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County Home Rule in Tennessee

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imposed upon burial insurance associations since the same considerations do not apply to both. For example, there is no need to require the maintenance of a large reserve by associations offering burial insurance. Since the performance required of the insurer is to render services rather than to pay cash, the guarantee that there will be a solvent concern able to perform the services when the obligations mature should be the paramount consideration. Positive comprehensive legislation along the lines of the North Carolina enactment and embodying the desired features of other codes is the best answer for the abuses inherent in the association device. In states where the new regulations would tend to overburden the insurance commissioner, provision can be made for a special commissioner, as in North Carolina, or an experienced board, as in Oklahoma, to control and supervise the formation and operation of burial associations.

CHARLES T. CADY

COUNTY HOME RULE IN TENNESSEE

The movement for home rule for local government began in 1875 and now 19 states have constitutional provisions conferring home-rule powers upon cities and six state constitutions grant home-rule powers to counties.[1] Several additional states have some scheme of legislative home rule.[2] The existence of home rule for local governments gives them powers in one or both of two general categories: (a) power to determine the form and organization of local government; and (b) power to determine and regulate matters which are of local concern as distinguished from those of state-wide interest.[3] Home rule is said to benefit both the local government and the legislature, permitting the former to determine its form and activities of government and the latter to devote more time to general state policies.[4]

Increasing attention has been given to the problems arising out of the legislative control of local governments in Tennessee through the use of special legislation.[5] In view of the difficulty—heretofore impossibility—of amending the Constitution of the State of Tennessee[6] the question arises as

1. SNIDER, AMERICAN STATE AND LOCAL GOVERNMENT 65 (1950).

2. KNEIER, CITY GOVERNMENT IN THE UNITED STATES 85 (1947).

3. SNIDER, AMERICAN STATE AND LOCAL GOVERNMENT 64 (1950).

4. HOLLOWAY, STATE AND LOCAL GOVERNMENT IN THE UNITED STATES 304 (1951); Williams, *The Tennessee General Assembly: Appraisal and Suggestions*, 22 TENN. L. REV. (June, 1952).

5. SIFFIN, SHADOW OVER THE CITY (1951); REPORT OF CONSTITUTION REVISION COMMISSION, STATE OF TENNESSEE (1946); Roady, *Special Legislative Acts and Municipalities under the Tennessee Constitution*, 21 TENN. L. REV. 621 (1951).

6. COMBS AND COLE, TENNESSEE: A POLITICAL STUDY c. 2 (1940); Dodd, *State Constitutional Conventions and State Legislative Power*, 2 VAND. L. REV. 27 (1948); Williams, *The Calling of a Limited Constitutional Convention*, 21 TENN. L. REV. 249 (1950).

to the extent to which the General Assembly can authorize counties to determine local matters.

The Constitution of the State of Tennessee contains a provision relative to the separation of powers.[7] Presumably this provision emphasizes the concept of the non-delegability of legislative power. Thus the question is presented as to the extent that the Tennessee General Assembly can delegate authority to counties to determine their own affairs. The rule of the non-delegability of legislative power appears generally not to apply to delegations of power to municipal corporations.[8] Delegation of legislative power to counties ordinarily is not permitted.[9] Doubtless this distinction in the extent to which legislative power can be delegated reflects the fact that counties are regarded as lesser forms of government than are municipal corporations.[10] The suggestion has been made[11] that adequate authority can be found in the present constitution to permit the General Assembly to authorize a substantial amount of county home rule. The purpose of this inquiry is to examine the validity of that suggestion. Manifestly constitutional change would not be required if the General Assembly may act under existing grants of power.

The Constitution of the State of Tennessee provides: "The Legislature shall have the right to vest such powers in the courts of justice, with regard

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7. "The powers of the Government shall be divided into three distinct Departments: The Legislative, Executive and Judicial. . . . The Legislative authority of this State shall be vested in a General Assembly. . . . No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." TENN. CONST., Art. II, §§ 1, 3, 2.

