MUNICIPAL HOME RULE IN COLORADO†

By ALFRED S. REINHART*

IF the actual adoption of constitutional[1] municipal home rule is the product of the West, there can be little doubt that it is the product of the experience of the East. For had not New York[2] and Massachusetts[3] and Pennsylvania,[4] to mention a few salient examples, demonstrated the almost incredible extents to which interference by legislatures in the local affairs of their creatures, the municipalities,[5] might reach, it is safe to say that the chances are preponderant that the western states themselves would have had to suffer through the evils consequent on legislative butting before municipal home rule would have made the headway it has made in

†Although this article treats of the cases in a single state, it is printed in the hope that knowledge of Colorado's experience may prove useful elsewhere. Ed.

*Dorchester, Massachusetts.

[1]One should distinguish between constitutional and so-called statutory home rule. Although no adequate study of the latter has yet been made, it is certain that mere legislative enactment has failed totally to preserve the rights of the municipality.

[2]A home-rule amendment (Article 12) to the New York constitution was ratified in November, 1923. The following year was passed the Enabling Act, known as the City Home Rule Law (1924, ch. 363).

[3]Massachusetts municipalities are still in practical subservience to the legislature. A four-option charter law, however, (but not applicable to Boston) was passed in 1915.

[4]Although Pennsylvania adopted a so-called Home Rule Amendment in 1922, there has, nevertheless, been no enabling legislation, with the possible exception that in the second sentence of the amendment are found the words, "to exercise the powers and authority of local self-government." The legislature has, however, amended the Third Class City Law in an attempt to confer greater home-rule powers, but this enactment (1925, Act no. 127) has been of very doubtful value.

[5]Despite the doctrine enunciated by Judge Cooley in People ex rel. LeRoy v. Hurlburt, 24 Mich. 44 (1871) that cities have an inherent right to local self-government, our conception of the legal subordination of city to state has not in the least changed. For typical expressions of the "creature doctrine" see especially, Barnes v. District of Columbia, 91 U. S. 540 (1875); Atkins v. Kansas, 191 U. S. 207 (1903); and City of Trenton v. New Jersey, 262 U. S. 122 (1923).

our great trans-Mississippi territory.[6] So when we learn that the municipal home-rule provisions of Washington[7] and Oklahoma[8] and Arizona[9] are actually integral parts of the original respective state constitutions concerned, we must not regard them as spontaneously conceived solutions of an age-old problem, but merely as ameliorative provisions adopted in the wake of a long eastern experience, and in flattering reflection on the few older western states which saw fit to enact home-rule amendments to their state constitutions. I do not mean for a moment to imply that the aforementioned constitutional provisions acted as *dei ex machinis* by which cities became immune from legislative interference in their local matters; the point is that the states noted lack the long preliminary struggle for municipal home rule that we find elsewhere.

Colorado, on the other hand, though not endowed with as long and varied a history of home rule as New York[10] and Ohio,[11] for instance, did not entirely escape the same sort of struggle for municipal freedom. The chain of circumstances and incidents leading up to the adoption of the home-rule amendment to the Colorado constitution,[12] the conditions and environment of the strife therefor—all has found excellent and authoritative expression elsewhere,[13] and

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[6]The following states west of the Mississippi have adopted constitutional home rule: Missouri (1875), California (1879), Washington (1889), Minnesota (1899), Colorado (1902), Oregon (1906), Oklahoma (1908), Arizona (1912), Nebraska (1912), Texas (1912).

[7]Article 11, section 12.

[8]Article 13.

[9]Article 13, sections 1-5.

[10]It has been said that the question of home rule has been before every New York constitutional convention since 1821. Francis M. Hugo, "The State and the Municipality," Proceedings of the Sixth Annual Conference of Mayors and their City Officials of the State of New York, 1916, p. 7. Actual legislation was begun with the Municipal Empowering Act of 1913 (1913, ch. 248) and continued until the Enabling Act of 1924 (1924, ch. 363).

[11]Provision for prohibition of special legislation for municipalities was made in the Ohio constitution of 1851 (Article 13, secton 1), but until 1902, the legislature displayed great ingenuity in evading the requirements for uniform laws by a vicious system of classification. In 1902 the supreme court denounced in four cases certain municipal legislation as unconstitutional. From 1902-1912 a general municipal code was in effect. In the latter year constitutional home rule was adopted.

[12]Article 20.

[13]C. L. King, THE HISTORY OF THE GOVERNMENT OF DENVER WITH SPE-

it is far from my purpose here to reproduce what is doubtless one of the most interesting, if not amazing chapters in the politics of our West. Suffice it to note that the Colorado home-rule amendment was ratified overwhelmingly by popular vote,[14] becoming law on December 1, 1902. Colorado thus became the first state in the twentieth century to adopt constitutional home rule.[15]

Space permits of but a most summary review of the Rush Amendment.[16] Composed of eight sections, the Amendment devotes much more than half of its text to the case of Denver. Section one provides for the consolidation of the city and county of Denver; sections two and three deal with the officers of the resultant consolidated district; sections four and five outline the procedure and machinery for charter-making therein;[17] while section seven deals with the school district of Denver. Section six extends the provisions of sections four and five to all cities of the first and second classes, and finally section eight makes all the provisions of the article paramount to the remainder of the constitution in case of conflict therewith.

It should be noted at the outset that the Twentieth Amendment applies only to cities of the first and second classes; *i.e.* to all cities having populations of two thousand or more inhabitants. There are thirty-four such municipalities[18] in Colorado, but of these only about

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CIAL REFERENCE TO ITS RELATIONS WITH PUBLIC SERVICE CORPORATIONS, (Denver, 1911) chs. 4-5.

[14]The vote was: yes, 59,750; no, 25,767.

