and 87, 63rd General Assembly invalid. Said bills will be effective to increase the compensation of persons serving at the time said bills become effective.

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November 9, 1945

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date, which reads as follows:

> "Senate Bill 85 duly passed and signed by the Governor provides for increasing the salary of the Superintendent of the State Sanitorium at Mt. Vernon.
>
> "Senate Bill 86 provides for increases in salaries of superintendents of hospitals.
>
> "Senate Bill 87 provides for increasing salaries of the staff physicians of the various hospitals.
>
> "Each of these three bills carry a purported emergency clause.
>
> "I would like a written opinion from your office as to when these increases become legally effective."

As stated in your letter, each of the three bills inquired about contains a purported emergency clause. Two sections of the Constitution must be considered in determining the validity of such emergency clauses. Said sections are Nos. 29 and 52 of Art. III, and they read as follows:

> "Section 29. No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that the laws previously passed and not effective shall take effect ninety days from the beginning of such recess."
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> "Section 52. A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded. * * * * * Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise."

While Section 29, supra, provides that an act may go into effect sooner than ninety days after the adjournment of the legislature "in case of an emergency," yet Section 52 provides that all laws except those "necessary for the immediate preservation of the public peace, health or safety" (and some others not material to our discussion

here) shall be subject to referendum at any time within ninety days after the adjournment of the legislature. As we shall hereinafter point out, the courts have always construed these two constitutional provisions together and have held that the emergency referred to in Section 29 must be such as makes it "necessary for the immediate preservation of the public peace, health or safety" that a statute go into effect sooner than ninety days after the adjournment of the legislature.

The Supreme Court of this state some 25 years ago had occasion to consider two almost identical provisions of the constitution of Missouri in the case of State ex rel. v. Sullivan, 283 Missouri 546, 224 S.W. 327. In that case the court said (224 S.W. l. c. 337):

> "The next contention is that although we may rule that the usual emergency clause of a measure may not prevent its reference, as we have ruled above, yet it is contended that the expressions in section 81 of the measure before us are such as to amount to a legislative declaration that the measure is one 'necessary for the immediate preservation of the public peace, health, or safety,' and that the courts cannot go back of such legislative declaration.
>
> "In the first place the language in said section 81 of the act of 1919 (Laws of 1919, p. 484) is not such a legislative declaration, and with this the matter might end. In a valuable note in 36 Cyc. p. 1194, it is well said:
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> "'Under a constitutional provision for the submission of acts to the people before their taking effect, "except as to laws necessary for the immediate preservation of the public peace, health or safety," a clause intended to put them in effect before the time prescribed by the general law must not only declare an emergency, but must also set forth such an emergency as described in the above-quoted provision of the Constitution.'

"This emergency clause touches neither side nor bottom, when measured by this rule. But both sides urge and discuss the larger question, as to whether or not such legislative declaration would foreclose the matter in the courts. Upon this question the courts are divided, and in our judgment, some have been lead into error by reason of court rulings upon mere emergency declarations. Before the days of initiations and referendums all the state constitutions contained sections similar to our section 36 of article 4 of the Missouri Constitution. The courts were liberal in construing the emergency provision of such sections. They largely ruled that when the lawmaking body said that an emergency existed the matter was foreclosed. It was simply a matter of the time at which the law became effective, and had no real substance. And since the referendum provisions of state constitutions some courts, viewing the 'peace and safety' clause of these constitutional provisions in the light of mere emergency clauses of a law, have ruled that, if the lawmaking body declared that the measure was for the 'immediate preservation of the peace, health or safety,' such legislative declaration was binding upon the courts and a finality. To the rule in this line of cases we do not agree. The very substance of a constitutional right could be taken from the people by an overanxious and hostile legislative body. The right here involved is not only constitutional, but one of vital importance and of large proportions. If the courts cannot view the whole measure, and from it determine whether or no the lawmakers overstepped the constitutional restrictions in denying the referendum of the measure by their ukase on the subject of 'immediate preservation of peace, health or safety' then the constitutional referendums become a farce. It becomes a legislative referen-

> dum, rather than a constitutional referendum, because by a mere false declaration as to 'the peace, health or safety' every measure could be precluded from the constitutional referendum."

Later, in the foregoing opinion, the court said:

> "The reason of the thing lies with this rule. By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum by a mere declaration of 'immediate preservation of the peace, health or safety' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yardstick of the Constitution, and determine whether or not the lawmakers breached the Constitution in making the declaration."

