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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

INTERPRETIVE PROBLEMS IN THE NEW MISSOURI CONSTITUTION

The new Missouri State Constitution is replete with problems of interpretation, as are all written constitutions. Constitutional framers cannot possibly foresee all the diverse problems which will arise over the years and deal with them in such a way as to allay controversy. Furthermore, either grammar has not as yet reached the point where words and phrases are so exact that meaning is immutable in the hands of different individuals, or human beings have not mastered the "science" of manipulating the symbols of language adequately enough to insure universal meaning. And vested interests also interpret!

“Due process of law” and many other phrases with a long litigation history were in the old Missouri Constitution and appear in the new one. These will likely continue to occupy a major share of the time of judicial bodies; however, as these problems were not created by the new Constitution, there would be no particular gain in pointing them out at this time.

On the other hand, there are a number of instances, which have been discovered thus far, wherein the subject is new to the Constitution and wherein the language is such as to give rise to at least two (and in some cases, infinite) interpretations. In these cases the General Assembly will place its interpretation on the provision when it enacts the law, but the Supreme Court cannot escape determining whether or not such interpretation is the correct one.

The language of the Constitution is not conclusive in these instances, and the intent of the framers as reflected in the debates of the constitutional convention in most cases is so obscure as to be of little help. In other words, the Supreme Court will be forced by the very nature of the situation to substitute its judgment for that of the people. This being true, it is well that the problems be delineated as early as possible so that a full discussion can be had and a careful and mature judgment reached.

It is the purpose of this article to point out such of these instances as have been discovered thus far.

The problems in the field of county government seem to loom larger than in any other field. This is only natural because it is in this field that the greatest change was wrought. The county court is taken out of the judicial article, shorn of judicial authority and established as the chief governing authority of the county—as it should be. County classification is required, with a limit of four classes which contrasts with the one class required by the old Constitution but ignored by the legislature and courts in the passage and approval of a large number of population-bracket laws, some of which amount to special legislation for one county. The 1945 Missouri Constitution is the first of the forty-eight state constitutions to limit the legislature as to the number of county classes; thus precedent is a void. Home rule is provided for counties of over 85,000 population, and such counties granted legislative authority, which authority has been almost universally denied counties by courts and legislatures alike in this country.

The provisions for county government in the new Constitution are, in the opinion of this writer, the most progressive part of the entire document and will be far-reaching in the reform of this most neglected level of government. It is little wonder that the provisions will give rise to a considerable volume of litigation.

The data presented herein are as factual as it is possible to make them with no opinion one way or another being expressed. The problems are taken up in the order in which they occur in the Constitution.

Age of Legislators (Article III, Sections 4 and 6). The Constitution says: “Each representative shall be twenty-four years of age . . .” and “Each senator shall be thirty years of age . . .” *Question*: Is this to be interpreted literally or

shall the words "at least" be interpreted into each of the two sentences? *Explanation*: This question is probably not of very great importance because although the language is defective the intent is fairly clear. As it involves elections, however, it is likely that the question will be raised in an election contest case before many years go by.

General Assembly Committee Records (Article III, Section 22). The Constitution says: "Each committee shall keep such record of its proceedings as is required by rule of the respective houses and this record and the recorded vote of the members of the committee shall be filed with all reports on bills." *Question*: Does this mean the vote of the committee as a whole is to be recorded, *i.e.*, 2-6, 7-10, etc., or does it mean the recorded vote of *each* member? *Explanation*: The House of Representatives of the current General Assembly has decided that this provision requires the recording of the vote of each member, while the Senate is recording merely the vote of the whole committee. As all the laws being passed by this session are affected, it is likely that at least one and perhaps all of them will be challenged as unconstitutional because the General Assembly did not conform with the constitutional provisions governing legislative procedure.