[15]The Oregon legislature, however, was already courting constitutional home rule, but was unsuccessful until 1906. In 1901 provision was made for a home-rule charter for Portland (1901, p. 296); while it appears that two proposed home-rule amendments were ineffective due to the failure of the legislature to provide for the submission of the amendment to popular vote. See New York State Library Bulletin 87, Legislative Bulletin 22v, 1903.

[16]The Colorado home-rule amendment is known as the Rush Amendment because Senator John A. Rush was the one who introduced and led to successful conclusion the bill (1901, p. 97) providing for the submission to the state electorate of the home-rule amendment.

[17]The only restrictions to which charters or amendments thereto are made subject are first, that they shall be acted upon by petition and electoral vote; and second, that they shall not diminish the rate of state taxes or interfere with the collection thereof.

[18]According to the U. S. Census of 1920 the following municipalities come within the first two classes: Alamosa, Boulder, Brighton, Brush, Canon City, Colorado Springs, Cripple Creek, Delta, Denver, Durango, Englewood,

a third[19] have taken advantage of their opportunity to frame their own respective charters. The eligible non-home-rule cities range from Pinero with a population of two thousand to Trinidad with a population of almost eleven thousand.

No sooner was the home-rule Amendment adopted than its constitutionality was attacked.[20] The legality of the Amendment was impeached on five main grounds, all of which were based on the constitutional provisions relative to the proposal of amendments by the legislature.[21] It was further contended, however, that even were the procedural requirements of the constitution properly complied with, the Amendment was void on three other grounds: first, as a violation of the Fourteenth Amendment to the federal Constitution;[22] second, as a violation of section four of the Colorado Enabling Act,[23] which provides that the state constitution shall be republican in form;[24] and finally, as a violation of the principle that the opera-

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Florence, Fort Collins, Fort Logan, Fort Morgan, Glenwood Springs, Golden, Grand Junction, Greeley, La Junta, Larnar, Las Anunas, Leadville, Longmount, Loveland, Montevista, Montrose, Prinero, Pueblo, Rockyford, Salida, Sterling, Trinidad, and Walsenburg.

[19]There follow the names of the Colorado home-rule municipalities. The dates are those on which the respective charters were filed with the secretary of state. The figures in parentheses represent the populations according to the U. S. Census of 1920.

Denver, April 7, 1904 (256,491); Colorado Springs, June 15, 1909 (30,195); Grand Junction, Sept. 20, 1909 (8,665); Pueblo, Sept. 29, 1911 (43,059); Durango, Sept. 12, 1912 (4,110); Delta, Jan. 15, 1913 (2,623); Fort Collins, Sept. 24, 1913 (8,755); Montrose, Jan. 22, 1914 (3,581); Fort Morgan, Oct. 9, 1914 (3,818); and Boulder, Nov. 6, 1917 (11,006).

[20]People ex rel. Elder v. Sours, 21 Colo. 369, 74 Pac. 167 (1902).

[21]The Colorado constitution provides that proposed amendments be entered in full on the Journals of the House and Senate. Now the Senate, in which the home-rule proposal originated, passed it with slight amendments. The House Journals, however, showed the printed bill without the Senate amendments. The court held that the discrepancy between the Journals of the two Houses was due to a mere clerical omission, and moreover, the bill passed by the House was in fact in the same form as the amended Senate measure.

[22]It was contended that the consolidation of the city and county of Denver resulted in a deprivation of property without due process of law, for certain buildings paid for by the citizens of various towns became incorporated in the property of Denver, while the people of other towns who had contributed to the existing buildings were excluded from the new municipality.

[23]1883, p. 28.

[24]The "republican in form" clause has also served as a rallying-ground for the opponents of municipal home rule in other states. It is noteworthy

tion of an amendment shall not be made to depend on contingencies.[25] It is quite unnecessary to go into any discussion of these various contentions, for there can be no doubt of the justification of the Colorado supreme court in sustaining the constitutionality of the home-rule Amendment.[26]

Following this decision, the new City and County of Denver, in compliance with the procedure outlined in the constitution, took the proper steps for the adoption of a charter. Due to the strenuous opposition of both partisan and public utility interests, however, the proposed charter was rejected at the polls.[27] It was soon successfully replaced,[28] however, by a second, which went further than its predecessor in catering to the demands of the previously antagonized interests.

The home-rule Amendment was early vitalized in two important cases. In the first of these,[29] the court held that since the adoption of the Twentieth Amendment the governor had no power to appoint the members of the Denver fire and police boards.[30] Thus was

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that other political reforms such as the Initiative and Referendum, the city manager plan, and proportional representation have fallen heir to like opposition.

[25]I.e., the people were authorized to frame their own charters, but they might never do so. The court held that this was not a contingency within the meaning of the law.

[26]It is interesting to note that the foes of home rule have adopted similar tactics in other states. In New York, after the home-rule bill had passed the Senate on March 13, 1923, a technicality was evoked in opposition to the measure, which was fortunately overruled, however, on the basis of precedent. After the amendment was duly ratified its validity was again assailed on two technical grounds much resembling the Colorado complaints: one related to the entry of the resolution in the Legislative Journals, the other to the process of ratification. In a unanimous opinion the lower court declared the amendment invalid, but the court of appeals, also with unanimity, reversed that part of the decision. Browne v. Board of Estimate, 241 N. Y. 96; 149 N.E. 211 (1925). In Wisconsin the home-rule amendment suffered a very similar experience.

[27]September 20, 1902.

[28]March 29, 1904.

[29]People ex rel. Parish v. Adams, etc., 31 Colo. 476, 73 Pac. 866 (1903). In 1924, in a case strongely reminiscent of the Adams case, the court upheld a provision of the Denver charter which provided that the mayor and not the governor shall appoint the public trustee. People v. Sabin, 75 Colo. 545, 227 Pac. 565 (1924).