After discussing cases from other states on the same question, the court further said in the Sullivan case (224 S.W. l. c. 339):

> "So that in the case at bar, had the lawmakers in section 81 of the measure actually declared such measure to be necessary for the 'immediate preservation of the peace, health or safety,' we would hold such section void upon a comparison of the measure as a whole with the constitutional provisions of section 57 of article 4 of the Constitution. The words 'necessary for the immediate preservation,' as found in our Constitution, must be given effect, and are of vital importance in measuring the legislative act by the Constitution. Many acts may be necessary to public peace, health, and safety, yet not be

'necessary for the immediate preservation of the public health, peace or safety.'"

The above case has been consistently followed by the Supreme Court of Missouri. In the later case of State ex rel. v. Becker, 289 Mo. 660, 233 S.W. 641, the decision in the Sullivan case was attacked for several reasons, but the Court expressly approved the holding of the Sullivan case on the question of the validity of an emergency clause in a legislative act and of the power of the Court to question such validity. The principal opinion in the Becker case said:

"There is but a single legal proposition presented by this record to this court for determination, and that is, Has the Legislature of the state the constitutional authority under section 57, art. 4, of the Constitution, to enact a law, and debar the power of the courts of the state from passing upon the question as to whether or not the law is subject to referendum by adding thereto the words, 'This enactment is hereby declared necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 57 of article 4 of the Constitution of Missouri'? * * * * This question has been most elaborately and ably discussed by counsel for the respective parties, and all the authorities bearing upon the question from the various states of the Union have been cited; and, after a thorough consideration of the same, I am fully satisfied that the law of the case was, and is, fully and correctly declared by Judge Graves in the case of State ex rel v. Sullivan, 224 S.W. 327, where the same legal proposition was presented to this court for determination that is here presented by this case. I fully concurred in the views as there expressed by Judge Graves, and adopt them as my views of the law of this case."

The Sullivan case was also cited with approval on the same question in State ex rel. v. Maitland, 296 Mo. 338, 246 S.W. 267, and Fahey v. Hackmann, 291 Mo. 351, 237 S.W. 752. Also, in the case of State ex rel. v. Linville, 318 Mo. 698, 300 S.W. 1066, the Court, at l. c. 1068, said:

> "It was held in the case of State v. Sullivan, 283 Mo. 546, 224 S.W. 327, that these two sections of the Constitution must be construed together; that a declaration in a bill that it was an emergency measure within the meaning of the Constitution, did not make it so; that the emergency must appear in fact upon the face of the bill to be within the terms of the Constitution, authorizing an emergency clause which would put the act into immediate effect."

From the above we think it is clear that even though a legislative act declares that an emergency exists and that the act is "necessary for the immediate preservation of the public peace, health or safety," the Courts are not bound by such declaration, but may and should look at the whole act to determine whether in fact such an emergency is set forth in the act as will authorize the legislature to cause the act to become effective sooner than ninety days after the adjournment of the legislature. With this principle in mind, we turn to the various acts under consideration to see if they are such as justify emergency clauses, putting them into effect immediately upon passage and approval.

S. B. 85 is an act to repeal Section 9277, R. S. Mo. 1939, relating to qualifications and compensation of the Superintendent of Missouri State Sanatorium at Mount Vernon, and to enact a new section in lieu thereof relating to the same subject matter. Said Section 9277 read as follows:

> "The superintendent of the Missouri state sanitorium, at Mount Vernon, shall be a physician skilled in the treatment of tubercular diseases, and shall receive for his services the sum of $3,600.00 per annum, payable

> monthly, together with all necessary and actual traveling expenses."

The new section (same number) of S. B. 85 reads as follows:

> "The superintendent of the Missouri State Sanatorium, at Mount Vernon, shall be a physician skilled in the treatment of tubercular diseases, and shall receive for his services the sum of not less than $4,000.00 nor more than $6,000.00 per annum, payable in monthly installments, said annual compensation to be determined by recommendation of the president of the board and approval by the board of managers, together with all necessary and actual traveling expenses."

Comparison of the new section with the one to be repealed, shows that no change whatever was made in the provisions as to the qualifications of the superintendent referred to in said sections, and that the only provisions changed were those relating to the compensation of such officer. The old section provided that said officer should receive for his services the sum of $3,600.00 per annum, together with all necessary and actual traveling expenses, while the new section provides that the officer shall receive for his services the sum of not less than $4,000.00 nor more than $6,000.00 per annum, the amount to be determined by recommendation of the president of the board and approval by the board of managers, together with all necessary and actual traveling expenses. The new act, therefore, changes the amount of the superintendent's salary and provides a different method for determining the exact amount of the salary.

