

2309.

EMERGENCY—LAW DECLARED EMERGENCY BY LEGISLATURE QUESTION OF NECESSITY THEREFOR NOT SUBJECT TO JUDICIAL REVIEW.

SYLLABUS:

When the legislature has added an emergency clause to a law and adopted it in the manner prescribed by the Constitution, the question of whether or not there was a necessity for making such law an emergency is not subject to judicial review.

COLUMBUS, OHIO, February 21, 1934.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“We would respectfully ask an opinion of your department on the following matter. The present special session of the General Assembly passed House Bill No. 36, known as the Sundry Claims Bill, as an emergency measure. This bill is a duplicate of House Bill No. 703, passed July 1, 1933, approved July 20, 1933, and seeks to repeal House Bill No. 703.

Q. 1. Does the passage of House Bill No. 36 as an emergency measure, with its provisions for repeal of House Bill 703, conform to the Constitution of the State of Ohio as said Constitution relates to the enactment of emergency laws of the General Assembly?

Q. 2. Is the language contained in Sec. 5 of said Bill sufficient to constitute an emergency under the Constitution of Ohio?”

House Bill No. 36 is an act “to make sundry appropriations, and to declare an emergency.” It appears that this measure was introduced by the 90th General Assembly in special session pursuant to a message of the Governor, issued under the requirements of Article III, Section 8 of the Constitution of Ohio, which reads as follows:

“MESSAGE

February 7, 1934.

To the Members of the Ninetieth General Assembly in Special Session:

Whereas, Under date of November 24, 1933, a proclamation was issued by me calling a special session of the general assembly of the state of Ohio for one o'clock p. m., Wednesday, December 6, 1933, for the purpose of the consideration and passage of legislation relating to the manufacture, possession, use and traffic in liquors, to which matter said call was limited; and

Whereas, Public necessity also requires the enactment of legislation appropriating funds for the payment of sundry claims, such a necessity arises out of the fact that the courts have declared House Bill No. 703 unconstitutional by reason of the fact that said bill in its passage did not receive the required constitutional vote of two-thirds of the members of the House. It should be pointed out at this time that the sundry

claims appropriation bill as enacted by the Ninetieth General Assembly, did not appropriate as great an amount as had been appropriated by such legislation in previous years. The claims in question represent the moral obligation of the state and were carefully considered by the sundry claims board and the general assembly at the time of passage of House Bill No. 703; now, therefore,

I, George White, governor of the state of Ohio, by virtue of the authority vested in me by the constitution of Ohio, do by this message to the general assembly of Ohio now convened in extraordinary session amend the purpose for which this extraordinary session was called as expressed in the proclamation of November 24, 1933, by now authorizing the general assembly of Ohio to consider and enact emergency legislation providing for the appropriation of funds with which to pay sundry claims.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the great seal of the state of Ohio to be affixed hereto at Columbus, this seventh day of February A. D. in the year of our Lord one thousand nine hundred and thirty-four.

GEORGE WHITE,
Governor."

The first three sections of this act are in the usual form of sundry claims appropriation bills and, I am advised, the same as House Bill 703, as set forth in your letter.

Sections 4 and 5 of this act are as follows:

"Section 4. That said original act entitled 'An act to make sundry appropriations,' known as House Bill No. 703, passed July 1, 1933, and approved July 20, 1933, be, and the same is hereby repealed.

Section 5. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety. The reason for such necessity lies in the fact that the claims authorized to be paid by the state under the provisions of House Bill No. 703, approved July 20, 1933, and filed in the office of the secretary of state, July 22, 1933, are still unpaid, due to the fact that House Bill No. 703 has been rendered invalid by appellate court decision. Therefore, this act shall go into immediate effect."

It appears that the foregoing act was passed by the House on Friday, February 16, 1934, as an emergency measure, the vote having been 92 yeas and 7 nays on the passage of the bill, and the vote on the emergency clause, which, under Article II, Section 1d of the Constitution, is required to be taken on a separate roll call, having been 90 yeas and 3 nays. It further appears that on this same day, February 16, 1934, the vote in the Senate on the passage of this act was 24 yeas and no nays, and the vote on the emergency clause taken separately was 24 yeas and no nays. Hence, in view of these representations which have been made to me by the offices of the clerk of the House and of the clerk of the Senate, it is obvious that the act here under consideration was passed as an emergency measure by the affirmative vote of two-thirds of the members elected to each house of the General Assembly. I am advised by the Governor's office that this bill was signed by the Governor February 20, 1934.