[30]The original charter (section 45) permitted the governor to appoint the

secured the first legal sanction of a positive measure of home rule in Colorado. The second case referred to, *Denver v. Hallett*,[31] brought up the question of whether Denver had the power to provide in its charter for the erection of a municipal auditorium, for the purchase of a site therefor, and for the issuance of bonds to discharge the indebtedness incurred. The importance of this case lies not so much in the decision that Denver did have the power in question, as in the far-reaching implications in the statement by the court that Denver had "every power possessed by the Legislature in the making of a charter for Denver." Because of the permanent value and clear-cut expression of opinion by the court at this point, I quote more at length in the footnote.[32] An analogous declaration was made by the court the following year,[33] *viz.*: "As far as city functions are concerned, the charter convention had all the power the Legislature possessed with reference to such matters prior to the ratification of article 20."

The next important group of cases we come to is collectively known as the "county offices elections cases." These were eight cases involving the titles to the offices of county judge,[34] county

members of the city fire and police boards to serve two years. The governor was also given the power of removal.

[31]34 Colo. 393, 83 Pac. 1066 (1905).

[32]"We agree with counsel that no power to build an auditorium is expressly granted by the twentieth article; that such power is not incident to the powers expressly conferred, nor can it be necessarily or fairly implied therefrom; and that an auditorium is not indispensable to the objects and purposes of the municipality as declared in the twentieth article. But we do not agree with him that the stinted grant of power contained in section 1 and other parts of the article is the only power possessed by Denver. It seems very clear that the statement contained in the first section was not intended to be an enumeration of powers conferred, but simply the expression of a few of the more prominent powers which municipal corporations are frequently granted. The purpose of the twentieth article was to grant home rule to Denver and other municipalities of the state, and it was intended to enlarge the powers beyond those usually granted by the legislature. *It was intended to confer not only the powers specially mentioned, but to bestow on the people of Denver every power possessed by the Legislature in the making of a charter for Denver.*

"It is therefore necessary to determine whether the Legislature could have conferred upon the city of Denver power to" * * * (italics my own).

[33]People v. Lindsley, 37 Colo. 476, 86 Pac. 352 (1906).

[34]People ex rel. Miller v. Johnson, 34 Colo. 143, 86 Pac. 233 (1905).

assessor,[35] county clerk and *ex officio* recorder,[36] treasurer,[37] constable,[38] sheriff,[39] county commissioners[40] and justice of the peace.[41] All these cases were argued orally and presented at the same time. Inasmuch as they have been adequately dealt with elsewhere,[42] it is unnecessary to go into any further detail here. Suffice it to note that in general, the expensive[43] and reactionary decisions handed down were expressly overruled some years later in the cas of *People ex rel. v. Elizabeth Cassiday et al.*,[44] which apparently settled the point that since the adoption of Article 20, section 2, there had never been in Denver a county officer as such, but that the functions of county government, so far as they remained after the consolidation of the city and county of Denver were to be performed by persons or agencies prescribed by the city charter.[45] But it transpired that the issue was even not yet finally settled, for in the following year the court held that the decision in the *Cassiday* case did not apply to the office of county judge.[46] The election controversy cropped up once again in 1916,[47] when the court decided that

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[35]People ex inf. Stidger v. Alexander, 34 Colo. 193, 86 Pac. 240 (1905).

[36]Byrne v. The People ex inf. Stidger, 34 Colo. 196, 86 Pac. 250 (1905).

[37]People ex inf. Stidger v. Elder, 34 Colo. 197, 86 Pac. 250 (1905).

[38]People ex inf. Stidger v. Berger et al., 34 Colo. 199, 86 Pac. 250 (1905).

[39]People ex rel. Nisbet v. Armstrong, 34 Colo. 204, 86 Pac. 251 (1905).

[40]People ex rel. Lawson et al. v. Stoddard et al., 34 Colo. 204, 86 Pac. 251 (1905).

[41]People ex rel. Harrington et al. v. Rice et al., 34 Colo. 198, 86 Pac. 251 (1908).

[42]H. L. McBain, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, (New York, 1916) pp. 509 ff. See also C. L. King, *op. cit.* pp. 245-250.

[43]A dual set of officers for city and county were elected at municipal and state elections respectively from the time the decision in the Johnson case was handed down until it was overruled.

[44]50 Colo. 562, 123 Pac. 101 (1912).

[45]It is interesting to observe here the decision in the New York case of Schiefflin v. Berry, 241 N. Y. 96, 149 N.E. 211 (1925) where the court had before it the problem of whether a city could, since the adoption of constitutional home rule, establish a minimum wage and change the salaries of government employees performing service within the city and paid by the city. The court decided in the negative on the ground that many of those public servants, although paid by the city, were county or state officers. That is, although many county and city officers are paid by the city, their legal and factual status as county and state servants is not changed.

[46]Dixon v. People ex rel. Elliott, 53 Colo. 527, 127 Pac. 930 (1912).

[47]Arnold v. Hilts, 61 Colo. 8, 155 Pac. 316 (1916).

the elected county assessor had to give way to the assessor appointed by the mayor.[48]

Before we leave this consideration of the formative era as it were of municipal home rule in Colorado, mention at least should be made of the case of *Mauff v. People*[49] in which the question to be decided was whether the Election Commission of Denver was subject to the state statutes relative to the conduct of elections. The court held that inasmuch as the conduct of elections was not a matter of local concern,[50] Denver was subject to the general statutes relative to elections.

