PROSECUTING ATTORNEYS:
COUNTIES:
CHARTER COUNTIES:
LEGISLATURE:

The legislature may validly pass a statute requiring the Prosecuting Attorney of a Constitutional Charter County to devote full time to his duties.

OPINION NO. 234

March 29, 1966

FILED
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Honorable Maurice Schechter
Senator, 13th District
41 Country Fair Lane
Creve Coeur, Missouri

Dear Senator Schechter:

Recently you requested an official opinion from this office as follows:

> "I am enclosing a copy of the above bill which was referred to the Senate Committee on Criminal Jurisprudence, and a hearing on such bill was held last night.
>
> During the course of the hearing, Senator Cliff Jones and I commented that we had doubts as whether the Missouri Legislature could, by law, regulate the duties of the Prosecuting Attorney of St. Louis County, and we stated that such jurisdiction is vested in the St. Louis County Council under the county charter.
>
> The county charter provides that the Prosecuting Attorney shall have a 4-year term and the Council shall and does set his salary.
>
> The above bill, as it applies to St. Louis County, makes the Prosecuting Attorney of both first class counties a full-time job.
>
> The Senate Committee designated me to request an opinion from your office to determine if the Missouri Legislature has the authority to compel the Prosecuting Attorney of St. Louis County to devote full time to his office.

> "The Committee has indicated that it intends to hold such bill in abeyance until it receives your opinion."

You refer to Senate Bill No. 7, now pending before the 73rd General Assembly, Second Extra Session. Since St. Louis County is a charter county you inquire whether the General Assembly has authority to compel the Prosecuting Attorney of St. Louis County to devote full time to his office and not engage in private practice of law.

Article VI, Section 18(a), Constitution of Missouri 1945, provides that any county having more than 85,000 inhabitants may frame, adopt and amend a charter for its own government.

Article VI, Section 18(b), Constitution of Missouri 1945, provides:

> "Provisions required in county charters.--The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state."

Under the above constitutional provision the county charter is to provide for the number, kinds, manner of selection, terms of office and salaries of the county officers.

Article VI, Section 18(e) Constitution of Missouri 1945, provides:

> "Laws affecting charter counties -- limitations. --Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this Constitution and by law, 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."

Under this constitutional provision the legislature has authority to enact laws providing for free and open elections in the counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided in this constitution and by law there follows a limitation "but no law shall provide for any other official or employee of the county or fix the salary of any of its officers or employees."

A prosecuting attorney is not a judicial officer as that term is used in the above constitutional provision. Article V, Constitution of Missouri 1945; State ex rel Heimburger v. Wells, 210 Missouri 601.

Article VI, Sections 18 (b) and 18(e) of the Constitution were considered by the Supreme Court in State ex rel Shepley v. Gamble, 280 SW 2d 656. The question before the Court in this case concerned the authority of St. Louis County to amend its charter so as to provide for a police department and to vest in the police department powers and duties with respect to the preservation of order, prevention of crimes, and misdemeanors, apprehend and arrest, conserve the peace, and other police and law enforcement functions other than those relating to civil actions and detention, care and custody of prisoners in the county jail which authority had previously been vested in the sheriff and county constables under the county charter. In discussing the authority of the county council to create the county offices and designate the duties and responsibilities of the officers the Court, among other things, stated, l.c. 659:

> "'[2] St. Louis County, regardless of its charter, remains a legal subdivision of the state. Art. VI, §§ 1 and 18 (a). As such, it is charged with the performance of the state functions just as other counties are. Section 18 (b), supra, expressly requires that the charter must provide 'for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the state.'
>
> [3] A charter county differs from others chiefly in the form of county government which it may adopt. The charter must provide for the structure of county government and shall provide for 'the number, kinds, manner of selection, terms of office and salaries of the county officers.' Section 18(b), supra. In fact,

the General Assembly is prohibited from providing for any office or employee of the county or fixing the salary of any of its officers or employees other than election and judicial offices and officers. Section 18(e), supra. This is an express limitation on the legislative power.