Effective Date of Laws and the Referendum (Article III, Sections 29 and 52). Under the provisions of the old Constitution a law passed by the General Assembly did not go into effect until ninety days after the adjournment of the session at which the law was passed, except emergency and appropriation laws. This gave the people ninety days to use their referendum powers under the provisions of the Constitution relating to the initiative and referendum. Section 52, Article III, of the new Constitution relating to the referendum reads substantially the same as the provision of the old Constitution, the pertinent part being as follows: "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." (Italics added) However, Section 29 of Article III of the new Constitution provides that "... 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." *Question*: Is it possible for the General Assembly to defeat the purposes of the referendum provisions by recessing for thirty days and causing the laws passed theretofore to go into effect? *Discussion*: It seems likely that the current session of the General Assembly will use the recess method to place bills into effect because some of the laws must be effective by June 30, 1946, yet the General Assembly will likely need to remain in session well into June in order to complete the revision work. As the ninety days after the beginning of the recess will likely come before final adjournment, the people are left no time in which to petition for a referendum. An early court test seems inevitable.

Recesses of General Assembly (Article III, Section 31). This section makes provision for the governor returning bills signed or vetoed to the General Assembly within *fifteen* days and also in case the General Assembly adjourns or recesses for

"... a period of thirty days or more. . . ." but makes no provision in case the General Assembly recesses for more than fifteen days but less than thirty days. *Question:* Is this a "no man's land" or may the General Assembly by law fill in the gap? *Explanation:* It seems reasonably clear that the General Assembly can supply the gap, although if the legislature should on some occasion recess for, say, twenty days, it is likely that the problem would reach the Supreme Court.

Number of Executive Departments (Article IV, Sections 12 and 37). Section 12 names nine departments of the Executive Department and provides for the establishment of additional departments, "... not exceeding five in number. . . ." Section 37 requires that a department of public health and welfare be established. This latter department is not one of the nine specifically named in Section 12. *Question:* Is the department of public health and welfare one of the five or is it in addition to the five? *Explanation:* The General Assembly is encountering difficulty in squeezing the present 72 executive agencies into 14 departments; thus it is not unlikely that it will create a fifteenth department. There is also some discussion of "attaching" certain agencies to the office of the Governor. If either of these is done, the question will arise whether or not this violates the constitutional limitation to 14 departments.

Assignment of State Agencies (Article IV, Section 12). After providing for nine departments named and "not exceeding five" additional departments in the Executive Department, Section 12 states: "Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by the governor to the department to which their respective powers and duties are germane." *Question:* Is the General Assembly confined to "establishing" and "discontinuing" agencies or may it assign agencies to the departments "to which their respective powers and duties are germane"? Or is the latter exclusively a power of the Governor? *Explanation:* It is likely that the General Assembly will pass legislation creating the fourteen departments and will assign agencies to each department in the course of the establishment of the departments. The Governor will, sooner or later, transfer some agency from one department to another and the transfer will be questioned in court.

Duties of State Auditor, Secretary of State, and State Treasurer (Article IV, Sections 13, 14 and 15). Sections 13, 14 and 15 of Article IV specify the duties of the State Auditor, Secretary of State and State Treasurer, respectively, and end with a sentence forbidding the imposing of unrelated duties on them. For example, the final sentence of the section on the State Auditor reads as follows: "No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds." *Question:* What duties are related to the "... supervising and auditing of the receipt and expenditure of public funds"? Could "supervising" the "expenditure" of public funds mean purchasing and budgeting? *Explanation:* The three state officials concerned have had sizable powers and duties in the past, and it is reasonably certain that they will wish to continue as

many of the old duties and replace as many lost duties with new ones as possible. As the General Assembly has been sympathetic to the wishes of these officials in the past, there is a possibility it may go to considerable lengths in increasing their powers and a court test is inevitable.

Local Government Audits (Article IV, Section 13). This section requires the State Auditor to "... establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law." *Question:* Are cities, townships, levee districts, road districts, etc., "political subdivisions of the state" and if so does this require the State Auditor to audit them and is it possible for the legislature to provide that, say, private auditing firms shall audit these governmental units to the exclusion of the State Auditor? *Explanation:* There are already in the statutes certain laws requiring audits of cities by private auditing firms. It is not unlikely that the State Auditor will question in court the constitutionality of these laws and the audits made thereunder.