The Amendment of 1912 and the Utility Cases

In November, 1912, section 6 of Article 20 was fundamentally amended.[51] The amendment is significant in two respects particularly: first, it contains an overt statement that in matters of local concern the provisions of home-rule charters will supersede any conflicting state statute relating to the municipal affair concerned; and second, it contains a definite enumeration of eight express classes of powers[52] bestowed on home-rule cities. Then follows this impor-

[48]Just as in Michigan much of the early home-rule litigation was spent on points of charter amendments, charter commissions, and the like, so in Colorado there has been no dearth of election cases. Most of these have been caused by conditions resultant upon the consolidation of the city and county of Denver. For further material see Aichele v. Denver, 52 Colo. 183, 120 Pac. 149 (1912); Elder v. City and County of Denver, 53 Colo. 496, 127 Pac. 949 (1912); Thrush v. People, 53 Colo. 544, 127 Pac. 937 (1912); Lawson v. Meyer, 54 Colo. 96, 129 Pac. 197 (1913); Lindsley v. City and County of Denver, 64 Colo. 444, 172 Pac. 707 (1917); etc. The cases mentioned here deal respectively with the clerk and recorder, city treasurer, justice of the peace, superintendent of schools, and district-attorney.

[49]52 Colo. 562, 123 Pac. 101 (1912).

[50]The court here used what logicians know as "the chain analogy." The court reasoned that if local control over elections were sustained, then Denver could proceed to fix the qualifications of electors, declare what shall constitute electoral offenses, prescribe punishment therefor, declare in what courts contests shall be waged, etc.—all of which are matters of more than local concern.

[51]The vote was: yes, 49,596; no, 44,778.

[52]The following is a summary of the subject-matter of the eight classes of powers: municipal offices and officers, creation and regulation of police courts, municipal elections and their appurtenances, certain aspects of municipal finance, consolidation and management of park or water districts, municipal taxation and assessment, and regulation of penalties for charter violations.

tant assertion: "It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions, the full right of self-government in both local and municipal matters and the enumeration of certain powers shall not be construed to deny to such cities and towns, and to the people thereof, any right or power essential to the full exercise of such right."

The statement of Mr. Justice Teller that, "It is common knowledge that the decision in *Mauff v. People* was the moving cause of the framing and initiating of the amendment of 1912,"[53] is in some measure justified and corroborated by the fact that section "d" of the amendment gives the home-rule municipality practically complete control over "matters pertaining to municipal elections"; but then one is left at a loss to account for the other grants of power, none of which is directly traceable to any particular decision adverse to the spirit of home rule.[54] It is worthy of note, nevertheless, that the first home-rule case to arise after the adoption of the amendment of 1912 was one[55] in which *Mauff v. People* was in fact overruled[56] on the authority of the aforementioned subdivision "d," local control over municipal elections thus being given judicial sanction. The court has since upheld the power of home-rule cities to call special elections to consider questions of public improvements.[57]

But the most important home-rule case which has arisen in the last twenty-five years is *Denver v. Mountain States Telegraph and*

[53]From concurring decision in Denver v. Mountain States Telegraph and Telephone Co., 67 Colo. 225, 184 Pac. 610 (1919).

[54]On the contrary, the power of special assessment set forth in clause "g" of the amendment was vigorously upheld by the court the previous year in Londoner v. City and County of Denver, 52 Colo. 15, 119 Pac. 156 (1911). See also pp. 31-36, infra.

[55]People ex rel. Tate v. Prevost, 55 Colo. 199, 134 Pac. 129 (1913). This was a suit instituted to test the validity of the Pueblo charter adopted September 19, 1911, which provided for the commission plan of government. The court said that the matter involved was a political question over which it had no control. The general validity of the 1912 amendment was also upheld.

[56]Relative to Mauff v. People the court said, "Whatever may have been the law of the status of municipal elections before the amendment, their status now, by the adoption of that amendment, is fixed by legislative declaration of the people as local and municipal matters." p. 134.

[57]Clough v. Colorado Springs, 70 Colo. 87, 197 Pac. 896 (1921). The election upheld was that of September 8, 1920 on the question of a bond issue for pavements.

Telephone Co.[58] which, by virtue of that fact, merits our closer attention. In 1913, the Colorado legislature created a Public Utilities Commission whose main function it should be to regulate public utilities operating in the state of Colorado.[59] When this commission sought to regulate the rates charged by the Mountain States Telegraph and Telephone Co. within the territorial limits of the City and County of Denver, the latter objected to its jurisdiction. The problem then resolved itself into the question of whether the Public Utilities Act was applicable within the territory of Denver.[60]

Now in 1912 Denver had amended its charter so that section 280 read: "All power to regulate the charges for service by public utility corporations is hereby reserved to the people to be exercised by them in the manner herein provided for initiating an ordinance." The amended Denver charter was already on file in the office of the secretary of state when the Amendment to Article 20 of the constitution was adopted. And one of the provisions of this latter Amendment reads as follows: "All provisions of the charter of the City and County of Denver * * * filed with the Secretary of State which provisions are not in conflict with this Article * * * are hereby ratified, affirmed and validated as of their date."

Technically, then, there could be little doubt of Denver's right to regulate the rates of public utilities operating within her boundaries, provided, however, that such regulation could be shown to be a local or municipal matter. For it must be remembered that the 1912 Amendment provides for the validation of provisions of the Denver charter which "are not in conflict with this Article," and that "this Article" says that the city charter shall supersede within muncipal territorial limits conflicting state statutes dealing with matters local and municipal.[61] It remained for the court then

[58]67 Colo. 225, 184 Pac. 604 (1919).

[59]1913, p. 464. The general validity of this act was upheld in Denver & S. P. Ry. Co. v. City of Englewood, 62 Colo. 229, 161 Pac. 151 (1916).

[60]The question of the applicability of the Public Utilities Act to home-rule cities was expressly left undecided in the Englewood case.

[61]Compare Article 20, sec. 6, paragraphs 1-2. Mr. Justice White evidently did not think this a serious objection for he said, "The provision of the Denver charter was in substantial effect written into the Constitution. It was adopted by reference for there is nothing in the charter provision in question which is in any wise in conflict with the article." There follow later reasons for this statement.

to show that the regulation in question was a local and municipal matter. This the court was able to do on the authority of two important cases, one decided within,[62] and one without[63] its own jurisdiction.