8. "The legislature may, without violating the rule forbidding it to delegate its law-making power, delegate to municipal corporations and to their proper officers or boards all powers, whether legislative or otherwise, which are incident to municipal government and of purely local concern." 16 C.J.S., *Constitutional Law* § 140 (1939). The Supreme Court of Tennessee has expressed the rule ". . . it has always been held, and never denied, that the power to create corporate bodies for all municipal purposes, and with the means of self-government, is a legitimate exercise of sovereignty on the part of the state by its legislature; and that there is nothing in the Constitution of the United States, or of the state, restraining or prohibiting the exercise of such power by the state." Hope v. Deaderick, 27 Tenn. 1, 6 (1847).

9. "While powers vested by the constitution in the legislature may not, as a rule, be delegated to county commissioners or other governing authorities of a county, the legislature, unless restrained by the constitution, may delegate to such authorities powers with respect to purely local matters, even though the exercise of such powers may involve not only administrative, but also quasi-legislative, functions." 16 C.J.S., *Constitutional Law* § 140 (1939).

10. "Counties are not created for the purpose of general government, and because of this fact it has been said that they are corporations of low character, and cannot discharge corporate duties in the broad sense in which municipalities can discharge them. . . . [C]ounties have their creation in the Constitution, and the statutes confer on them all the powers which they possess, prescribe all the duties they owe and impose all the liabilities to which they are subject. Considered with respect to their powers, duties, and liabilities, they stand low down in the scale of corporate existence. They are ranked as quasi corporations." Weakley County v. Carney, 14 Tenn. App. 688, 698 (W.S. 1932). See 20 C.J.S., *Counties* §§ 1, 3 (1940).

11. Tenn. Pub. Acts 1949, HOUSE RES. No. 27.

to private and local affairs, as may be expedient."[12] This provision first appeared in the constitution of 1834[13] and was carried into the still unamended constitution of 1870 without change. The background of this provision in the constitutional convention of 1834 is relevant to this inquiry.

A committee to study the problems of private and local legislation was appointed by the constitutional convention on June 14, 1834.[14] On July 24 the committee reported proposals relative to denying the legislature the power to grant divorces, authorize lotteries, or establish other than a rate of interest uniform throughout the state.[15] The committee recommended on July 29 that the General Assembly be prohibited from passing other than general laws[16] and the provision quoted above.[17] In connection with this last recommendation the committee pointed out that formerly the General Assembly had wasted much time in passing laws to authorize individuals to hawk and peddle without a license, to release fines and forfeitures, to grant letters of administration, and to authorize mill dams and fish traps.[18]

The first General Assembly to meet under the constitution of 1834 authorized the county courts[19] to take certain action "conformable" to the constitutional provision being examined here. The caption of the enabling statute read: "An Act to authorize the several County Courts which are now or may hereafter be established in this State, to grant the privilege of building bridges, erecting fish dams, and such other private or local improvements, as in their discretion shall be right and proper, and as shall be conformable to the 7th and 8th sections[20] of the 11th article of the Constitution of the State of Tennessee."[21]

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12. TENN. CONST. Art. XI, § 9.

13. MCCLURE, STATE CONSTITUTION-MAKING 448 (1916).

14. JOURNAL OF THE CONVENTION OF STATE OF TENNESSEE CONVENED FOR THE PURPOSE OF REVISING AND AMENDING THE CONSTITUTION 78 (1834), hereinafter cited as JOURNAL OF THE CONVENTION.

15. *Id.* at 155. See TENN. CONST. Art. XI, §§ 4, 5, 6 (1834) and TENN. CONST. Art. XI, §§ 4, 5, 7.

16. Note 34, *infra.*

17. JOURNAL OF THE CONVENTION 190 (1834).

18. *Id.* at 191. Apparently without specific constitutional permission the General Assembly earlier had authorized county courts to license and establish ferries. Tenn. Acts 1804, c. 1, TENN. REV. LAWS 415 (Haywood 1815). The Supreme Court in Memphis v. Overton, 11 Tenn. 386, 391 (1832) held that the legislature had the power to pass the statute, but the court did not indicate the source of the legislature's authority. The constitution of 1796 did not have a separation of powers clause. The separation of powers clause first appeared in the constitution of 1834.