Section 2 of S. B. 85 reads as follows:

> "Since the present compensation for physicians at eleemosynary institutions is totally inadequate and the emergencies of the war render this situation extremely acute, it, therefore, becomes necessary to relieve

> the situation as speedily as possible, and this Act is necessary for the immediate preservation of the public health, safety, and general welfare, and an emergency, therefore exists within the meaning of the Constitution, and this Act shall be in full force and effect for and after its passage and approval."

The facts constituting an emergency are thus declared to be the gross inadequacy of the compensation of physicians at the eleemosynary institutions and the further fact that the emergencies of the war render that situation extremely acute. In other words, the plain meaning of the language used in the emergency clause is, that in view of the increased cost of living caused by the war, the compensation of physicians at eleemosynary institutions of the state are totally inadequate and, that the situation should be relieved immediately. There is nothing in the act to indicate that physicians cannot be obtained at these institutions at the compensation now provided. The only fact stated as creating an emergency is the fact that the compensation of these particular persons is totally inadequate under present conditions. The same argument could probably be made as to the compensation of many state officers and employees, but does that fact constitute an emergency, that is, a situation which is a threat to the "immediate preservation of the public health, peace or safety"?

The case of State ex rel. Harvey v. Linville, 318 Mo. 698, 300 S.W. 1066, involved an act which had been passed increasing the salary of the county superintendent of schools. The act contained the following emergency clause:

> "Sec. 4. Emergency Clause. The fact that the annual school election will be held on the first Tuesday in April, 1919, at which time county superintendents of public schools for the several counties in this state will be elected, creates an emergency within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its passage."

In passing upon the validity of the emergency clause in the foregoing case, the court said:

> "Plainly the emergency clause in the act does not state a condition to which the emergency provision of the Constitution could apply."

The Linville case was followed in the later case of Hollowell v. Schuyler County, 322 Mo. 1230, 18 S.W. (2d) 498.

From all the above we must conclude that mere inadequacies of compensation of public officials, or employees, is not a situation which requires that it be corrected "for the immediate preservation of the public health, peace or safety." Therefore, the emergency in S. B. 85 (Sec. 2) is invalid and of no effect.

S. B. 86 is an act designed to repeal Section 9278, R. S. Mo. 1939, relating to eleemosynary institutions and the authority of the superintendent of the several eleemosynary institutions to control and manage them and the superintendent's compensation, and to enact a new section in lieu thereof. Said Section 9278 read as follows:

> "The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institution over which he has been appointed as manager, and shall devote his entire time thereto, and shall receive, unless otherwise provided for, the sum of $3,600.00 per annum, to be paid monthly, together with all necessary and actual traveling expenses. The superintendent of the Missouri state school shall receive the sum of $3,600.00 per annum, to be paid in monthly installments, together with all necessary and actual traveling expenses."

The new section enacted by S. B. 86, (same number), reads as follows:

> "The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institutions over which he has been appointed as manager, and shall devote his entire time thereto, and shall receive as compensation for his services, unless otherwise provided for, not less than the sum of $4,000.00 nor more than the sum of $6,000.00 per annum, to be paid in monthly installments, said annual compensation to be determined by recommendation of the president of the board and approval by the board of managers, and in addition thereto he shall receive all necessary and actual traveling expenses. The Superintendent of the Missouri State School shall receive not less than the sum of $4,000.00 nor more than the sum of $6,000.00 per annum, to be paid in monthly installments, said annual compensation to be determined by recommendation of the president of the board and approval by the board of managers, and in addition thereto he shall receive all necessary and actual traveling expenses."

A comparison of the old section with the new section will show that there is no change whatever made in the new section, with respect to the powers and duties of the superintendent of the eleemosynary institutions, and that the only change that is made by the new act is a change in the amount of the compensation of such officer. The situation with respect to S. B. 86 is, therefore, identical with that set forth in S. B. 85, which was discussed above. The emergency clause of S. B. 86 is likewise identical with the emergency clause of S. B. 85. It is, therefore, apparent that the emergency clause in S. B. 86 is of no more force and effect than the emergency clause

of S. B. 85, which we discussed above, and therefore we must conclude that the emergency clause of S. B. 86 is likewise invalid.