It will be recalled that in the *Hallett* case[64] the test laid down as to whether a home-rule city was possessed of a certain power was to determine whether the legislature prior to the adoption of the home-rule Amendment could have conferred upon the municipality the power in question. In the past whenever the court had invoked the doctrine of the *Hallett* case it was able with comparative ease to show that the legislature could have conferred on municipalities the power involved.[65] But now when the question of rate regulation arose, thoughtful people began to shake their heads; and the consistent failure of state legislature to delegate their rate-regulating powers[66] to any agency other than state commissions (except in rare instances) became conspicuous. The Colorado court, however, found little difficulty in evoking a very pertinent decision[67] handed down by the United States Supreme Court some years before. The following language of Mr. Justice Moody speaking for a unanimous court, can leave no doubt of its purport:[68] "The power to fix, subject to constitutional limitations, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its nature, *and capable of being vested in a municipal corporation.*"[69]

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[62]City and County of Denver et al. v. Hallett, 34 Colo. 393, 83 Pac. 1066 (1905).

[63]Home Telephone Co. v. Los Angeles, 155 Fed. 554, 211 U. S. 265 (1908).

[64]See note 31, supra, and accompanying text.

[65]See especially, Londoner v. City and County of Denver, 52 Colo. 15, 119 Pac. 156 (1911). *Cf.* note 95, infra, and accompanying text.

[66]The leading case on which legislative regulation of the rates of public utilities is based will be found in Munn v. Illinois, 94 U. S. 113 (1876). For reference upholding the delegation of such power by a legislative body to an administrative commission see Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 (1912), and cases cited.

[67]See note 63, supra.

[68]211 U. S. 271.

[69]The main task of the Colorado court was to prove that public utility regulation is a municipal function. Mr. Justice Burke first quoted the fol-

But counsel for the utility company in the Denver case made much capital of the contention that the power to regulate public utilities was not expressly granted to home-rule cities. This contention was not wholly without basis; for while it is true that the 1912 Amendment provided that municipalities shall have all "powers necessary, requisite or proper for the government and administration of its local and municipal matters,"[70] and while it is true that following an enumeration of express powers[71] an even more emphatic statement was made relative to further powers of the home-rule city,[72] nevertheless, it is not insignificant that few of the powers expressly granted can compare in importance to the power of public utility regulation. The question then does naturally suggest itself, "If home-rule cities were intended to exercise as major a function as utility regulation, why the failure to make such an intention clear when minor powers are expressly provided for?" Mr. Justice Scott in a vigorous minority opinion[73] based much of his dissent on the very ground that the power to regulate local public utility rates was not expressly granted to home-rule cities. Mr. Justice White, however, speaking for the court said:[74] "The police power to control public utilities need not be granted or invested in

lowing sentence from the Home Telephone case (at page 279): "It is too late, however, after the many decisions of this court, which have either decided or recognized that the governing body of a city may be authorized to exercise the rate making function, to ask for a reconsideration of that proposition." Mr. Justice Burke then continued (184 Pac. 612): "The court is here speaking of an authorization by legislative enactment. If the governing body of a city may be authorized by the legislature, it is only because the subject is one of local and municipal concern. And if the municipality may be so authorized by the Legislature, it may, *a fortiore*, be so authorized by constitutional enactment." One must ask oneself at this point whether Mr. Justice Burke is begging the question when he says "authorized by constitutional enactment."

Note also such statements as the following: "Clearly, then, the regulation of the instrumentalities essential to deal with such problems is peculiar to such communities, and therefore a local or municipal matter." Mr. Justice White, 181 Pac. 607. "The regulation of the rates to be charged by public utilities has long been recognized as a proper municipal function." *ibid.*

[70]Article 20, section 6, paragraph 4.

[71]See note 52, supra.

[72]See page 389, supra.

[73]134 Pac. 613-626.

[74]184 Pac. 608.

a subordinate agency in express words. It is sufficient if it necessarily arises from, or is fairly implied in, or is incidental to, the powers expressly granted, or is essential to the declared objects and purposes for which the agency was created."

In appraising the various decisions rendered in this key case,[75] it seems clear that legally, both by reason and authority, the majority decision is the correct one. As a matter of practicability, however, it seems equally clear that the decision violated the rules of sound municipal economics. All the arguments directed against the exercise of local public utility regulation in big cities apply with so much the more potency to cities of small—many of inconsiderable—size.[76] Perhaps the Colorado judiciary did not wish to be caught in that current drift of jurisprudence wherein our courts are unmistakably becoming legislators in matters of social and economic doctrine. That the court was not unaware of the moment of the decision it was making, indeed, that it was not unanticipative of the adverse criticism which was bound to follow its decision, is demonstrated by two statements. Said Mr. Justice White:[77] "With the wisdom of the measure we have no concern. That question belongs solely to the people in their sovereign capacity." And Mr. Justice Burke, in his concurring decision:[78] "It may be that the plan will not work out to the satisfaction of the people of the state. If so it is within their province to amend or repeal it whenever they see fit. On their own heads, in their own hands, the sin and the saving lie."

But the finality with which the court spoke in the *Telephone* case did not close the door against future litigation involving the same issues. For analogous cases have continued to arise ever since, the Public Utilities Commission and the public service corporations apparently having difficulty in reconciling and acclimating themselves to what was a somewhat revolutionary decision in American municipal jurisprudence.

Three years after the *Telephone* case was decided, there arose

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[75]White, J. rendered the decision for the court. Burke, Dennison, and Teller, J. J. delivered concurring opinions. Bailey, J. delivered a dissenting opinion in which Mr. Chief Justice Garrigues concurred. Scott, J. also delivered a dissenting opinion.

[76]For populations of Colorado home-rule municipalities see note 19, supra.