19. Presumably the General Assembly intended to confer the power on the quarterly county court which is the usual governing body of the county. For a general discussion of county government in Tennessee, see SIMS, COUNTY GOVERNMENT IN TENNESSEE (1930).

20. Now TENN. CONST. Art. XI, §§ 8 and 9.

21. Tenn. Acts 1835-36, c. 29. This provision, as codified in TENN. CODE ANN. § 3047 (Williams 1932), has been construed as follows: "The authority of the County Court under this section of the Code, has no reference to works of public improvement,

The conclusion that the framers of the constitutional provision intended to authorize the General Assembly to permit counties to act in a rather limited field is thus strengthened by the early legislative interpretation.

Two problems have been considered by the courts in connection with the constitutional provision we are examining: (a) the determination of "courts of justice" and (b) the delineation of subjects with which the General Assembly may permit the courts of justice to deal.

The first General Assembly that had authority under Article XI, § 9 assumed that the county court was a court of justice within the meaning of the constitutional provision.[22] The provision of the statute which expressed that determination appears not to have been challenged in the courts. In 1907 the Supreme Court held that the constitutional provision did not authorize a delegation of power to incorporated towns.[23] The Supreme Court's most recent statement on the subject is that "courts of justice" are ". . . the governing bodies of the county, which is the county court, or a board of commissioners with substantially all of the statutory powers and functions of the quarterly county court."[24] All recent legislative interpretations of the term "courts of justice" have followed this statement by the Supreme Court.

The General Assembly has infrequently exercised its power under the constitutional provision of Article XI, § 9. The first General Assembly to have such power authorized the county courts to grant the privilege of building toll bridges and causeways across bottoms, fish traps, mill dams and public ferries,[25] and public roads.[26] In 1872[27] the court stated with approval "Under

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to be undertaken, made and paid for by the county, but to those private enterprises undertaken with more or less reference to the public convenience, but for private gain, which require to be licensed, or may be regulated by the County Court, and are in the nature of privileges." Hunter v. Justices of Campbell County, 47 Tenn. 49, 55 (1869).

22. Tenn. Acts 1835-36, c. 29.

23. Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907).

24. Henderson County v. Wallace, 173 Tenn. 184, 189, 116 S.W.2d 1003, 1005 (1938). Perhaps earlier decisions can be distinguished on their facts. In interpreting TENN. CONST. Art. XI, § 9 in Hickman v. Wright, 141 Tenn. 412, 210 S.W. 447 (1918) the court said that that provision permitted the General Assembly to delegate to the chancery, circuit and criminal courts authority to determine the number of deputy clerks they required and to fix the salaries of such deputies. Such action, said the court, ". . . would not be imposing nonjudicial duties on the courts." Hickman v. Wright, *supra*, at 423, 210 S.W. at 450. Earlier the court had said: "This section [Art. XI, § 9] cannot be reconciled with the thought that the quarterly county court is the exclusive agency of the constitution for the local government of the counties. Inferior courts of justice may be ordained at the discretion of the legislature (section 1, art. 6) and it may vest in them such powers in respect of local affairs as it may deem expedient, and not conflicting with some other provision of the constitution. And so it may in the circuit and chancery courts." Prescott v. Duncan, 126 Tenn. 106, 133, 148 S.W. 229, 235 (1912).

25. Tenn. Acts 1804, c. 1, TENN. REV. LAWS 415 (Haywood 1815), had authorized county courts to license and establish ferries. This statute was upheld in Memphis v. Overton, 11 Tenn. 386 (1832), but the court did not indicate the source of the legislature's authority. In Malone v. Williams, 118 Tenn. 390, 432, 103 S.W. 798, 809 (1907) the court referred to Memphis v. Overton and stated, "We do not find anything in that case, or in any prior case, setting forth the grounds of this grant [of authority to the

this provision [Article XI, § 9] of the Constitution the Legislature has vested in the County Courts the power defined in the Code in regard to taxation[28] and to roads." The court suggested that the authority of the General Assembly to confer power on the county courts was without limit as to subject.[29]