[4,5] Moreover, charter counties are endowed with some of the powers and functions of a municipal corporation in the area outside incorporated cities. They are empowered to exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning in such areas. Section 18(c), supra. These are police powers ordinarily vested in municipal corporations. See, for example, Sections 73.010 and 73.110 RSMo 1949, V.A.M.S., relating to the organization and powers of cities of the first class. A county under the special charter provisions of our constitution is possessed to a limited extent of a dual nature and functions in a dual capacity. It must perform state functions over the entire county and may perform functions of a local or municipal nature at least in the unincorporated parts of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power. St. Louis County alone has the right to determine 'the number, kinds, manner of selection, terms of office and salaries' of its county officers. There can be no doubt that this is a proper constitutional provision, since the people of the state are sovereign, Art. I, §1, and they 'have the inherent, sole and exclusive right to regulate the internal government and police thereof * * *.' Art. I, §3. The constitution is harmonious in recognizing an exception to the provision for general laws for the organization and classification of counties. Art. VI, §8."

In Stemmler v. Einstein, 297 SW 2d 467, the question before the court was whether under the constitution, St. Louis City was authorized to form a county charter under Sections 18(a) to 18 (1) Article VI. In discussing the constitutional provisions in Sections 19(a) and 18(b), the court stated, l.c. 472:

> "* * *These sections make sweeping limitations upon the power of the General Assembly to enact laws relating to the government of a county so chartered. Such limitations can, of course, be made but the intent to do so must either expressly appear or its implication be clear, strong and convincing, if not, as has been said, absolutely necessary. McGrew v. Missouri Pac. Ry. Co., 230 Mo. 496, 132 S.W. 1076, 1083-1084. See also State v. Shelby, 333 Mo. 1036, 64 S.W. 2d 269, 271 [1-4]; State ex rel. Hughes v. Southwestern Bell Telephone Co., 352 Mo. 715, 179 S.W. 2d 77, 80 [3-5]. * * *"

In State ex rel Cole v. Matthews, 274 SW 2d 286, the question before the court concerned the purchase of voting machines, by the Election Board of St. Louis County. The court held that the Board of Election Commissioners by statute was vested with authority to designate the type and number of machines to be purchased and used. It was the duty and responsibility of the county council to pay for the purchase and rental of such machines. In discussing the authority granted the council under the above constitutional provision, the Supreme Court said, l. c. 292:

> "[4-6] Respondents also invoke the provisions of Art. III, §26, of the Charter and Ordinance No. 46 of the County of St. Louis as authorizing them to designate the type and number of machines to be purchased and used. The charter authorizes the Council to establish procedures governing the making of county purchases. The ordinance, enacted pursuant to the charter provision, creates a Division of Purchasing, and provides 'all bids for any * * * purchase may be rejected and new bids advertised for at the discretion of the Supervisor.' <u>The provisions of the charter and ordinances of the county which</u>

> are in conflict with prior or subsequent state statutes relating to governmental matters must yield. State ex rel. Volker v. Carey, 345 Mo. 811, 136 S.W. 2d 324, 325 [4]; Kansas City v. J. I. Case Threshing Machine Co., 337 Mo. 913, 87 S.W. 2d 195, 202, 203 [8,9]. Statutes pertaining to the conduct of elections are governmental in scope. See last case above cited. But, in any event, neither the charter nor the ordinance directly or impliedly vests respondents with any discretion other than to purchase at the best bid obtainable."

The principle is well settled that the Constitution of Missouri is in the main a limitation on the power of the legislature. The legislature has full power unless the Constitution limits that power. State ex rel Gordon v. Becker, 49 SW2d 146.

The significant limitation in Section 18(e), Article VI, upon the power of the legislature is that "no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees". This language cannot be construed to deny to the legislature the power to direct a charter county to have a full time prosecuting attorney to enforce the criminal and other laws of the state.

It has long been held by the Supreme Court under the express language of Section 19, Article VI, respecting Constitutional Charter Cities that the City Charter and ordinances can adopt any provision or enact any ordinance so long as it is "consistent with and subject to the laws of the state."

In Coleman v. Kansas City, 182 SW 2d 74, l.c. 77, the Supreme Court en banc said:

> "* * *We discussed the matter fully in those cases and our ruling is to the effect that as to matters pertaining to private, local corporate functions the city holds its power independent of control by the General Assembly, but as to governmental functions the State retains control. On this point the city's argument is wholly based on the fact that the license taxes are used exclusively for municipal purposes. That fact is not determinative. The

> distinction is not between local and general concern, but between corporate and governmental functions. The power of taxation is a governmental function which the constitution authorizes the General Assembly to delegate to the city as to municipal taxes, but only in a manner 'consistent with and subject to the Constitution and laws of the State.'"