In your first question, you ask whether or not the passage of this House Bill No. 36 conforms to the constitutional requirements of this state with respect

to the enactment of emergency laws. Article II, Section 1c of the Constitution, relating to referendum, provides that "No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided."

Article II, Section 1d of the Constitution provides which laws shall not be subject to the referendum and shall go into immediate effect. The language of this section is as follows:

"Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a ye and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a ye and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum."

If this sundry claims appropriation measure was validly enacted as an emergency law, its effective date was February 20, 1934, the date on which the same was approved by the Governor. The syllabus of *State vs. Lathrop*, 93 O. S. 79, is as follows:

"Construing Section 1c of Article II with Section 16 of Article II of the Constitution, in so far as both sections relate to the time from which an act of the general assembly shall operate, laws providing for tax levies, appropriations for current expenses of the state government and state institutions, and emergency laws, as defined in Section 1d of Article II of the Constitution, go into immediate effect when approved by the governor. All other acts go into effect ninety days after the same have been filed with the secretary of state, regardless of the date of approval by the governor."

In view of the foregoing, your first inquiry must be answered in the affirmative.

In your letter you mention the fact that House Bill No. 36 repeals House Bill 703, as enacted by the 90th General Assembly in regular session. House Bill 703 was attacked as to its constitutionality in the case of *State, ex rel. Krieg, vs. Tracy, Auditor, et al.*, upon several grounds not necessary to detail in this opinion. The Court of Common Pleas of Franklin County held the act to be constitutional. The case was taken to the Court of Appeals of Franklin County and that court sustained the judgment of the Court of Common Pleas as to each provision of the Constitution which plaintiff contended had been violated excepting plaintiff's contention with respect to Article II, Section 29 of the Constitution. Hence, the court enjoined the payment of the sundry claims for which appropriation was made in House Bill 703 upon the sole ground that the act as passed in its final form did not meet the requirements of this last mentioned section of the Constitution which are to the effect that no claim the subject matter of which shall not have been provided for by preexisting law may be allowed by less than two-thirds of the members elected to each branch of the General Assembly. The final vote in the House concurring in the Senate amendments of House Bill 703 disclosed an affirmative vote of less than two-thirds of

the members elected to that body. It is obvious that House Bill No. 36 does not contain this defect which the Court of Appeals held to render House Bill 703 violative of the Constitution.

Your remaining inquiry is as to the sufficiency of the emergency clause set forth in Section 5 of the act, *supra*. It is unnecessary to consider or pass upon the question of whether or not there was in fact a necessity for making House Bill 36 an emergency measure. The act is expressly declared to be an emergency measure by the legislature in section 5, *supra*. The case of *State, ex rel. Durbin vs. Smith*, 102 O. S. 591, in a *per curiam* opinion in which four of the judges of the Supreme Court concurred, established the law of this state that when the legislature had added an emergency clause to a law and adopted it in the manner prescribed by the Constitution, the courts cannot review the necessity for making such law an emergency measure. Three of the judges vigorously dissented in separate dissenting opinions. The court has, however, since adhered to the principles laid down by the majority opinion in this case and has applied these principles to questions affecting emergency clauses of municipal ordinances. In the recent case of *Holcomb, Auditor vs. State, ex rel.*, 123 O. S. 496, the third branch of the syllabus is as follows:

“The duty and responsibility of determining the emergency and the necessity that a measure go into immediate effect are confided to the legislative branch of government. If the prescribed procedure for enactment thereof is followed, such measure goes into effect immediately upon its passage.”

It follows in view of the foregoing discussion and citations that since the emergency clause as contained in Section 5 of the act here under consideration has been adopted in the manner prescribed by the Constitution, the act went into effect when signed by the Governor and the question of whether or not there was a necessity for making such law an emergency is not subject to judicial review.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2310.

TOWNSHIP TRUSTEES—UNAUTHORIZED TO ENTER INTO DEPOSITORY CONTRACT PROVIDING FOR LESSER RATE OF INTEREST IN EVENT LEGISLATURE REDUCES MINIMUM RATE ON SUCH DEPOSITS.

SYLLABUS:

A board of township trustees has no legal authority under the provisions of Section 3320 to Section 3326, General Code, to enter into a contract for a township depository which provides that the depository shall pay 2% interest per annum on the average daily balance of township deposits but containing a proviso that such contract shall become void if the legislature shall amend the statute in such