[77]184 Pac. 608.

[78]184 Pac. 613.

the case of *City of Pueblo v. Public Utilities Commission of Colorado.*[79] The facts involved were simple. A provision in the charter of the city of Pueblo[80] authorized the council to fix by ordinance every five years the rates of public utiilty corporations operating within the territorial limits of the city of Pueblo. When the Public Utilities Commission sought to raise the gas rates to a figure higher than that fixed by the Pueblo council, the court held on authority of the *Telephone* case that the commission lacked jurisdiction.

In the same year the issue was raised in two other cases. In the one[81] it was consistently held that the city of Colorado Springs had jurisdiction over the rates to be charged for electric current furnished within municipal limits. In the other[82] the doctrine of municipal jurisdiction was extended to the local switching service ("industrial switching") of railroads. In the following year the *Telephone* case arose in different form,[83] but was quickly disposed of on the basis of authority.

There remain to be considered two recent utility cases which, although they do not involve the issue of home rule as such, have nevertheless great indirect importance. The question for adjudication in the first case[84] was whether a non-home-rule city could regulate the rates of a municipally-owned and operated lighting plant.

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[79]68 Colo. 155, 187 Pac. 1026 (1920).

[80]Article 10, section 3.

[81]Golden Cycle Mining and Reduction Co. v. Colorado Springs Light, Heat and Power Co., 68 Colo. 588, 192 Pac. 493 (1920).

[82]Atchison T. & S. F. Ry. Co. et al. v. Public Utilities Commission, 68 Colo. 588, 192 Pac. 493 (1920). This case should be distinguished from others such as Lake Shore & Michigan Southern Ry. v. Ohio, 173 U. S. 285 (1899), which upheld an enactment requiring passenger trains to stop daily at every town containing more than three thousand inhabitants; Hennington v. Georgia, 163 U. S. 299 (1896), which upheld a statute forbidding the running of freight trains on Sunday; Southern Ry. v. King, 217 U. S. 324 (1910), which upheld a statute regulating the movement of trains at dangerous crossings; Erbs v. Morasch, 177 U. S. 584 (1900), which upheld a statute restricting the speed of trains within city limits to six miles an hour; etc., etc. All these cases dealt with state statutes, not with municipal ordinances. Of course it is to be realized also that industrial switching is far less a burden on interstate commerce than any of the matters just mentioned.

[83]City of Fort Collins v. Public Utilities Commission, 69 Colo. 554, 195 Pac. 1099 (1921).

[84]Town of Holyoke v. Smith, 75 Colo. 286, 226 Pac. 153 (1924).

To begin with, the statute creating the Public Utilities Commission[85] does not give the commission authority to fix rates for municipally-owned utilities. In the second place the operation of public service industries by municipalities is specifically authorized by another law.[86] And finally, the constitution provides that the general assembly shall not delegate to any special commission any power to perform any municipal function whatsoever.[87] Two things must then be determined: first, whether the regulations of the rates of a municipally-owned plant is a municipal function within the constitutional prohibition; and second, whether the Public Utilities Commission is "special" within the meaning of the constitution. The court answers both of these questions in the affirmative.

As to the first point, the court quoted Freund,[88] a part of whose thesis it is that the justification in rate regulation is the danger of monopoly. But the court continues to point out that a plant owned and operated by the consumers themselves could never assume the evils of a monopoly nor become an "instrument of oppression." Hence there was no just cause for the employment of the sovereign police power. For the fixing of rates by consumers through their agents can not be an evil from which the former need external protection. In short, since the people hold the political check, the power of the ballot if you will, it would seem quite unnecessary to give a state commission authority to regulate the rates of a municipally-owned utility. But, to follow the reasoning of the court, in the case of a privately-owned utility, the political check being absent, and the danger of monopoly and oppression being present, regulation becomes a proper exercise of the sovereign police power and not a municipal function.

As to the second point, the court declared in no uncertain terms that the Public Utilities Commission was "special" within the meaning of the constitution. "This court has, therefore, twice held that

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[85]1913, p. 464.

[86]C. L. sec. 8987.

[87]Article 5, section 35: "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property or effects, whether they be held in trust or otherwise, or to levy taxes, or to perform any municipal function whatsoever."

[88]THE POLICE POWER, p. 379.

a body distinct from the city government, created for a different purpose, or one not connected with the general administration of municipal affairs, is a special commission. It cannot be denied that the Public Utility Commission is a body separate and distinct from the 'city government' and that it is created for an object 'not connected with the general administration of municipal affairs.' The framers of the constitution had in mind the possibility that the legislature might attempt to interfere with the management of municipal affairs, and wisely made provision to prevent such action."

We shall return to this declaration in a moment.[89]

In the second case referred to above,[90] the court decided that where a city furnishes a public service not only to its own citizens, but also to the residents of an outlying community, the Public Utilities Commission has jurisdiction over the rates of service in the extra-municipal territory. For, extending the reasoning of the *Holyoke* case, "a consumer outside the city * * * has no voice in electing those who fix rates for public service."[91]

The ruling in the *Holyoke* case leaves the status of municipal affairs in Colorado an interesting one. For inasmuch as the regulation of the rates of public utilities operating within home-rule territory, or owned by the municipality, is a municipal function; and inasmuch as the Public Utilities Commission is a special one, it follows that the jurisdiction of the commission is legally restricted to privately-owned utilities operating in non-home-rule cities, or operating in home-rule territory but extending their operations into non-home-rule territory. It would seem to follow then that even if a home-rule city, or a non-home-rule city owning a utility, should desire to take advantage of the superior advantages afforded by state commission regulation, such a delegation of function would be illegal on account of the restricted jurisdiction of the commission. Hence

[89]In the case of Star Investment Co. v. Denver, Case No. 176, Decision No. 314, decided December 30, 1919, the Public Utilities Commission held that it was not "special" within the meaning of the constitution. In that case a motion was made by the petitioners to dismiss the writ of review without prejudice, which was done. Hence the supreme court did not review the commission's actions therein. The present status of the problem is that established by the Holyoke case.