State Revenues (Article IV, Sections 15 and 22). Section 15 requires that "All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury . . ." and Section 22 requires that the division of collection of the department of revenue shall collect "... all taxes, licenses and fees payable to the state. . . ." *Question:* Are both these provisions to be interpreted literally, thus requiring such moneys as fees paid by students to the University of Missouri and by litigants to the courts to be collected by the division of collection and go promptly into the state treasury? *Explanation:* The provisions of Section 15 are substantially the same as in the old Constitution and some contend that if certain types of fees were exempt from the provision of the old Constitution, they will likewise be exempt under the new one. The provisions of Section 22, however, were not in the old Constitution; thus a taxpayer, the Director of Revenue, the State Auditor, or the State Treasurer might question the collection, and retention, of these fees by individual agencies.

State Training Schools (Article IV, Section 38). Section 38 is found under the general heading "Public Health and Welfare," but it requires that the "state training schools and industrial homes for boys and girls shall be classified as educational institutions. . . ." *Question:* Does this require that the state training schools and industrial homes for boys and girls be in the Department of Education or in the Department of Public Health and Welfare? *Explanation:* If these institutions are placed in either department, such assignment might well be attacked in court.

Status of County Government (Article VI, Section 2). This section provides that the "... existing organization of counties shall continue until further provisions applicable thereto shall be provided, as authorized in this Constitution." *Question:* Does this mean that if the legislature passes no classification scheme as provided in Section 8, Article VI, all the present statutes governing county government are constitutional after July 1, 1946, and if so can present statutes be amended without

violating Section 8? *Explanation:* Section 8 of Article VI limits the General Assembly to four classes in legislating for counties. At the present time there are many laws in the statutes which classify counties by the population-bracket device, *i.e.*, the law applies to all counties between 200,000 and 400,000 inhabitants, or to all counties between 50,000 and 150,000 inhabitants, etc. There are many more classes than the four to which the General Assembly is limited by the new Constitution. If the General Assembly decides not to change the "existing organization of counties" as provided in Section 2, Article VI, and there is some inclination to do this, any one of the present population-bracket laws may be attacked as constituting a fifth class and thus unconstitutional. If Section 2, Article VI, be declared a savings clause in such case, any amendment to a population-bracket law might be attacked on the ground that the legislature might leave the existing organization, but any future law must conform to the four-class requirement.

County Classification (Article VI, Sections 8, 9, and 11). Sections 8 through 11 of Article VI read as follows:

"Section 8. Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs.

"Section 9. Alternative forms of county government for the counties of any particular class and the method of adoption thereof may be provided by law.

"Section 10. The terms of city or county offices shall not exceed four years.

"Section 11. Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall be prescribed by law uniform in operation in each class of counties. Every such officer shall file a sworn statement in detail, of fees collected and salaries paid to his necessary deputies or assistants, as provided by law."

Questions:

1. Does the word "class" as used in Section 11 refer back to "classes" as used in Section 8 and thus require laws governing the compensation of county officers to be uniform within each of the four classes, or is Section 11 to be read independent of Section 8 and thus require only that compensation be set by "general laws" uniform within the particular bracket named in the law, which bracket may or may not coincide with the four classes as established under the provisions of Section 8? *Explanation:* It is argued by some that Section 11 does not require that compensation be set on a strictly four-class basis because the last sentence of Section 8 is not repeated in Section 11 and basically this is the sentence which requires uniformity. It is argued that "organization and powers" were the matters dealt with in Section 8, and the fact that "compensation" is purposely not mentioned in Sec-

tion 8 but is the subject of a separate section is evidence that it was the intent there should be a difference. If the legislature passes a law subclassifying, say, Class 4 counties and sets a different salary for the county clerk in each of the subclasses, the law will likely be tested out in the courts without delay.