S. B. 87 is an act designed to repeal Section 9280, R. S. Mo. 1939, relating to eleemosynary institutions and the authority of the board of managers to appoint assistant physicians -- number and compensation, and to enact a new section in lieu thereof. Said Section 9280 read as follows:

> "The state eleemosynary board, upon the joint recommendations of the president of the board and the superintendent of each institution concerned, shall appoint assistant physicians for the various eleemosynary institutions of the state on the following basis, to wit: * * * * * * * * * * * * * * * * *"

The new section in S. B. 87 reads identical with the old one above quoted, except that the words "staff physicians" are used instead of "assistant physicians." Following the colon in each statute, brackets are set up to determine the number of assistant or staff physicians which may be used, and providing for the compensation of the various classes of physicians. The ultimate effect of the new act, therefore, is to provide more physicians for the eleemosynary institutions and to provide for greater compensation. The emergency clause in S. B. 87 is identical with the emergency clauses of S. B. 85 and S. B. 86, discussed above. It might be that had the emergency clause in S. B. 87 recited that the number of physicians now provided by law was insufficient to properly take care of the patients at the various institutions, and that therefore there was an imperative need for correcting this situation, it might be said that an emergency was stated in the bill. However, the emergency clause only recites that the emergency is the inadequacy of the compensation of the physicians. Apparently the Legislature did not consider that the need for additional physicians was sufficient to create an emergency. It only considered that the inadequacy of the pay of the present physicians was the real emergency. From what was said above with regard to S. B. 85 and S. B. 86, we conclude, therefore, that the emergency clause in S. B. 87 is likewise invalid and of no effect.

So far as the emergency clauses in the three bills under discussion are concerned, therefore, the three bills will go into effect ninety days after the adjournment of the present session of the 63rd General Assembly. However, in order to answer your question completely, the real object of which is to determine when you shall commence issuing warrants in accordance with said three acts, it is necessary that we direct attention to another provision of the Constitution. Section 13 of Art. VII 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."

It is held that a provision like the above applies only to officers having a fixed term. In 46 C. J. 1023, it is said:

> "A constitutional prohibition against changing the compensation of an officer during his term applies only to officers having a fixed and definite term."

Also, in the case of State ex rel. v. Farmer, 271 Mo. 306, 196 S.W.1106, 1109, we find the following:

> "The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term."

Also, in the case of State ex rel. v. Johnson, 123 Mo. 43, it was held that a city officer appointed by the council and subject to removal by it at pleasure is not an officer within the meaning of the Constitution prohibiting the increase of the salary of an officer during his term.

If, therefore, the persons occupying the positions set forth in the acts, at the time said acts become effective, are state officers with fixed terms, then such in-

creases in compensation cannot be effective as to them.

By Section 9259, R. S. Mo. 1939, the state eleemosynary institutions are placed under the care, management, and control of a board of managers. Section 9275, R. S. Mo. 1939 reads as follows:

> "The board of managers shall appoint some suitable person as superintendent for each of the several eleemosynary institutions herein named."

No term is fixed by the fore going section for the various superintendents. Furthermore, Section 9281, R. S. Mo. 1939 provides as follows:

> "The superintendent of the several state institutions herein enumerated may be removed by the board for cause or upon the recommendation of the health supervisor, and the several assistant physicians may be removed at any time by the superintendent of such institution and any assistant physician shall be removed by the superintendent upon the recommendation of the health supervisor."

In 46 C. J. page 964, it is said:

> "Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no 'term' of office."

It will be seen, therefore, that the superintendents of eleemosynary institutions are not appointed for any definite term and that they are subject to removal in accordance with Section 9281, supra. So, whether the superintendents are officers or merely employees, the provisions of Section 13, Art. VII of the Constitution,

supra, do not apply to them. The compensation of such superintendents can, therefore, be increased while they are serving and, the provisions of S. B. 85 and S. B. 86 will be effective as to the various superintendents at the time said acts go into effect.

S. B. 87 relates to the compensation of staff physicians for the various eleemosynary institutions of the state. No term of office or employment is prescribed for them. On the contrary, Section 9281, supra, provides that such physicians may be removed at any time by the superintendent of such institution and shall be removed by the superintendent uppn the recommendation of the health supervisor. So, whether said staff physicians are officers or employees makes no difference so far as the provisions of Section 13, Art. VII of the Constitution, supra, are concerned. If they are officers they have no term and, if they are not officers they are employees, in either of which event the constitutional provision does not apply.

CONCLUSION

It is, therefore, the opinion of this office (1) that the emergency clauses in Senate Bills 85, 86 and 87 of the 63rd General Assembly are invalid and of no effect, (2) that said acts will go into effect ninety days after the final adjournment of the present session of the 63rd General Assembly, and (3) that when said acts go into effect they will be effective to increase the compensation of the superintendents and physicians mentioned therein who are serving at that time.

Respectfully submitted,

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APPROVED:

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