[90]City of Lamar v. Town of Wiley (Colo. 1927) 248 Pac. 1009.

[91]*Ibid,* p. 1010.

the provision in the Durango charter which leaves the regulation of public utilities to the state commission would seem to be unconstitutional.

The practical legal solution is constitutional amendment. For although the supreme court's overruling the *Holyoke* case would accomplish the desired purpose, it is doubtful whether the court would wish to take away from municipalities the right to regulate their own utilities—which result would, it would seem, necessarily follow. Of course, as is mentioned below, the state commission can legally render assistance to the municipalities; or it can continue its *ultra vires* performance by tacit understanding with the municipalities.

We have traced here only the legal aspects of the public utility problem in Colorado. But there is also a very practical side of the problem which we have not touched upon at all, namely, the extent to which, and the success with which Colorado municipalities have taken advantage of their opportunities of local regulation. These are questions of great moment for many reasons; and a thorough study of them should be made by someone close to the scene of operations.[92] It is certain that home-rule regulation has not proved altogether successful. The state Utilities Commission still receives continued requests for advice, information, aid, and service, which, be it said to its credit, it graciously and gratuitously offers.[93] It has also received many complaints relative to service extensions which it has usually settled informally. None of the home-rule cities has provided suitable staff for the effective regulation of public utilities, although Denver has gone far by hiring experts to pass upon special matters. Durango is the only city which by its charter leaves the regulation of its public utilities to the State Commission.

[92]There should first be an investigation of the rates charged by each home-rule city for every utility. These rates should then be compared with those set by the State Utilities Commission for non-home-rule cities, as well as with the rates of municipally-owned utilities. Conditions of service should then be studied with a view to determining whether any relation exists between rates and service, etc. Other topics of investigation will very soon suggest themselves such as facilities for regulation, the marketability and price-fluctuation of utility securities, dividend records, litigation, etc.

[93]I wish here to express my acknowledgments to the secretary of the Colorado Public Utilities Commission for various information he has given me in two recent letters.

All the others exercise to some extent their privilege of regulating rates and service over all public utilities within their corporate limits. As for municipal ownership, all the home-rule cities own their own water plants; while all except Fort Collins, Durango, Grand Junction, and Delta own their own electric plants.[94]

Leaving the question of public utilities let us now glance at a few of the other problems which have arisen in Colorado's experiences with home rule. The matter of special assessments has proven a highly interesting one. The leading case in this connection is *Londoner v. Denver,*[95] which decided that Denver had the right not only to acquire land for parks and parkways, but also to levy special assessments for the payment thereof. This decision, based largely on the *Hallett* case,[96] was in effect reenforced several years later when the court upheld[97] a legislative enactment[98] relative to the process of special assessment in non-home-rule cities similar to that discussed in *Londoner v. Denver.* The decision in the *Gillum* case may be regarded as having been arrived at by a process of reverse reasoning with reference to the *Hallett* case, the court saying in effect that since it sustained the legality of a given process as provided for in the Denver charter, the legislature could adopt the same process for a non-home-rule city.[99]

In another case[100] the court expressly declared that the home-rule city's powers relative to local assessments are plenary—more specifically, extending even to county property situated within municipal territorial limits. However, as we shall see presently, the

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[94]For some financial data see, THE YEAR BOOK OF THE STATE OF COLORADO, Folder No. 1, Denver (1925).

[95]52 Colo. 15, 110 Pac. 156 (1911).

[96]Note 31 supra.

[97]Gillum v. Town of Rifle, 70 Colo. 173, 197 Pac. 1016 (1921).

[98]R. S. 1903, sec. 5361.

[99]A different decision in the Gillum case would have amounted virtually to an overruling of Londoner v. Denver. For in the latter case the decision was based on the assumption that the legislature could have enacted such a law applicable to all the cities prior to the adoption of the Twentieth Amendment, or to the non-home-rule cities after the Twentieth Amend. Hence later to declare that the legislature could not provide for such assessment provisions would seem to invalidate the provision of the Denver charter dealing with such assessments.

[100]Board of Commissioners of El Paso County et al. v. City of Colorado Springs, 86 Colo. 11, 186 Pac. 381 (1919).

county courthouse (which was the property in question) although subject to the municipal power of special assessment, is nevertheless apparently exempt from the general tax levy. That this is the situation has been made clear by the recent case of *Denver v. Tihen*,[101] which the court distinguished from the *El Paso* case. In the *Tihen* case, the court held invalid a tax levied by Denver on all cemeteries situated within its territorial jurisdiction. Now under various legislative and constitutional provisions cemeteries not held or used for profit are made exempt from general taxation,[102] while other statutory enactments exempt such lands from special assessments.[103] Although the court had previously upheld the power of the home-rule city anent local assessments[104] and the 1912 amendment had specifically further provided therefor,[105] the court held that the legislative enactments in question, because of the character of the lands involved, established in fact a public policy which even a home-rule city could not repudiate.[106] For the determination of the classes or kinds of property subject to local improvement assessments is not a purely municipal matter, but a question of "general state import," and hence to be made by the general assembly. Now to return to the distinction between cemeteries and courthouses, there is a constitutional provision which exempts county property from taxation.[107] But the Colorado court had far back held that this exemption does

[101]77 Colo. 212, 835 Pac. 777 (1925).

[102]Constitution, Article 10, section 5; Rev. St. 1908, section 5545, p. 1303 as amended by 1921, p. 687 (C. L., sec. 7196, p. 1846).

[103]1887, secs. 3, 5, p. 70; 1901, secs. 6, 7, p. 58.

[104]See previous paragraph, supra.