Only in more recent years has the court considered attempts by the General Assembly to delegate to the county courts power in fields other than those envisioned by the members of the constitutional convention of 1834. In 1937 the court upheld a statute permitting county courts to determine the places at which beer dealers might do business.[30] In considering a statute in 1938 which authorized county courts to determine whether voting machines would be used in the counties the court said: "It is . . . competent for the Legislature to leave the matter of the location of voting machines to the county courts just as it leaves to those bodies the matter of the location of ferries, roads, bridges and beer dealers. The local authority is of course in a better position to determine where these machines will be of most service."[31] The court recently upheld an act[32] which authorized a county council to enact ordinances, a violation of which was made a misdemeanor.[33]

The power of the General Assembly to authorize the quarterly county courts to take action with respect to local matters has been progressively extended by judicial interpretation. Manifestly the quarterly county courts can now act on many subjects not contemplated by the framers of the constitutional provision being considered here. This result may be one of the virtues of the judicial process. Are there limits to the power of the General Assembly to delegate authority to the quarterly county courts?

Presumably the General Assembly would be limited only by the restriction on special legislation.[34] The General Assembly may constitutionally

county courts to license and establish ferries]. However, since the constitution of 1834, and of 1870, went into effect, the power to delegate has been ascribed to . . . [Art. XI, § 9]; or at least the power must be found to reside there."

26. Tenn. Acts 1835-36, c. 29. See note 21, *supra.*

27. Grant v. Lindsay, 58 Tenn. 651, 666 (1872).

28. Chief Justice Nicholson apparently neglected his Tennessee constitutional history when he wrote the word "taxation." In Taylor McBean & Co. v. Chandler, 56 Tenn. 349, 372 (1872) the court stated that TENN. CONST. Art. II, § 29 (1834) was inserted to overcome the decision in Marr v. Enloe, 9 Tenn. 408 (1830) that under the constitution of 1796 an act authorizing county courts to levy a tax was unconstitutional.

29. County courts ". . . can exercise that portion of the sovereignty of the State communicated to them by the Legislature and no more. In the exercise of the powers so conferred they become miniature legislatures, and the powers so exercised by them, whether they are called municipal or police, are in fact legislative powers." Grant v. Lindsay, 58 Tenn. 651, 666-67 (1872).

30. Wright v. State, 171 Tenn. 628, 106 S.W.2d 866 (1937).

31. Mooney v. Phillips, 173 Tenn. 398, 405, 118 S.W.2d 224, 227 (1938).

32. TENN. PRI. ACTS 1947 ,c. 346.

33. Donathan v. McMinn County, 187 Tenn. 220, 213 S.W.2d 173 (1948).

34. TENN. CONST. Art. XI, § 8: "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the

enact a special act affecting one particular county in its political or governmental capacity but generally such act cannot be contrary to the provisions of a general law applicable to all counties.[35] The General Assembly has an opportunity to avoid the plague of special legislation in this field initially by passing general rather than special enabling statutes with respect to the power of quarterly county courts in local matters.

The present Tennessee Constitution as interpreted by the courts permits the legislature to grant to the governing boards of counties a considerable amount of power to determine and regulate matters which are of local concern. There is no reason to doubt that the legislature could authorize county governing boards great freedom in determining the form and organization of county government. Thus the General Assembly could go far in establishing county home rule in Tennessee.

The chief difficulty in relying on the General Assembly's granting considerable authority under the existing constitutional provision to the governing boards of the counties to determine local matters is that the General Assembly could repeal the enabling act.[36] Thus counties would not be protected from the General Assembly as many advocates of constitutional home rule feel desirable.

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benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law. No corporation shall be created, or its powers increased or diminished by special laws, but the General Assembly shall provide by general laws, for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed; and no such alteration or repeal shall interfere with, or divest, rights which have become vested."

35. Darnell v. Shapard, 156 Tenn. 544, 3 S.W.2d 661 (1928); Clark v. Vaughn, 177 Tenn. 76, 146 S.W.2d 351 (1941).

36. Presumably the remarkable decision that the Tennessee General Assembly cannot repeal its act as announced in Biggs v. Beeler, 180 Tenn. 198, 173 S.W.2d 1944 (1943) would not be followed. See Williams, *The Poll Tax and Constitutional Problems Involved in Its Repeal*, 11 U. OF CHI. L. REV. 177 (1944).