2. Does the word "class" as used in Section 9 refer back to "classes" as used in Section 8 and thus require that alternative forms be in conformance with the four classes or may special brackets be created by "general law" and alternative forms be provided for counties within the special bracket? *Explanation:* It may be argued that Section 9 does or that it does not refer back to Section 8. If the General Assembly passes a law providing for an alternative form of government in all counties of, say, 10,000 to 15,000 population and this bracket differs from those set in the law establishing the four classes, the law will likely be tested in the Supreme Court because county officials would hesitate to perform public functions, spend money, and issue bonds until they were assured of the validity of the law creating their offices and powers.

3. Is Section 8 to be interpreted as though it were the same as the provision in Section 15 for cities under which provision in the Constitution of 1875 the Supreme Court has ruled that special bracket groups may be created in addition to the four classes, or does the last sentence of Section 8 (which is not found in Section 15) require four classes and no more and make special bracket classes in addition to the four classes unconstitutional? *Explanation:* For the first 30 years after the adoption of the Constitution of 1875, the Supreme Court held that any law creating any class of cities in addition to the four classes already created was unconstitutional. The language of the old Constitution on the point was substantially the same as Section 15, Article VI, of the new Constitution, which section reads as follows: "The General Assembly shall provide by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." The General Assembly, under the mandate of the Constitution of 1875, created four classes of cities with all those of over 100,000 population as Class 1, but in 1893 a law was passed which applied only to cities of 300,000 or over. The Supreme Court in *Murnane vs. City of St. Louis* (123 Mo. 479, 27 S. W. 711) declared the latter law unconstitutional purely and simply on the basis that it created a fifth class and thus violated the above-quoted constitutional provision. In 1901 the Supreme Court reaffirmed its stand in the *Murnane* case in *State ex. inf. Mylton vs. Borden* (164 Mo. 221, 64 S. W. 172). However, this position was completely reversed in later cases and laws applying to all cities of over 300,000 inhabitants were declared constitutional. (See *State ex rel. Hawes vs. Mason*, 153 Mo. 26, 52, 54 S. W. 524 and *State ex rel. Carpenter vs. City of St. Louis*, 318 Mo. 874, 2 S. W. (2d) 713.) There are now in the statutes approximately 100 laws classifying cities by brackets other than those specified in the laws establishing the four classes. Some members of the Constitu-

tional Convention of 1945 maintain that Sections 8 and 15 of Article VI are identical and are to be given the same interpretation as the Supreme Court has given to Section 15 in recent years, while other members are equally convinced that Section 8 is different from Section 15. Undoubtedly, only the Supreme Court can settle the problem.

4. What is meant by "organization" when used with reference to county government; for example, is the Circuit Judge a county official? the Circuit Court Reporter? the Circuit Clerk? the Magistrate? the Probate Judge? the Magistrate Clerk? the Probate Clerk? the Prosecuting Attorney? the Superintendent of Schools? the Collector? the Assessor? election commission? jury commission? If so, must all laws governing them fit into the four classes; if not, who are "county officials" and what is county "organization"? *Explanation:* Nowhere in the Constitution, statutes or court decisions is there to be found a clear-cut definition of "county government," of "county powers" or of which officials are county officials and which are not. As county affairs could be dealt with under the old Constitution by special laws in the guise of population-bracket general laws, the question was academic. The new Constitution, however, limits the General Assembly to four classes of "county government," and it is certain that some of the laws which will be passed governing county officers will soon reach the Supreme Court.

5. What are the "powers" of county government; for example, is the levying, assessing and collecting of the property tax a "power" of county government or of the state government? Is the maintenance of peace a "power" of the county or the state? the maintenance of a judiciary? elections? roads? schools? welfare? health? *Explanation:* The explanation given under Question 4 above applies alike to the question of county powers.