[105]Clause g.

[106]The decision in the Tihen case naturally evokes the question as to what constitutes a public policy; for obviously if the courts will indiscriminately declare legislative enactments to be expressions of public policy, the powers of the home-rule city are to the same extent emasculated. But a survey of what the courts have determined to be expressions of public policy will satisfy one that there is practically no danger that the powers of home-rule municipalities will be unduly trespassed upon. The cases involving this issue are comparatively few, and of these some dealt with the now legally settled problem of the traffic in intoxicating liquors. Other cases dealt with labor regulation, the sale of oleomargarine, etc. See also, McBain, *op. cit.*, pp. 549-52.

[107]Article 10, section 4. "The property, real and personal, of the state, counties, cities, towns and other municipal corporations, and public libraries, shall be exempt from taxation."

not apply to special assessments.[108] Hence the absence of immunity from special assessment in the case of a courthouse as distinguished from a cemetery.

While on the topic of assessments, it might be well to mention the fact that the courts have recently declared[109] that the creation of *ad hoc* districts as it were by the legislature involves no violation of the home-rule principle.[110] Such districts may even levy special assessments without the approval of the taxpaying electors concerned. In the case of improvements accruing to the component cities and towns as a whole, as was the case with the conservancy district, the latter may levy assessments to be paid from the general taxes of the component municipalities.[111]

Conclusion

The foregoing survey serves to illustrate the legal status of the Colorado home-rule municipality. To minor considerations such as points of charter procedure[112] and comparatively unimportant powers[113] we have devoted no attention. One acquainted with the con-

[108]Denver v. Knowles, 17 Colo. 204, 38 Pac. 1041 (1892), overruling Palmer v. Way, 6 Colo. 106.

[109]Milheim et al. v. Moffat Tunnel Improvement District et al., 72 Colo. 268, 211 Pac. 649 (1922). Such a district is an independent entity, not subject to the charter of Denver even though the city forms part of the district. The leading authority on this question is Wilson v. Board of Trustees, 133 Ill. 432, 27 N.E. 203 (1890), which upheld the right of the legislature to form a district involving parts of cities and counties, and to give it the right to levy local assessments.

[110]In Miami County v. Dayton, 92 Ohio St. 215, 110 N.E. 726 (1915), the same issue was involved. The court there said that the home-rule principle was conserved insofar as officers of the district administer the affairs thereof. In State v. Flaherty, 140 Minn. 19, 167 N.W. 122 (1918), which upheld the establishment of drainage and flood control districts, the principle of home rule was not even mentioned as an objection, although, to be sure, the question of assessment was not at issue.

[111]People v. Lee, 72 Colo. 598, 213 Pac. 583 (1923).

[112]Points of procedure are treated in such cases as Speer et al. v. People ex rel. Rush et al., 52 Colo. 325, 122 Pac. 768 (1912); Lail v. People, 75 Colo. 459, 226 Pac. 301 (1924); People ex rel. Moore v. Perkins et al., 58 Colo. 17, 137 Pac. 55 (1913); etc.

[113]E.g. the right of the home-rule city to impound and charge fees for impounding stray animals, notwithstanding the state statute (Rev. St. 1908, secs. 6437-6443) regarding the same. City of Pueblo v. Kurtz, 66 Colo. 447, 132 Pac. 884 (1919).

ditions of home-rule cities in other states can not help placing the Colorado municipalities in the category of those enjoying a large measure of autonomy. However, in Ohio for instance, the large measure of home rule is due in great part to a liberal judiciary as such. In Colorado, on the other hand, while the courts have been very liberal indeed, it is certain that in many cases they had no alternative; for the people, by unequivocally inserting their wishes in the state constitution, gave a direct mandate to the court, which the latter can not help but obey. This is splendidly illustrated by a comparison of two of the election cases referred to above. In 1912 municipal elections were not a local matter; in 1913 they were.[114] In the latter year the Ohio court, on the other hand, upheld local control over municipal elections with no specific constitutional mandate.[115]

Although no other such obvious example as the aforementioned election cases can be adduced, there can be little doubt that the Colorado court has upheld after the amendment of 1912 certain municipal powers which it could have legally upheld, but would not have ventured to do so, before that date. The outstanding example is, of course, the public utility decisions; *i.e.* although municipal regulation of public service might conceivably have been sustained before 1912,[116] in all probability such would not have been the course of the court. I do not mean in any sense to intimate that the Colorado judiciary on its own inclination, *i.e.* without its forceful mandate, would not maintain in general the proper spirit and attitude toward municipal home rule. The numerous dicta of the court are excellent evidence of the unjustifiability of such a contention. However, a constitutional provision unique in its elaborateness and unmistakable in its clarity of purpose, has made pursuance of the path of liberalism easy for the court.

On the future in any given jurisdiction of such a political enterprise as municipal home rule it is difficult judiciously to comment.

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[114]See pp. 389-390.

[115]Fitzgerald et al. v. City of Cleveland, 88 Ohio St. 338, 182 N.E. 512 (1913). See also, State ex rel. Frankensteiner v. Millenbrand et al., 199 Ohio St. 339, 126 N.E. 309 (1919).

[116]Compare statement of Mr. Justice Teller in the Telephone case: "If it were necessary, therefore, the right claimed for the city might find a basis in article 20, as it was before amendment." 184 Pac. 600.

Nor is it easy to rationalize even on the past. It may or may not be significant, for instance, that while from the adoption of the home-rule amendment charters were adopted by cities at the rough average of one city per year for more than a decade, during the past ten years there has been no new entrant into the ranks, despite the fact that two dozen municipalities are still eligible. The small size of the remaining municipalities is no doubt in large part responsible for the late inertia. It is certain, however, that the situation merits an extended scientific investigation of the possible effect on the non-home-rule communities of the relative success or failure of municipal home rule where in existence.