In State ex rel Spink v. Kemp, 283 SW 2d 502, l.c. 515 the Supreme Court En Banc said:

> "In State ex rel. Carpenter v. City of St. Louis, 318 Mo. 870, 2 S.W. 2d 713, 721, we said: 'The cases construing the police laws are in point. The state has authority to provide by general law for the establishment of a metropolitan police force in a city operating under a special charter, and compel the city to maintain it by taxation * * * In State ex rel [Hawes] v. Mason, 153 Mo. 23, 54 S.W. [524] 527, it was held that the city of St. Louis could be compelled, by mandamus to pay the expense of the police system of that city, established by an act of the Legislature (Laws 1860-61, p. 446). It is significant that the original legislative act supplanted the municipal system which had existed prior to that time. Id., [153 Mo. 23] loc. cit. 32 (54 S.W. 524). The opinion written by Judge Gantt, referring to earlier cases, says ([153 Mo.] loc. cit. 47 [54 S.W. 530]): "The power of the Legislature to provide the necessary agencies to perform the high functions of the state in the preservation of * * * peace, etc., and to impose the duty of paying therefor on the locality for which * * * said agencies were created, was fully and firmly established."'
>
> "The cases cited by the Special Commissioner and relied upon by respondents do not militate against the doctrine above announced. <u>Each of them recognizes and holds inviolable the rule</u>

> that the charter of a city (organized as is Kansas City) is subordinate to the will of the General Assembly insofar as it relates to governmental policy as distinguished from matters of local municipal concern." (Emphasis ours)

And again most recently in School District of Kansas City v. Kansas City, 382 SW 2d 688, the Supreme Court en banc said, l.c. 692:

> "[3] The Charter of Kansas City was adopted pursuant to constitutional provisions which are not §§ 18 and 20 of Art. 6 of the 1945 Constitution. Section 19 requires that the Charter be 'consistent with and subject to the constitution and laws of the state'. In case of conflicting or inconsistent provisions, the Charter must give way to the Constitution and state laws in regard to governmental functions or general policies of statewide concern. State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 SW 2d 532, 537 [6]; State ex rel. Spink v. Kemp, 365 Mo. 368, 283 S.W. 2d 502, 514 [4-6]; City of Joplin v. Industrial Commission of Missouri, Mo., 329 S.W. 2d 687, 693 [7]." (Emphasis ours)

We think the law respecting Constitutional Charter Counties is analogous to the law in Constitutional Charter Cities as announced in the cases above cited.

Charter counties authorized by Section 18(a) Article VI, are subject to laws enacted by the legislature. This is implicit in the language of Section 18(b) Article VI when it provides that a County Charter shall provide "for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state." The superiority of state law is recognized in the St. Louis County Charter in Article III, Section 22, Paragraph 24, "To exercise all powers of legislation now or hereafter conferred upon counties by the Constitution, law and this charter * * *."

The almost exclusive function of a Prosecuting Attorney is to prosecute and enforce the criminal laws enacted by the legislature. This is an exercise of the sovereign power of the state delegated by the legislature to the respective prosecuting attorneys of the state.

Honorable Maurice Schechter

The legislature has the power to determine that the needs of an urban population are so urgent that it may require the prosecuting attorney to devote his full and entire energy to the prosecution of persons accused of violation of the criminal laws. To hold otherwise would require that Senate Bill 7 be deemed unconstitutional. The only constitutional limitation bearing on this is the last clause of Section 18(e), Article VI, which provides "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." Senate Bill 7 does not provide for another office or employee and as applied to St. Louis County does not fix the salary of the Prosecuting Attorney. No other constitutional limitation or prohibition has been pointed out to us and we have found none. We must therefore conclude that Senate Bill 7 is not unconstitutional and if enacted would be operative in St. Louis County.

CONCLUSION

It is the opinion of this office that the legislature may validly pass a statute requiring the Prosecuting Attorney of a Constitutional Charter County to devote full time to his duties, and prohibit him from engaging in the practice of law.

The foregoing opinion which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,

NORMAN H. ANDERSON
Attorney General