Classification of Home Rule Counties (Article VI, Sections 8, 18a, and 31). Section 8 limits the General Assembly to not more than four classes of counties "... except as provided in this Constitution." Section 18a authorizes counties of over 85,000 population to frame home rule charters, and Section 31 provides home rule for St. Louis City-County. *Question:* Are the provisions of Sections 18a and 31 "except as provided in this Constitution" and thus outside the four classes? must the counties affected by these two sections be included within the four classes? *Explanation:* The Supreme Court in *State ex rel. Halsey vs. Clayton* (226 Mo. 292, 126 S. W. 506) decided that the cities framing charters under the home rule for cities provisions of the Constitution of 1875 were not included in the four classes of cities. If the General Assembly either includes or excludes the home rule counties from the four classes of counties, it is likely that the Supreme Court will have to decide the question at an early date.

County Home Rule (Article VI, Section 18). Under the provisions of this article, counties of over 85,000 population may frame and adopt charters providing for their own government. Such counties are given legislative authority, which has never been possessed by counties heretofore and presumably is still denied counties that cannot or do not adopt their own charters. State laws shall provide free and

open elections and govern the judiciary in such counties, but "no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees." *Question:* Are the Sheriff, Circuit Clerk, and Prosecuting Attorney "county officers," "state officers" or "judicial officers"? *Explanation:* The question raised is only one of a large number which is certain to come before the courts relating to county home rule, judging from the large amount of litigation which resulted from city home rule established for the first time in the 1875 Constitution.

Municipal Indebtedness (Article VI, Section 26). Cities are allowed to become indebted to the extent of five per cent of the assessed valuation by Section 26(b), another five per cent by 26(c), another ten per cent (for streets and sewers) by 26(d), and another ten per cent (for waterworks and electric or other light plants) by Section 26(e). Section 26(e), however, contains the following proviso: "provided the total general obligation indebtedness of the city shall not exceed twenty per centum of the assessed valuation." *Question:* In view of the fact that the twenty per centum proviso is not in Section 26(d) but only in 26(e), would it be possible to issue up to 20 per cent under 26(b), 26(c), and 26(e), then issue another 10 per cent under 26(d) or a total of 30 per cent? *Explanation:* Some of the leading bond attorneys of the state maintain that the order in which indebtedness of cities is incurred is significant, and it is possible for a city to issue bonds up to 30 per cent of the assessed valuation. Others maintain that the last clause of Section 26(e), coming at the end of a series of related provisions, was meant to be an over-all limitation. It may be some time before any city reaches its limit on indebtedness although all questions relating to governmental debts sooner or later are dumped into the lap of the Supreme Court because bonds must be legal before they can be marketed.

Commissioner of Education (Article IX, Section 2). Under the provisions of Article V of the Constitution of 1875 the Superintendent of Schools was an elective state official. He was elected in 1942 for a four-year term beginning in January, 1943. The new Constitution makes no reference to a "Superintendent of Schools" but provides for a State Board of Education which in turn appoints a "Commissioner of Education." *Question:* When does the term of the incumbent Superintendent of Schools end and the term of the Commissioner of Education begin? *Explanation:* If the new Board of Education appoints the incumbent Superintendent of Schools as the first Commissioner of Education, this problem will not arise, but if it does not, there is certain to be a controversy because a salary and certain authorities are involved.

State University (Article IX, Section 9). This section makes special provision for the government of the State University. *Question:* Is the University an "independent agency" or does it have to be integrated with the Department of Education under the provisions of Section 12 of Article IV and if so, how much? *Explanation:* If the University is placed in the Department of Education and if the Department of Education makes no particular attempt to exercise authority over the University, this question may never be of importance; but it is almost inevitable that

at some time in the future, when different personalities are involved and another generation is in power in each agency, the question will be raised.

Tax Commission (Article X, Section 14). Under Section 14 the General Assembly is required to establish "a commission" to equalize assessments as between counties. *Question*: Is this commission an "independent agency" or must it be integrated with the Revenue Department under the provisions of Section 12 of Article IV and if so, how much? *Explanation*: As tax matters are involved in this case, it is reasonably certain that the authority of the tax commission will be challenged at an early date and its relationship to the Revenue Department will likely be a point at issue.

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